Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-08

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Barbara Miller** **Mr. Antoine Frechette**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.**
HEARING DATE:	**November 14, 2003**
ISSUE(S):	**Reinstatement of Income Replacement Indemnity Benefits**
RELEVANT SECTIONS:	**Section 110(1)(a) 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 4, 1999. The Appellant was travelling west in a motor vehicle at the speed of 90 km per hour when a deer came out from the right causing the Appellant to hit his brakes and turn to the left. The vehicle hit the loose gravel and the Appellant went into a skid and came into contact with a sign on the south side of the ditch, resulting in injuries to the Appellant.

The Appellant initially saw [Appellant's doctor #1], in [text deleted], Manitoba on May 12, 1999. [Appellant's doctor #1's] Initial Health Care Report indicated the Appellant was complaining about pain to the left trapezius, left infraspinatus and left thoracic area and lower back pain. The Appellant also had limited rotation of his left side of his neck as well as limitations on the left upper back and left arm. The Appellant did not complain of headaches at that time. [Appellant's doctor #1] indicated in his report that the Appellant would be unable to work at any job because of limited function of the neck and left arm.

The Appellant attended upon [text deleted], a chiropractor, for treatment, and in his Initial Health Care Report confirmed that the Appellant had a diagnosis of L5 – S1 facet irritation, Grade II whiplash and left arm strain. [Appellant's chiropractor] was of the view that the Appellant would likely be able to return to work on June 7, 1999. He also indicated in his report that the Appellant was capable of working supernumerary. [Appellant's chiropractor] contemplated that the Appellant would require treatment at a frequency of two or three times a week for a period of approximately three to six weeks.

On May 12, 1999 a physiotherapist, [text deleted], provided a report to MPIC. In the narrative portion of the report [Appellant's physiotherapist #1] indicated that the Appellant will require ongoing treatments as follows:

1. Cervical Spine – six to eight weeks;
2. Left Scapular/Shoulder Area – six to eight weeks;
3. Lumbar Area – three to four weeks;
4. Thoracic Area – two to three months;
5. Calf Pain – three or four weeks.

This report also indicated that the Appellant had headaches.

[Appellant's chiropractor], the Appellant's chiropractor, provided a Treatment Plan Report dated June 23, 1999 in which he outlined a course of treatment with an estimated discharge date of July 24, 1999. [Appellant's chiropractor] did not indicate a likely return date in his report. [Appellant's chiropractor] indicated that the patient described headaches as coming and going with some lasting up to four hours.

[Appellant's physiotherapist #1] provided a report to MPIC dated July 2, 1999 and indicated:

> I have continued to see [the Appellant] on a regular basis. After discussion with [Appellant's chiropractor] both of us feel that the need for manual therapy, manipulations and hands on approach can continue to diminish as he is approaching more normal range of motion, with regards to the cervical spine and left shoulder. As well his focus of complaints has been primarily headaches and mid thoracic pain, although functions and range of motion have continued to improve.

[Appellant's physiotherapist #1] indicated that she would be commencing an aggressive conditioning program in addition to both therapy and stretching. As well, an In-clinic conditioning program was also established to address aerobic cardiovascular work as well as the use of pulleys and weights.

The Appellant was reassessed by [Appellant's chiropractor] on July 28, 1999. In a Treatment Plan Report to MPIC [Appellant's chiropractor] confirmed that the Appellant was still out of work and no likely return date was indicated by him. Under the portion of the report requesting the care giver to identify any risk factors for chronic pain or delayed recovery, [Appellant's chiropractor] indicated:

> "- patient is guarding ROM testing – now is dizzy with headache

- no anatomical reason for H/A (headache)"

Under the Treatment Strategies of the report [Appellant's chiropractor] went on to indicate:

> "I told [the Appellant] that he has to get back to work. I also informed him that I did not know the origin of his headaches and that I felt I could not help him any longer. I suggested if he needs to see me in the next 2 week to do so." (underlining added)

The Appellant attended at the offices of [Appellant's doctor #2] who provided a Health Care Provider Progress Report to MPIC dated July 29, 1999. [Appellant's doctor #2] indicated a diagnosis of "? myofascial pain" and indicated the Appellant would likely be able to return to work on August 2, 1999.

[Appellant's chiropractor] reassessed the Appellant on September 3, 1999 and on that date provided a report to MPIC wherein he stated that:

(a) the Appellant complained to him that his headaches had been steady and constant and were relieved by the Appellant taking oxygen and stretching.

(b) he had expressed some concern to the Appellant about the Appellant's need for chiropractic treatments and that he had indicated to the Appellant he should only see him if needed.

(c) the Appellant should continue with other rehabilitation and physiotherapy and only use [Appellant's chiropractor] if needed.

(d) the Appellant reported to him that he was working part-time.

On November 1, 1999 [Appellant's doctor #2] wrote to MPIC and advised them that the Appellant had attended on fifteen occasions at the [text deleted] for treatment of headaches from May 4, 1999 to September 14, 1999. [Appellant's doctor #2] indicated that there was no record

that the Appellant had attended at [text deleted] for treatment of headaches prior to May 4, 1999.

On September 27, 1999 MPIC's case manager wrote to [Appellant's rehab doctor], of [rehab clinic], and advised [Appellant's rehab doctor] that the Appellant had made Application for Compensation to MPIC. The case manager further informed [Appellant's rehab doctor] that he had received information that the Appellant had been referred to [Appellant's rehab doctor] by [Appellant's doctor #2] for treatment of persistent headaches and that the Appellant's first appointment was on October 7, 1999. The case manager further requested [Appellant's rehab doctor], upon completion of the assessment, to provide a brief report outlining the Appellant's present condition, the treatment plan and [Appellant's rehab doctor's] prognosis for recovery. In addition, the case manager requested [Appellant's rehab doctor's] opinion as to when the Appellant might return to work as a house painter.

On January 9, 2000 [Appellant's rehab doctor] provided a report to the case manager. In this report [Appellant's rehab doctor] stated that the Appellant attended at his office on October 7, 1999 complaining of back and neck pain with accompanying headaches. Following the examination [Appellant's rehab doctor] indicated that the Appellant had myofascial neck, shoulder and back pain. [Appellant's rehab doctor] recommended back and neck education concurrent with trigger point injections and nerve blocks and that these treatments were carried out on November 15, 1999, November 20, 1999 and December 16, 1999.

[Appellant's rehab doctor] further reported to MPIC in a letter dated January 9, 2000 that despite these treatments the Appellant was still complaining of symptoms and on February 1, 2000 further trigger point injections were performed. [Appellant's rehab doctor] was of the view that the Appellant required more aggressive physiotherapy with more active modalities. [Appellant's

rehab doctor] proposed to MPIC a functional restoration and work hardening program.

On February 25, 2000 [rehab clinic] provided an Initial Rehabilitation Report in respect of the Appellant. MPIC was advised in this report that a multi-disciplinary assessment in respect of the Appellant was undertaken by [rehab clinic] on February 21, 2000. The Appellant was complaining of stiffness and pain in the shoulder, neck, headaches, shoulder region discomfort, lumbar, thoracic and cervical spine pain with night sweats, rashes and fatigue.

[Text deleted], Medical Director, MPIC Health Care Services, in reviewing this assessment stated in an Inter-Departmental Memorandum to MPIC, dated October 9, 2000, stated:

> The patient performed some disability inventories and scored himself at the 56% level with the neck disability index in the severe disability category. The patient had essentially full range of motion of his shoulders with the exception of a right shoulder external rotation. The cervical spine range of motion was decreased significantly only in extension and right and left rotation. The patient had normal myotomes and dermatomes. The patient was described as having thoracolumbar myofascial pain syndrome of the cervical shoulder girdle areas. The patient was described as having significant pain behavior. Functional restoration and psychological counseling was recommended.

[Appellant's rehab doctor] again wrote to MPIC on April 25, 2000 and stated that he saw the Appellant on April 18, 2000 and the Appellant advised him that he was doing better. In this report [Appellant's rehab doctor] further stated:

> Soft tissue examination revealed some trigger points in his trapezius, levator scapulae thoracic paraspinal muscles at the level of T9 – T12. Palpation of these trigger points produced his headaches.
>
> I booked an appointment for him on May 3, 2000 to provide him with trigger point injections and suboccipital nerve block injections.
>
> [The Appellant] will complete his work hardening program at the end of last week. Based on my medical opinion and his progress with the program, he will be able to assume his pre-accidental occupation full time, full duties. I have booked two appointments with him in two and four weeks time to address any problem or concern that [the Appellant] may have while working. (underlining added)

Upon receipt of that report the case manager wrote to the Appellant on May 1, 2000 and advised the Appellant that he had had the opportunity of reviewing a report from [Appellant's rehab doctor] and indicated, based on his medical opinion and the Appellant's progress with the rehabilitation program, that the Appellant was capable of resuming his pre-accident work. As a result, the case manager indicated that Income Replacement Indemnity ("IRI") benefits would cease as of May 7, 2000 in accordance with Section 110(1) of the MPIC Act.

In this letter the case manager further stated:

> Although [Appellant's rehab doctor] feels that you are able to return to your job on a full-time basis at this point, I would be willing to consider a gradual return to work over two weeks, based on 4 hours per day the first week, and 6 hours per day the second week, and then your full work schedule by the third week. For those two first weeks I would top up your income replacement.
>
> It has been indicated that you will require follow-up treatments with [Appellant's rehab doctor], and I can tell you that those treatments and the associated costs will continue to be a part of your claim, and will be dealt with as they have been in the past.

The case manager was provided with a further narrative report from [text deleted] and [Appellant's rehab doctor], dated May 10, 2000. This report stated in part:

> [Appellant's case manager] was provided with a further narrative report from [text deleted] and [Appellant's rehab doctor] dated May 10th, 2000. It was stated therein, as follows:
>
> > "Thus, it is of this clinic's opinion that based upon [the Appellant's] ability to perform his work related activities within the clinical setting for the above mentioned time commitments objectively qualifies him with the physical capacity to resume his previous employment of Painter at full-time hours of full duties, and no further functional testing is necessary in this regard. [The Appellant] does continue to report ongoing pain symptomology, which in our opinion does not limit his functional capacity, and pain in itself is not an impairment. Should his pain exacerbate, we would be happy to see [the Appellant] at our facility to continue to help him manage his pain symptomology so that he may be better able to maintain his regular work activities.

On June 29, 2000 the Appellant made an application to MPIC to have the case manger's decision reviewed by an Internal Review Officer.

[Text deleted], the chiropractor, provided a further treatment plan to MPIC dated July 21, 2000 which indicated the Appellant was continuing to have problems and complained of the following symptoms:

> "getting headaches 2 – 3 times per day. These are controlled by O2 stretching and self-manipulation. Sore upper neck/traps/and bilateral SI joints."

On August 17, 2000 the Internal Review Officer wrote to [vocational rehab consulting company] and requested a Physical Demands Analysis Report. The Internal Review Officer further indicated to [vocational rehab consulting company]. that the Appellant was aware that a Physical Demands Analysis Report was being requested and has consented to participating in the Physical Demands Analysis.

[Vocational rehab consulting company] provided a Physical Demands Analysis Report in respect to the Appellant dated September 6, 2000 to the Internal Review Officer. The Physical Demands Analysis Report outlines the physical demands of the Appellant's employment as a painter, involving preparation of surface for painting, priming/painting service, and purchasing paints and supplies.

On September 13, 2000 the Internal Review Officer wrote to [Appellant's rehab doctor] and advised him that during the course of the Internal Review Hearing the Appellant had complained to the Internal Review Officer in respect of [rehab clinic's] work hardening program. The

Internal Review Officer stated:

> . . . . It was [The Appellant's] indication at the hearing:
>
> 1. That at the end of the work hardening program, his condition was more or less the same as when he commenced the program.
>
> 2. That in the assessment approximately three weeks prior to the termination of his benefits, he was still having significant problems and in that regard I draw your attention to the Progress Summary Report of March 24, 2000. In that regard [the Appellant] drew my attention to the percentages contained in the assessment which he says are indicative of significant ongoing problems.
>
> 3. That included in the time "spent in the work hardening program" was the travelling time to and from your facility as well as a number of hours stretching. [The Appellant's] position that these activities are significantly different from the full-time, everyday demands of his employment.

The Internal Review Officer also provided [Appellant's rehab doctor] with the Physical Demands Analysis from [vocational rehab consulting company] and further stated:

> I would appreciate your reviewing this file in light of the comments of [the Appellant], the Physical Demands Analysis Report, and the reports enclosed herewith, and provide me with your further opinion as to whether, in your view, [the Appellant] was able, or substantially, able or unable, to resume the employment he held at the time of the accident. Needless to say, I would appreciate your providing me with the objective basis for your opinion.

[Appellant's rehab doctor] in his reply to the Internal Review Officer, in a report dated December 5, 2000, indicated in part:

> "It is observation of the totality of his performance of these rehabilitation tasks that my staff and I were able to summarize that [the Appellant] would be able to return to his occupation as a painter. To characterize his rehabilitation program as simply driving to and from the clinic, and doing stretching activities while there, would be inaccurate. We were unable to demonstrate or find a reason why [the Appellant] could not, or should not, perform the activities of his job as a painter on a daily basis without physical restrictions of any kind.
>
> I have been able to review the physical demands analysis dated September 6, 2000 performed by [vocational rehab consulting company]. There is nothing in the physical demands analysis that would concern me with regards to [the Appellant's] ability to undertake that job. Specifically, they (the) physical demand of carrying 25 lbs. between 5-10 feet, as well as pushing and pulling 15 lbs. without movement would be of no

> specific concern. During his physical rehabilitation program he clearly exceeded those physical demands. With regards to bending to the sides, as well as bending forward at the waist, and binding the neck backwards, he was able to do those things without much difficulty on an intermittent basis during his rehabilitation program. I do note that the need for these particular movements is not continuous, and is intermittent in the occupational setting. To this extent, [the Appellant] should be able to perform those duties without concern to physical harm, if he should experience physical symptoms while doing them." (underlining added)

Internal Review Decision

On January 10, 2001 the Internal Review Officer issued his decision confirming the case manager's decision to terminate the IRI benefits effective May 7, 2000 and rejecting the Appellant's Application for Review. In this decision the Internal Review Officer stated that:

(a) the Internal Review Hearing commenced on April 15, 2000 and, as a result of concerns raised by the Appellant, the Internal Review Officer retained [vocational rehab consulting company] for the purpose of preparing a Physical Demands Analysis Report;

(b) this Report, upon its receipt, was provided to [Appellant's rehab doctor] who responded by letter dated December 5, 2000 which the Internal Review Officer forwarded to the Appellant.

(c) on January 3, 2001 he discussed [Appellant's rehab doctor's] response with the Appellant and the Appellant concluded his representations in respect of the Internal Review Application.

The Internal Review Officer, in his decision indicated that he had reviewed all of the relevant medical reports and the submissions of the Appellant, having regard to the work hardening program conducted by [vocational rehab consulting company] he stated:

> You and I discussed [Appellant's rehab doctor's] final report on January 3rd, 2001. In our discussion you indicated that you had extreme concerns concerning your ability to stand

> in one spot for a long time as you are required to do on a ladder. You also mentioned continuing ongoing severe problems with headaches and difficulties with your sleep. You confirmed that since receiving treatment from [Appellant's rehab doctor's] office you had begun experiencing headaches on your left side which you had not suffered from previously. You indicated that you were making regular use of oxygen when you had bouts with headaches. You informed you were no better after receiving your treatments which had been provided than you were previously. You also confirmed that you would be starting a course of physiotherapy in [text deleted], although I think you were unclear as to whether that would be funded by the Corporation. You also indicated that you had been previously referred to a neurologist [text deleted], who had indicated that there were no neurological problems evident.
>
> The fact that you continue to experience ongoing symptoms which may make working somewhat difficult does not satisfy the requirement under the legislation that requires you to establish that you are unable to continue an employment "as a result of injuries from an accident for which coverage is provided." The balance of the totality of the medical evidence on your file would indicate, coupled with the physical demands analysis, that you are capable of carrying out the physical requirements of your previous employment. Therefore, based upon the information in your file, I am unable to conclude that the Case Manager's decision was incorrect and I am upholding that decision and dismissing your Application for Review. (underlining added)

On March 8, 2001 the Appellant filed a Notice of Appeal in respect of the decision of the Internal Review Officer rejecting his Application for Review.

The Appellant had consulted with [Appellant's doctor #3] who referred the Appellant to [text deleted], a Consultant Neurologist. On May 23, 2000, Dr. Robert Tang-Wai provided a report to [Appellant's doctor #3] in respect of the Appellant. In this report [Appellant's neurologist] indicates that at the request of [Appellant's doctor #3] he conducted a neurological consultation in respect of the Appellant to exclude a neurological cause for recurrent headaches. In this report [Appellant's neurologist] stated:

> No tenderness on palpation of his neck, with excellent rage of pain free cervical movements in all directions. He also has good range of pain free shoulder movements. He reports variable tenderness on palpation of the right trapezius and also mild to moderate tenderness on palpation of his thoracic spine between his shoulder blade. No winging of his scapula on either side. Normal gait including normal heel, toe and tandem walking. No motor deficits, either wasting or weakness, anywhere in his 4 limbs, distally or proximally. No limb ataxia in his 4 limbs. All his deep tendon reflexes are 2+ in his 4

limbs, plantars flexor. Sensory examination is entirely normal.

Neurovascular examination also normal.

The issues are as follows:

1. He is neurologically normal on examination.

[Appellant's doctor #3] also referred the Appellant to a physiotherapist, [text deleted]. [Appellant's physiotherapist #2] provided [Appellant's doctor #3] with a report dated January 30, 2001 wherein he stated that:

(a) the Appellant was involved in work;

(b) the Appellant reported that he had severe headaches and muscle tightness in his neck. Home oxygen therapy relieved the Appellant's headaches.

(c) the Appellant had full cervical spine extension at that time and had a normal neurological examination.

(d) the Appellant also had myofascial trigger points in his upper trapezius and other cervical muscles.

In this report the physiotherapist also stated that overall he was unable to objectively identify any of the sources that may be producing the patients excruciating headaches besides tight myofascial bands and that he was unable to detect any movement restrictions that would prevent the patient from performing his activities as a painter. The physiotherapist recommended:

> With regards to ongoing physiotherapy intervention, a brief trial of physiotherapy may be beneficial at this point in time with regards to the myofascial trigger points as well as developing an abdominal strengthening program that may decrease [the Appellant's] back symptoms. Otherwise, it appears that conservative therapy has been given a reasonable course of time and has perhaps plateaued, I would be happy to continue to see [the Appellant] for a few visits to progress the above strengthening programs pending further funding from Manitoba Public Insurance.

The case manager referred the Appellant's file to [text deleted], Medical Consultant, MPIC's Health Care Services Team, to determine whether further therapeutic interventions are medically required in the management of the Appellant's medical condition arising from the collision in question. In an Inter-Departmental Memorandum dated May 23, 2001 [MPIC's doctor] recommended a short course of physiotherapy treatments as outlined by [Appellant's physiotherapist #2] in order to address the Appellant's symptoms that still might be the residual effect of the motor vehicle collision related conditions. [MPIC's doctor] further stated that it would not be appropriate to provide coverage for a comprehensive rehabilitation program since the Appellant has already previously successfully completed such a program. [MPIC's doctor] further stated it would be appropriate for the Appellant to receive occasional chiropractic care to assist in minimizing the Appellant's symptoms and to review his home exercise program to ensure that the Appellant is performing the exercises properly.

On January 15, 2002 the case manager wrote to the Appellant and provided him with a copy of a treatment plan report recently received from [Appellant's chiropractor]. The case manager indicated that [Appellant's chiropractor] had been seeing the Appellant occasionally on a maintenance basis and that he had been discharged from treatment. The case manager advised the Appellant that since the Appellant's treatments were now considered to be maintenance only, MPIC would no longer cover the cost of treatment and travel expense to and from the appointment.

At the request of [Appellant's doctor #3], the Appellant was referred to [text deleted], a Professor of Medicine, who is employed as a physiatrist at the [hospital. [Appellant's physiatrist] reviewed several reports that had been provided by [Appellant's doctor #3], which

are as follows:

1. May 10, 2000 [Appellant's rehab doctor] and [text deleted report to [Appellant's case manager], MPI.
2. May 23, 2000 [Appellant's neurologist] letter to [Appellant's doctor #3].
3. January 30, 2001 [Appellant's physiotherapist #2], letter to [Appellant's doctor #3].
4. August 24, 2001 [Appellant's doctor #3] letter to [Appellant's case manager].
5. January 24, 2002 [Appellant's doctor #3] letter to [Appellant's case manager], MPI.

[Appellant's physiatrist] provided a medical report to the Commission dated March 31, 2003 and indicated that he saw the Appellant on November 24, 2002 and carried out a history and physical examination as well as reviewing the reports submitted to him. [Appellant's physiatrist], in his report describes the Appellant as having constant pain in the right posterior neck extending from the base of the neck to the sub occipital region. The pain went along the right side of his head to the temple and eye region. He was using daily oxygen therapy for headaches prior to seeing [Appellant's physiatrist].

[Appellant's physiatrist] also noted that the Appellant also had bilateral intermittent numbness of the hands and forearms. He was sweating and had tremor when his headaches were severe. The Appellant informed [Appellant's physiatrist] that his neck pain and headaches were aggravated by working with his upper limbs above his shoulders or with his head in an extended position. These activities were described to [Appellant's physiatrist] as being physical requirements for the Appellant's occupation as a house painter. The Appellant informed [Appellant's physiatrist] that he had been able to work off and on for only short periods. [Appellant's physiatrist] described the Appellant as having full cervical flexion, and was able to work off an on for only short periods.

[Appellant's physiatrist] stated that on assessment for spinal segmental sensitization using a paper clip scratch test and skin pinch and roll techniques [Appellant's physiatrist] could demonstrate:

> . . . . hyperalgesia along C3 as well as C5 dermatomes. C2-3 and C5-6 supraspinous ligaments were very tender. On palpation of muscles, I could locate acutely tender points right suboccipital. Right sternomastoid had taut band and tender trigger point with local twitch response. I could irritate this trigger point to cause referral of pain up the back of his head to the side of head and temple region reproducing his headache complaints.
>
> I could palpate taut bands and tender trigger points with local twitch responses in right and left upper trapezius. Right and left infraspinatus also had taut bands and tender trigger points. On the right, I could irritate to cause referral down the right upper limb and numbness into the hand.
>
> Previous investigation included x-ray of the cervical spine as well as thoracic spine April 2000 and both were normal. He has never had a CT scan or MRI.
>
> His symptoms and signs are characteristic of myofascial pain syndrome with trigger points in muscles as documented in my physical exam. This was also the diagnosis made by [Appellant's rehab doctor]. [Appellant's neurologist] did not find any neurologic cause of his symptoms and indicated that they were musculoskeletal in origin. The physiotherapy report of [Appellant's physiotherapist #2] dated January 30, 2001 noted that paracervical musculature revealed myofascial trigger points in the upper fibers of the trapezius and other cervical spine musculature. He initiated myofascial trigger point physiotherapy treatment.

[Appellant's physiatrist] further stated that based on his history and physical examinations he noted that:

(a) the C2-3 supraspinous ligaments were tender.

(b) there were also tender points in the right suboccipital muscle.

(c) there was a taut bank and sternomastoid trigger point with local twitch response which referred to pain up to the back of his head reproducing his headache complaints.

(d) there were trigger points in the right and left infraspinatus muscles, as well as the right and left upper fibres of the trapezius.

(e) in his opinion the current symptoms and abnormal objective physical findings were directly caused by the motor vehicle accident on May 5, 1999 and on a temporal basis has continued until the present time.

[Appellant's physiatrist] recommended needle point treatment with block injections and he would expect progressive improvement to occur with decrease in neck pain and headaches over a period of six visits. He further stated if no persistent improvement occurred, further treatment would not be provided. However, if progressive improvement occurred, but not maximum, a further few treatments could be indicated.

[Appellant's physiatrist] concluded his report by stating:

> His prognosis for significant improvement in both symptom reduction and improved function is good if he receives the recommended treatment as outlined above.
>
> His ability to return to gainful employment should await the outcome of treatment. At this time, it would be contraindicated for him to return to work as a painter since this would be a strong perpetuating and aggravating factor in increasing his symptoms as well as decreasing his function.

[Text deleted], the Medical Director, MPIC's Health Care Services, was requested to comment on [Appellant's physiatrist's] medical opinion in respect of the issue of causation of the Appellant's medical complaints arising out of the motor vehicle accident in question. [MPIC's doctor] in his report states:

> The physical findings utilized by [Appellant's physiatrist] in my opinion, have never been validated. They have never been subjected to a reliability testing. They have never been carried out on normal, painfree individuals to see if they are indeed abnormal. In my view, they cannot be described as valid and reliable physical findings indicative of pathology.

[MPIC's doctor] concludes:

> The source of [the Appellant's] headaches is unknown. [Appellant's physiatrist] speculates that they are from myofascial trigger points or cervical z-joint irritation. [Appellant's chiropractor] has stated that he was unsure of the source of the patient's headaches. [Appellant's physiotherapist #2] stated he was unsure of the source of the patient's headaches.
>
> The patient's headaches appeared to get better with oxygen, which to my understanding is not a characteristic of myofascial syndrome or z-joint pain.
>
> The patient's physical capacity has never been substantially diminished since the early post-accident period. [Appellant's rehab doctor] and [Appellant's physiotherapist #2] both stated that the patient could return to work. [Appellant's chiropractor] stated that patient should return to work early in post accident convalescence.
>
> [Appellant's chiropractor] stated that patient should return to work early in post accident convalescence.

APPEAL

The appeal by the Appellant of the Internal Review Officer's decision to reject his application for reinstatement of Income Replacement Indemnity (IRI) benefits took place before the Commission on November 14, 2003. The Appellant appeared on his own behalf and MPIC was represented by legal counsel. The provisions of the MPIC Act governing this appeal are set out in Section 110(1)(a) of the MPIC Act, which 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:
> (a) the victim is able to hold the employment that he or she held at the time of the accident;

MPIC had retained [text deleted] to conduct a video surveillance of the Appellant and the surveillance took place on the following dates:

1. August 2, 3, 4, 10 and 11, 1999
2. July 25 and 25, 2000
3. May 2 and 3, 2003

Prior to the appeal hearing, which took place on November 14, 2003, the Appellant received a

binder from the Commission containing all of the medical reports and other documents relevant to his appeal. The binder contained a written summary of the contents of the video surveillance which [text deleted] had provided to MPIC. However, the Commission did not provide to the Appellant a copy of the videotapes which it had received from MPIC but had not reviewed prior to the appeal hearing.

On November 2, 2003 the Director of Appeals wrote to the Appellant and stated:

(a) The Commission had received a copy of the videotapes from MPIC.
(b) The policy of the Commission was not to view these videotapes prior to hearing and would do so only if requested by either party.
(c) The Appellant was invited to attend at the Commission offices prior to the hearing and to view these tapes.

The Appellant did not respond to the Commission's invitation to view the videotapes, nor did he indicate to the Director of Appeals prior to the appeal hearing that he wished the Commission to review the videotapes. As a result the Commission, at the commencement of the appeal hearing on November 14, 2003, had not viewed the videotapes which had been provided to the Commission by MPIC.

The Appellant testified at this hearing and asserted as a result of the motor vehicle accident he was unable to return to the employment he held prior to the motor vehicle accident and he relied on the medical report of [Appellant's physiatrist] in support of his position. MPIC's legal counsel cross examined the Appellant in respect of his testimony. Neither [Appellant's physiatrist], [Appellant's rehab doctor] or [MPIC's doctor] testified at the appeal hearing.

At the conclusion of the Appellant's testimony at the appeal hearing MPIC's legal counsel filed a written submission in support of MPIC's position. In this submission MPIC's legal counsel

relied on portions of the video surveillance in order to demonstrate the Appellant was not a credible witness and that the Appellant's testimony, as well as [Appellant's physiatrist's] medical opinions, should be rejected by the Commission.

The Commission requested the Appellant to respond to the verbal and written submissions made by MPIC's legal counsel and in particular respond to that portion of the written submission which dealt with the video surveillance of the Appellant. In response the Appellant indicated that he was unaware of the existence of the videotapes and he had not had an opportunity of examining them. The Commission asked the Appellant whether he wished to review the videotapes and provide a response to MPIC's submission in this respect and the Appellant indicated he wished to do so. The Commission therefore adjourned the appeal hearing on the following terms:

1. MPIC's legal counsel was to provide the Appellant with the three copies of the videotapes referred to in MPIC's written submission.
2. After reviewing the videotapes the Appellant could:
    a. contact [text deleted], the Director of the Appeal Commission, by telephone advising her that he had no submission to make; or
    b. alternatively make a written submission within a reasonable time; or
    c. request the Commission to reconvene in order that he could personally attend to make a submission; or
    d. request the Commission to reconvene by telephone conference to permit the Appellant to make a submission.

The Commission indicated that the Commission would render its decision as soon as possible after the Appellant made a submission if he chose to do so.

On November 17, 2003 legal counsel for MPIC wrote to the Appellant and stated:

> Further to the Commission hearing on November 14, 2003, enclosed are copies of the three videotapes referred to in the materials. Each has been cued to the time mentioned in my written submission.
>
> You will recall that the Chief Commissioner gave you several options in terms of making

> a submission with respect to the videotapes. After reviewing the tapes, you can:
>
> 1. Contact [Director of Appeals] by telephone (1-800-282-8069) and advise her that you have no submission to make;
> 2. Make a written submission, within a reasonable time;
> 3. Reconvene an in-person hearing before the Commission to make a submission; or,
> 4. Reconvene the Commission hearing by teleconference to make a submission.
>
> The Commission will render its decision as soon as possible after your submission (if you choose to make one) has been made.

When the Appellant failed to respond to telephone requests by the Commission's staff to respond to MPIC's legal counsel's letter, the Secretary to the Chief Commissioner wrote to the Appellant on behalf of the Commission on December 12, 2003 and stated:

> This will confirm that you received copies of the videotapes from MPIC on November 18, 2003. This will further confirm that I spoke with you on December 2, 2003 in respect of your written submission regarding the videotapes and that our office was to be provided with your written submission within one week. To date we have not received your submission.
>
> Accordingly, if we do not receive your written submission on or before Friday, December 19, 2003, the panel will meet with a view to reaching a decision.

The Commission did receive a written response from the Appellant on December 18, 2003 and the Appellant indicated he did not wish to reconvene the appeal hearing. The Commission provided a copy of this submission to MPIC's legal counsel and requested a written reply if he desired to provide one. MPIC's legal counsel did provide a written reply to the Appellant's written submission and a copy of the reply was provided to the Appellant for his information.

The Commission has reviewed all of the written material which was filed at the appeal hearing, reviewed the surveillance video tapes in respect of the incidents referred to by MPIC's legal counsel in his written submission, the Appellant's reply after his review of the surveillance video tapes and MPIC's legal counsel's response.

Discussion

The Commission notes there is a conflict in medical opinions between [Appellant's physiatrist], [Appellant's rehab doctor] and [MPIC's doctor] in respect of whether the Appellant was able to hold employment that he held at the time of the motor vehicle accident when his IRI was terminated effective May 7, 2000. As indicated earlier in this Decision, none of the doctors testified at the appeal hearing. [Appellant's physiatrist], in his medical report, determined that the Appellant was not able to hold his pre-accident employment. [Appellant's rehab doctor] and [MPIC's doctor] in their written medical reports disagreed with [Appellant's physiatrist's] diagnosis.

[Appellant's physiatrist] examined but never treated the Appellant. He saw the Appellant on one occasion only in order to assess his medical condition some three and one-half years after the accident occurred. [Appellant's physiatrist], in his report dated March 21, 2003, stated that the motor vehicle accident caused the Appellant's myofascial pain syndrome and that this medical condition prevented the Appellant from returning to work on May 7, 2000.

[Appellant's rehab doctor], like [Appellant's physiatrist], determined that the Appellant did suffer from myofascial pain but concluded that the Appellant was capable of returning to his pre-accident employment. [Appellant's rehab doctor] was in a much better position than [Appellant's physiatrist] to determine the capacity of the Appellant's ability to return to work. Unlike [Appellant's physiatrist], [Appellant's rehab doctor] had access to all of the Appellant's medical reports, had the opportunity of reviewing the Appellant's detailed Physical Demands Analysis and treated the Appellant over a period of time. On this basis, [Appellant's rehab doctor] stated in his report dated December 5, 2000:

> . . . . . It was my assessment at that time [May 10, 2000], that, although his subjective complaints or subjective personal experience may not have changed in terms of pain levels, he certainly was quite physically capable, and was *(sic)* certainly had the capacity to return to his occupation as a painter. He would be able to do so with no specific concerns about psychologic or physical capability to undertake the tasks of that occupation at the appropriate pace or frequency.
>
> . . . . . we are able to observe his physical tolerance for moderately to quite strenuous activities, as well as activities that mimic critical components of his work activities as a painter. It is observation of the totality of his performance of these rehabilitation tasks that my staff and I were able to summarize that [the Appellant] would be able to return to his occupation as a painter. . . . We were unable to demonstrate or find a reason why [the Appellant] could not, or should not, perform the activities of his job as a painter on a daily basis without physical restrictions of any kind.
>
> . . . . . Thus, it is of this clinic's opinion that based upon [the Appellant's] ability to perform his work related activities within the clinical setting for the above mentioned time commitments objectively qualifies him with the physical capacity to resume his previous employment of a Painter at full-time hours of full duties, and no further functional testing is necessary in this regard. [The Appellant] does continue to report ongoing pain symptomology, which in our opinion does not limit his functional capacity, and pain in itself is not an impairment.

[Text deleted], the Medical Director of MPIC's Medical Health Services, reviewed all of the medical reports on file including the medical reports of [Appellant's physiatrist] and [Appellant's rehab doctor] and as well as surveillance video tapes in respect of the Appellant which had been commissioned by MPIC and agreed with [Appellant's rehab doctor]. [MPIC's doctor] concluded that based on the documented function of activity reported by the Appellant's caregivers, the observed functional capacity of the Appellant as disclosed on the surveillance video tape that the Appellant at the time of the termination of the IRI benefits had reached his pre-accident status and was capable of returning to his employment.

Unlike [Appellant's rehab doctor] and [Appellant's physiatrist], [MPIC's doctor] did not personally examine the Appellant but conducted a paper review. However, unlike [Appellant's physiatrist], [MPIC's doctor] did have access to all of the medical reports and as well he had

access to the video surveillance tapes that MPIC had provided him in respect of the Appellant.

In resolving the conflict in respect to the medical opinions, regard must be had to the credibility of the Appellant. The Appellant testified that as a result of the motor vehicle accident he suffered injuries to his shoulder and neck and was not able to return to work at his previous job because those job duties would aggravate his shoulder and neck injuries, causing him to have headaches. In his Application for Review the Appellant also asserted that daily tasks are difficult and there has been no improvement in his condition over the past thirteen months.

The Appellant in his verbal submission to the Commission submitted that notwithstanding his carpentry work in respect of building a deck, changing a tire and on a regular basis playing tennis, golf and hockey he was only able to do these physical activities on certain days when he felt better. The Appellant therefore submitted that MPIC was incorrect in terminating his IRI benefits and requested that they be reinstated.

MPIC's legal counsel, in his verbal submission to the Commission, relying on the video surveillance reports attacked the Appellant's credibility. In his written submission to the Commission MPIC's legal counsel stated:

> 12. Certain results of the surveillance are cause for concern:
>
> a. On August 11, 1999, at about 12:00 noon, [the Appellant] is shown backing out of a parking spot with a very hard turn of his head over his right shoulder. No facial expression of pain or discomfort is seen.
>
> b. On July 24, 2000, starting particularly at about 1:12 p.m., [the Appellant] is shown engaged in sustained, and evidently somewhat strenuous, physical activity (building a deck).
>
> Although clothed only in light grey shorts, he is perspiring noticeably (note, in particular, the many dark spots on his shorts). His companion, on the other hand, is fully clothed, including dark, full-length pants. The

expected high that day was +28 degrees Celsius.

[The Appellant] displays no evidence whatsoever of physical disability (or even any discomfort, for that matter). He makes frequent and unrestricted use of both of arms and shoulders. No limitations in neck movement are observable at any point during the taping.

Of particular interest is the fact that this video was taken just a few weeks after [the Appellant] submitted an Application for Review of Injury Claim Decision which reads, in part: "I am unable to return to work at my previous job because the duties involved aggravate my shoulder and neck injuries causing me headaches. Even daily tasks are difficult, and there has been no improvement in my condition over the last 13 months."

[Given the high level of function demonstrated by videotape, if the last statement quoted above is indeed true, then [the Appellant] was definitely not entitled to IRI after May, 2000, and may not have been entitled to it at any time during the previous 13 months!]

c. On May 2, 2003, starting particularly at about 12:21 p.m., [the Appellant] is shown jacking up a pick-up truck and changing a tire. He can be seen – for extended periods – on "all fours" (looking under the truck), and in a crouching position (removing and replacing the tire).

[The Appellant] displays no evidence whatsoever of physical disability (or even any discomfort, for that matter). He makes frequent and unrestricted use of both of arms and shoulders. No limitations in neck movement are observable at any point during the taping.

Of particular interest is the fact that this video was taken 32 days after [Appellant's physiatrist] declared [the Appellant] to be so disabled that "At this time, it would be contraindicated for him to return to work as a painter since this would be a strong perpetuating and aggravating factor in increasing his symptoms as well as decreasing his function."

There is no suggestion in any of the material before this Commission that [the Appellant] received any medical treatment, or that his physical condition changed in any respect, between the date of the report (March 31, 2003) and the date of the videotaping (May 2, 2003).

MPIC's legal counsel further attacked the credibility of the Appellant in his written submission as follows:

1. The Appellant acknowledged in his testimony that he resumed playing golf at the latest in July 2000, resumed playing hockey at the latest in October 2000 and he resumed playing tennis at the latest in September 2000.

2. The medical practitioners who treated the Appellant made the following observations in their respective medical reports relating to the Appellant. [Appellant's rehab doctor] in his medical report dated January 9, 2000 noted *". . . . he presented with a muscular build. His posture, gait, reflexes, power, and range of motion in every joint was normal."* [Appellant's neurologist], in his report dated May, 23, 2000 wrote *". . . . . he looks physically very healthy, in no distress, and looks quite muscular."* [Appellant's physiotherapist #2] in his report dated January 30, 2001 stated *"[The Appellant] as a physically fit [text deleted] year-old gentleman."*

3. In respect of the bona fides of the Appellant's medical complaints:

   [Appellant's doctor #1], the first physician to examine [the Appellant] after the accident (eight days later), identified only left neck, left upper back, and left arm limitations. There was no complaint of headaches recorded at that time (although headaches are mentioned in the notes [Appellant's physiotherapist #1], made later the same day). [May 12, 1999]

   The Application for Compensation [dated May 7, 1999] mentions the same left-sided symptoms.

   But when examined by [Appellant's physiotherapist #2] in January, 2001, and by [Appellant's physiatrist] in November, 2002, [the Appellant] was complaining of parasthesia (numbness) in the right arm and of other right-sided symptoms. [March 31, 2003 and January 27, 2001]

In further support of his submission that the Appellant was not credible, legal counsel for MPIC in his written submission stated:

6. [Appellant's chiropractor] – who examined [the Appellant] two weeks post-accident – identified "intense muscle ach (sic)" in the left shoulder girdle and arm. Headaches were described as "bothersome". He expected [the Appellant] to be back at work by June 7, 1999 (just over a month after the accident), but also felt that he could "work supernumerary" in the meantime.

7. By early July, 1999 (less than two months post-accident), [Appellant's chiropractor] and [Appellant's physiotherapist #1] both agreed that [the Appellant] was "approaching more normal range of motion, with regards to the cervical spine and left shoulder". While complaints of headaches and mid thoracic pain were ongoing, "functions and range of motion . . . continued to improve".

8. The case manager notes of July 15, 1999 are most telling:

   a. On the first page: "[The Appellant] does not strike me as some one who is motivated to return to work. He constantly throws up barriers and has

negative responses to any suggestions."

b. On the second page: "In discussing the case with both doctors [the second physician, [text deleted], and [Appellant's chiropractor]], I am left with the impression that this man should be capable of work, and that he may be magnifying some symptoms.

c. On the third page:
- "[Appellant's physiotherapist #1] feels perhaps he is not putting in a full effort".
- "He has frequently not shown up for his appointments."
- "Initially there were objective findings, but now, most of the complaints are subjective."
- "[The] headaches were not an issue early on, but have become the main issue over the last few weeks."
- "He does not work hard at this exercise program in her clinic."

d. [Appellant's chiropractor] [July 28, 1999] and [Appellant's physiotherapist #1] both suggested an early return to work, avoiding prolonged overhead work. [Appellant's doctor #2] thought he could return to work "in a couple of weeks", but does not mention any work-related restrictions. [Her report dated July 29, 1999 mentions only "light duties".]

The issue of the Appellant's credibility is central in determination of this appeal. In **Faryna v. Chorny** [1952] 2 D.L.R. 354, the British Columbia Court of Appeal addressed the issue of the credibility of witnesses in civil proceedings. Mr. Justice O'Halloran, on behalf of the British Columbia Court of Appeal, stated:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Commission finds that:

(a) the Appellant's testimony that he was incapable of returning to work because the motor vehicle accident caused significant headaches when he carried out job related duties is inconsistent with all of the medical evidence referred to herein with the exception of the medical evidence of [Appellant's physiatrist].

(b) the Appellant's activities in respect of driving a motor vehicle, working as a

carpenter in building a deck, changing a flat tire and on a regular basis playing golf, hockey and tennis are inconsistent with his testimony that he was incapable due to pain to return to his pre-accident employment.

(c) it was not probable that the Appellant could carry out these physical activities in the manner in which he did and, at the same time, be unable to work as a painter.

The Commission also has grave concerns about the bona fides of the Appellant's motor vehicle accident medical complaints in regard to the medical evidence as to whether these complaints were on the left side or the right side of his body. The Appellant's reports to [Appellant's doctor #1], [Appellant's physiatrist], [Appellant's chiropractor] and [Appellant's physiotherapist #1] and his statements in the Application for Compensation are inconsistent.

The Commission also finds that the manner in which the Appellant presented himself physically to [Appellant's rehab doctor] in 1999, [Appellant's neurologist] in 2000 and [Appellant's physiotherapist #2] in 2001 as a healthy, fit person whose movements appear to be normal, is inconsistent with his testimony that he was physically incapable of returning to work.

The Commission concludes that:

1. the Appellant's physical activities of carpentry work, changing a tire, on a regular basis playing hockey, tennis and golf, are inconsistent with the medical opinion of [Appellant's physiatrist] which determined that the Appellant was incapable of returning to his pre-employment status at the time his IRI was terminated.

2. the medical opinions of [Appellant's rehab doctor] and [MPIC's doctor] are consistent with the conduct of the Appellant who demonstrated that he was capable to perform the essential duties of his pre-accident employment at the time IRI was terminated.

[Appellant's rehab doctor] commenced treating the Appellant less than six months after the accident and continued to treat him over a period of time. [Appellant's physiatrist] on the other hand first saw the Appellant on one occasion some three and one-half years after the accident

had occurred and never saw him again. [Appellant's rehab doctor] was therefore in a better position to assess the credibility of the Appellant than was [Appellant's physiatrist].

[Appellant's rehab doctor] in arriving at his conclusions did review the detailed Physical Demands Analysis and had access to all of the medical reports while [Appellant's physiatrist] did not review this Analysis nor did he have access to all of the medical reports.

[MPIC's doctor], unlike [Appellant's physiatrist] and [Appellant's rehab doctor] did not personally interview or treat the Appellant but did review all of the medical reports and did review the surveillance videotapes. The Commission determines that [MPIC's doctor's] medical opinion corroborates [Appellant's rehab doctor's] medical opinion and is inconsistent with [Appellant's physiatrist's] medical opinion. For all of the above mentioned reasons the Commission gives greater weight to the medical opinions of [Appellant's rehab doctor] and [MPIC's doctor] than it does to the medical opinion of [Appellant's physiatrist] in respect of the capacity of the Appellant to return to work when MPIC terminated the Appellant's IRI benefits on May 7, 2000.

The Commission finds that the medical opinions of [Appellant's rehab doctor] and [MPIC's doctor] corroborate the Appellant's conduct which demonstrated that he was capable of returning to his pre-employment status at the time the IRI was terminated by MPIC.

The Commission upon reviewing the medical evidence, the surveillance videos, the testimony and submissions of the Appellant, the submissions of MPIC's legal counsel, rejects the Appellant's testimony that he was incapable of returning to work after MPIC terminated his IRI benefits on May 7, 2000. The Commission determines that the Appellant has not established, on

the balance of probabilities, that he was incapable of performing the essential duties of his pre-accident job at the time of the termination of the IRI benefits by MPIC.

The Commission concludes that MPIC was justified in terminating the IRI benefits to the Appellant in accordance with Section 110(1)(a) of the MPIC Act. The Commission therefore dismisses the Appellant's appeal herein and confirms the decision of the Internal Review Officer dated January 10, 2001.

Dated at Winnipeg this 16th day of January, 2004.

MEL MYERS, Q.C.

BARBARA MILLER

ANTOINE FRECHETTE`