Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-95

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **The Honourable Mr. Wilfred De Graves** **Dr. Patrick Doyle**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Danielle Robinson.**
HEARING DATE:	**March 22, 2007**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity benefits beyond November 7, 2004; and** **2. Entitlement to an augmentation of Income Replacement Indemnity benefits based on cost of living increases and increases in available overtime which came into effect after the motor vehicle accident.**
RELEVANT SECTIONS:	**Section 110(1)(a) of *The Manitoba Public Insurance Corporation Act* ('MPIC Act') and Sections 2(a) and 2(d)(iii) of Manitoba Regulation P215-39/94**

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

Reasons For Decision

On April 2, 2004 [the Appellant] was involved in a motor vehicle accident and sustained soft tissue injuries to his neck and shoulders. At the time of the accident the Appellant was employed as a Composite Fabricator/Plastic Lay-Up Technician with [text deleted] for over fifteen (15) years.

As a result of the motor vehicle accident injuries the Appellant was unable to return to his employment and was in receipt of Income Replacement Indemnity ('IRI') benefits and, as well, was in receipt of physiotherapy treatments which were funded by MPIC.

The Appellant advised MPIC's case manager that his personal physician, [text deleted], had recommended that on or about May 31st he would be able to return to work on a graduated return to work program ('GRTW').

At the appeal hearing the Appellant testified that he had advised his case manager on May 21, 2004 that his physiotherapist had recommended that upon his return to work he could undertake light duties because he was required to perform a great deal of upper body movements in carrying out his job functions. He further testified at the appeal hearing that he advised his case manager that his employer, in accordance with its policy, did not object to his return to work on a GRTW program but his employer did not permit him to return to work on the basis of performing light duties only.

On June 14, 2004 the case manager produced a note to file in which he indicated that in a telephone discussion he had with the Appellant on May 28, 2004:

1. the Appellant informed him that he would not be able to return to work until July 5, 2004 since he was unable to twist and could not turn or bend over and believed he wasn't receiving a sufficient number of physiotherapy treatments.
2. the case manager advised the Appellant that if his functional limitations remain that "*we may have to consider something else".*

On June 25, 2004 [Appellant's doctor] provided to MPIC a Physician's Evaluation of Employee Fitness form wherein he stated that:

1. the Appellant could return to work with restrictions on August 9, 2004.
2. the Appellant was capable of doing "*Light Work. Lifting 9 kg. (20 lbs) maximum with frequent lifting and/or carrying objects weighing up to 4.5 kg. (10 lbs).*" As well, [Appellant's doctor] indicated that in terms of an eight (8) hour work day the Appellant was capable of:
    - Stand Total Number Of Hours In A Day 2
    - Walk Total Number Of Hours In A Day 3
    - Sit Total Number Of Hours In A Day 3
3. the Appellant was not capable of climbing ladders or stairs, crawling, bending/stooping or squatting, or was able to reach above shoulder height.
4. the Appellant was capable of occasional simple grasping, pushing and pulling, and fine manipulation, as well as reaching at shoulder height or below shoulder height.

On July 16, 2004 the case manager produced a note to file which indicated that he had referred the Appellant to [rehab clinic] for an assessment and recommendations for further rehabilitation and had advised [Appellant's doctor] and the Appellant's physiotherapist of this referral.

On July 20, 2004 [rehab clinic] forwarded a Work Hardening Program Intake Assessment to MPIC in respect of the Appellant. The purpose of the assessment was to better understand the Appellant's physical ability and to make recommendations regarding treatment and future rehabilitation. The Work Hardening Program Intake Assessment form contained a section headed "*Job Description/Duties As Described By Claimant"* which set out the work duties of the

Appellant which included tracing, skin layup, sweeping, applying reinforcement cores, applying skins called "fillers" and "doublers", bagging and cleanup.

In respect of the Appellant's work duties the assessment stated:

> Information obtained from [the Appellant] has been incorporated; however, we cannot vouch for the veracity of subjective information provided. It is recommended that a Physical Demands Analysis (PDA) be performed to accurately assess the demands of the job as well as its frequencies and loads. If a PDA cannot be obtained and/or completed, then a worksite visit is recommended to better understand the job to return [the Appellant] to his job in a safe manner. (underlining added)

The assessment report further stated that in respect of the essential physical demands of the Appellant's job, the Appellant had provided a description of his pre-accident job duties but that this job description should not replace an objective Physical Demands Analysis (PDA).

The assessment report also stated:

> [The Appellant] classified his position at a **Medium – Heavy** demand level. (underlining added)
>
> **Dictionary of Occuptaional Titles (D.O.T.) Comparison**
>
> According to the Dictionary of Occupational Titles (D.O.T.), Fourth Edition, a Composites Fabricator is classified at a **Medium** demand level. The definition of **Medium** according to the D.O.T. standards is:
>
> **Medium** – exerting 20-50 lbs of force occasionally, and/or 10-25 lbs of force frequently, and/or greater than negligible up to 10 lbs of force constantly over a workday.

Under the heading *Overall Clinical Impressions*, the assessment report stated in respect of the Appellant's overall level of pain that "*This correlated to the ability to perform functional tasks at the **light** strength level*". The assessment report concluded:

> At this time it is recommended that [the Appellant] begin a comprehensive 4-week Reconditioning program to increase his overall functional ability and provide him with

> education on self-management of his pain complaints. The claimant will then progress into a 6-week Work Hardening program where [the Appellant] would then be attending daily, 7.5-hour sessions to help simulate full-time workday tolerance. (underlining added)

[Rehab clinic] provided a series of reports to MPIC between July 28, 2004 and October 1, 2004 as follows:

A. On July 28, 2004 [rehab clinic] forwarded to MPIC a Reconditioning Program Outline report which indicated that the four (4) week reconditioning program would commence August 3, 2004.

B. On August 6, 2004 [rehab clinic] provided MPIC with a Claimant Progress Summary in respect to the Appellant which stated:

> . . . [the Appellant] continues to experience pain in his neck and low back at the end of his session.

C. On August 12, 2004 [rehab clinic] forwarded a letter to MPIC seeking approval for acupuncture treatments for the Appellant, two (2) times per week, while he was in rehab. In this letter [rehab clinic] states:

> . . . We feel that acupuncture may be helpful in controlling [the Appellant's] pain complaints thereby increasing his function, helping him to progress through his rehabilitation program.

D. On August 13, 2004 [rehab clinic] provided another progress report to MPIC which states:

> . . . [the Appellant] reports severe levels of pain and nausea at the end of the rehab sessions.

E. On August 20, 2004 [rehab clinic] provided a further progress report to MPIC which states:

> . . . [the Appellant] continues to experience neck and low back pain, especially at the end of rehab sessions.
>
> . . . Numbness in left front thigh pain in right heel.

F. On August 26, 2004 [rehab clinic] reported to MPIC that the Appellant's six (6) week work hardening program commenced in the week of August 30, 2004 and would be completed in the sixth week commencing October 4, 2004 and that the Appellant would be attending daily sessions lasting 7.5 hours during the program. The report also indicated that they would be providing a copy of this schedule to the Appellant's physician, [text deleted], for his approval.

G. On August 27, 2004 [rehab clinic] provided a further progress report to MPIC and stated:

> . . . [the Appellant] reports stiffness and pain in the neck and lowback. He also reports intermittent right heel pain.

H. On September 3, 2004 [rehab clinic] provided a progress report to MPIC which stated:

> . . [the Appellant] tolerates activities well, he occasionally reports low back pain as well as heel pain.

I. On September 10, 2004 [rehab clinic] provided a progress report to MPIC which stated:

> . . . Reports of neck pain
>
> . . . shoulder pain increases with overhead exercise lower left back pain.

J. On September 17, 2004 [rehab clinic] forwarded the following progress report to MPIC which stated:

> . . . [the Appellant] reports low back & left hip pain
>
> . . . Still have sharp pains in right foot & right shoulder

K. On September 27, 2004 [rehab clinic] forwarded a Work Hardening Program Progress Report to MPIC which states:

> . . . [the Appellant] continues to demonstrate the ability to perform activities at the **LIGHT** strength level. He demonstrated the ability to perform standing and reaching activities on an **OCCASIONAL** basis, at the competitive level.
>
> We will continue to progress the exercises and work simulation tasks as tolerated. [The Appellant] continues to manage his pain with the use of heat and ice. Acupuncture treatments continue to be of benefit in reducing his pain reports. <u>At the completion of his Work Hardening Program, [the Appellant] should be able to enter into a short Gradual Return to Work Program</u>. (underlining added)

L. [Rehab clinic] provided a further summary report to MPIC, dated October 1, 2004, which stated:

> . . [the Appellant's] level of function is increasing and he reports decreased pain. Acupuncture continues to provide pain relief.
>
> . . . still experiencing pain in right foot & right shoulder.

In a note to file dated October 7, 2004 the case manager stated:

> Returned [the Appellant's] message and he says yesterday he saw [Appellant's doctor] and [Appellant's doctor] gave him a note requesting another 3 weeks in program. [The Appellant] says he told [Appellant's doctor] that his pain has shifted. The pain initially started in his neck and then shifted to his thigh and then shifted to his left foot and then his right foot and then shifted to his shoulder and now it's shifted back into his neck. . .

[Appellant's doctor's] note had stated "*further 3 wks of rehab L neck pain/headaches".* On October 13, 2004 the case manager produced a note to file which indicated that on October 8, 2004 he had provided his supervisor with [Appellant's doctor's] note and has received approval of two (2) extra weeks of rehabilitation program. This note further stated:

> . . . [the Appellant] should be at a Medium demand level but he's not quite there. Approved extra 2 weeks of program.

Between October 14, 2004 and October 22, 2004 [rehab clinic] provided three (3) further reports to MPIC as follows:

1. October 14, 2004 - [rehab clinic] provided MPIC with a Work Hardening Program Progress Report. In this report, under the heading ***Overall Impressions*** the report states that the Appellant had been involved in an active rehabilitation program for a period of ten (10) weeks, which includes an extension of two (2) weeks, in order to facilitate further gains in strength and function. The report further states that objective testing of the Appellant demonstrated that he had the ability to perform functional activities of the **MEDIUM** strength level.
2. October 14, 2004 - [rehab clinic] provided a further progress summary report to MPIC which stated:

   > . . . [the Appellant] has had fewer reports of pain this week, exercises were minimally progressed.
   >
   > . . . still min pain right heel & right shoulder

3. October 22, 2004 - [rehab clinic] provided a further progress summary report to MPIC:

   > . . . [the Appellant] demonstrates the ability to perform at a MEDIUM strength level
   >
   > . . . still experiencing sharp pains in R Heel & R shoulder (underlining added)

Discharge Report

[Rehab clinic] issued a Work Hardening Program Discharge Report in respect of the Appellant to MPIC and stated that the Appellant was:

> "fit for an immediate, unmodified return to pre-injury employment"
>
> . . . Based on his clinical presentation and objective test results, [the Appellant]

> demonstrates the ability to work at a **Medium** demand level which exceeds the demands based on the Occupational Therapist's observations of a similar position as a Plastic Layup Technician. [The Appellant].'s] demonstrated abilities meet the physical demands of his pre-accident position based on the Dictionary of Occupational Titles, 4th edition. (underlining added)

The case manager produced a note to file dated October 28, 2004 which indicates that the Appellant spoke to him on October 27, 2004 and advised him that he would be seeing [Appellant's doctor] the next day. He further informed the case manager that he had a sore right foot, right shoulder and left back problems and he stated he may/may not return to work.

Case Manager's Decision

On November 1, 2004 the case manager wrote to the Appellant and stated:

> The medical information on your file supports your return to your pre-accident employment and therefore no further entitlement to IRI benefits, in accordance with Section 110(1)(a) of the Manitoba Public Insurance Corporation Act. Entitlement to IRI will continue until November 7, 2004.
>
> . . .
>
> . . . On a consistent basis, you demonstrated the ability to perform these tasks at a level which meets or exceeds the demands of your pre-accident position as a Plastic Layup Technician. You performed at a Medium demand level despite your subjective complaints of pain in your back. (underlining added)

[Text deleted], the Appellant's physician, disagreed with MPIC's decision to return the Appellant to work without a GRTW program and on November 2, 2004 [Appellant's doctor] prepared a GRTW schedule for the Appellant which stated:

> Graduated Return to work
>
> 2 hrs)
> 4 hrs) 2 weeks each
> 6 hrs) per rehab
> 8 hrs)

The Appellant's employer ([text deleted]) did not accept the decision of MPIC to permit the Appellant to return to an immediate unmodified return to his pre-injury employment and prepared a return To Work Plan dated November 2, 2004 which stated:

> Subject: Return to Work Plan Effective November 2, 2004
>
> . . .
>
> **Abilities, Restrictions and Return to Work Schedule:**
> In line with the most recent documentation provided by your physician November 2, 2004 –
>
> - Your gradual return to work schedule is as follows:
>   - 2 hour shifts (7:45 – 9:45 AM) no break.
>   - Duration 2 weeks (November 2 – 12)
>   - 4 hour shifts (7:45 – 11:45 AM) no break.
>   - Duration 2 weeks (November 15 – 26)
>   - 6 hour shifts (7:45 – 2:15 PM) includes an unpaid lunch break.
>   - Duration 2 weeks (November 29 – December 10)
>   - **December 13, 2004 resume 8 hour shifts.**
> - Restrictions are as follows:
>   - Gradual Return to work as indicated above
>   - No physical restriction/limitations
>
> **Your restrictions/schedule is in place until December 10, 2004** based on current medical information on your file. **Should the above accommodation require modifications, medical documentation must be provided prior to December 10, 2004 to support your request.**
>
> - [text deleted] will pay you for hours worked/clocked.

The Commission notes that on the occasions when MPIC determines that a claimant should return to work on a GRTW program, the employer undertakes to pay the claimant for all hours the claimant worked at a regular rate of pay while MPIC tops up the claimant's salary by paying the balance of the claimant's salary that he would have earned had he worked his regular hours of work. In this appeal MPIC did not approve a GRTW program for the Appellant and, as a result, the Appellant was paid by his employer ([text deleted]) for the actual hours he worked

and, as a result, MPIC did not top-up the difference in the Appellant's salary during the Appellant's GRTW. The Appellant returned to work on November 22, 2004 on a reduced work schedule and received income only for the hours that he actually worked at [text deleted] without any top-up of his salary by MPIC.

Application for Review

The Appellant objected to the decision of MPIC to terminate IRI benefits on November 7, 2004 without approving a GRTW program. As a result the Appellant filed an Application for Review of the case manager's decision on December 6, 2004 wherein he stated:

> I ask the Corporation to review the decision of Nov 1 2004 which cut off income replacement indemnity payments, I believe I am entitled to payment until Dec 13 2004 which according to my submitted doctors reports have my return to work a full 8 Hr day after completing 2 wks of 2 Hr days, 2 wk of 4 Hr day & 2 wks of 6 Hr days.
> I would also like payments reviewed as a cola of 1.05 per hr & ≈ 5 Hrs OT per pay period – cola was increase twice & $1.45 & hrs of 07 to 12 Hr wkly ≈ 24 per pay period

In a further submission dated February 16, 2005 to the Internal Review Officer the Appellant stated:

> 1) RETURN TO WORK
>
> Assessment July 12/04;
>
> The duties stated here were stated as a result of [rehab clinic] having a description of a Lay-up technician at [text deleted]
> This, I accepted with the additional information that I also carried out the task of a composite rework technician.
> This brought my position to a demand level of MEDIUM. To HEAVY
>
> It was recommended that a Physical Demand Analysis be performed to accurately assess the demand of the job as well as frequencies and load.
> It was further recommended that a worksite visit to better understand the job and to be able to return [the Appellant] to his job in a safe manner.
>
> NOTE;
> NOT CARRIED OUT:

Internal Review Decision

The Internal Review hearing took place on February 16, 2005 and the Internal Review Officer issued a decision on March 18, 2005 confirming the case manager's decision and dismissing the Application for Review. In this decision the Internal Review Officer stated:

> **REVIEW DECISIONS**
>
> 1. The termination of IRI effective November 7, 2004 is amply supported by the information on the file. I am therefore confirming that decision at this time.
>
> 2. Your IRI was correctly calculated in accordance with the legislation. There is no entitlement to an augmentation of your IRI based on either cost of living increases or increases in available overtime which came into effect after the date of the accident.

Termination of IRI

In support of the case manager's decision to terminate the IRI, the Internal Review Officer stated:

> 5. The case manager then arranged for an assessment at [rehab clinic]. A reconditioning program, followed by a six-week work hardening program, was recommended. . .
>
> 6. [Rehab clinic] issued its Discharge Report on October 22, 2004. They concluded that you were "fit for an immediate, unmodified return to pre-injury employment". Although no actual worksite visit had been carried out, they had apparently used a [text deleted] job description (which, you advised me at the hearing, was similar to your actual job duties, although you had some other duties which you felt moved you from the Medium category into the Heavy category). (underlining added)
>
> . . .
>
> The effect of Section 110(1)(a) of the *Act* is to end the entitlement of a claimant to IRI when that claimant is "able to hold the employment that he … held at the time of the accident".
>
> The phrase "*able* to hold the employment" is not defined in the PIPP legislation.
>
> Section 8 of Manitoba Regulation P215-37/94, however, does define what is meant by "*unable* to hold employment". This provision (copy enclosed) states that a claimant is unable to hold employment when their injuries render them "entirely or substantially unable to perform the essential duties of the employment that were performed … at the

time of the accident".

At the effective date of the termination of your IRI (November 7, 2004), the weight of the available expert opinion firmly supported the termination. There were no "essential duties" identified that you were categorically "unable" to do, nor were there any such duties which the practitioners involved were saying you absolutely should not be doing. [Appellant's doctor] provided no explanation for his recommended GRTW, and provided no particulars of objective physical signs which would have justified the necessity of a GRTW.

Correct calculation of IRI

The Internal Review Officer, in his decision, indicated the case manager had correctly calculated the Appellant's IRI and stated:

Section 2(a) of Manitoba Regulation P215-39/94 (copy enclosed) stipulates that for a full-time earner, the Gross Yearly Employment Income ('GYEI'; the starting point for the IRI calculation) is the wages paid during the pay period when the accident occurred, divided by the number of weeks in the pay period, multiplied by 52.

This necessarily takes into account the overtime that you actually worked during that pay period when the accident occurred.

Section 2(d)(iii) of the same regulation (copy enclosed) stipulates that GYEI is also to include overtime pay received or earned during the 52 weeks before the accident which is not otherwise included in the Section 2(a) calculation. The IRI calculations show that this issue was specifically addressed in your case.

There is no provision in the legislation for augmenting the GYEI (or IRI) of a full-time earner based on the availability of post-accident overtime hours.

You also submitted that you had lost vacation pay while on IRI. I noted that this is also specifically taken into account in the Section 2(a) calculation, which is based on a 52-week year. During a normal work year, you would be entitled to receive a certain number of weeks of vacation pay. You would not, however, receive in excess of 52 weeks of earnings in any given calendar year. You have, therefore, already been compensated for your lost vacation pay.

On May 26, 2005 the Appellant filed a Notice of Appeal.

Appeal

The relevant provisions in respect of this appeal are:

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;

Manitoba Regulation P215-37/94:

Meaning of unable to hold employment

8 A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Manitoba Regulation P215-39/94:

GYEI not derived from self-employment

2 Subject to this regulation, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

(a) in the case of a full-time earner, the salary or wages received or receivable for the pay period in which the accident occurred, divided by the number of weeks in the pay period and then multiplied by 52;

. . .

(d) any of the following benefits, to the extent that the benefit is not received as a result of the accident:

. . .

(iii) remuneration for overtime hours that is not included in clause (a) and that is received or earned in the 52 weeks before the date of the accident;

At the appeal hearing the Appellant testified that:

1. the job that he performed prior to the motor vehicle accident was at a physical demand status at the heavy level and that [rehab clinic] incorrectly assessed his physical demand status at the medium level.
2. he had performed the job duties not only of a lay-up technician which required a physical demand status at a medium level, but also the job duties of a composite fabricator which required the physical demand status at a heavy level.
3. he had informed his case manager that in addition to performing his duties as a lay up technician, he had also performed the additional duties as a composite fabricator.

4. [Rehab clinic] only assessed his work duties as a lay-up technician and did not assess his work duties as a composite fabricator.

The Appellant further testified at the appeal hearing that:

1. the function of the composite fabricator required the Appellant, on a regular basis, each day, after the completion of his duties as a lay-up technician, to perform the additional duties of a composite fabricator which required the Appellant to examine fiberglass sheets for physical defects and if any defects were noted he was required to remove the sheets from the lay-up mandreal and to physically remove the defects from the fiberglass sheets.
2. in order to perform the work he was required to very often lift very heavy objects and using certain tools, to physically force the removal of the defects from the fiberglass sheets.
3. the removal of the defects required a great deal of exertion on his hands, arms, shoulders, neck, back and body. The work of a composite fabricator was physically demanding which he was required to perform on a regular basis, each day, and quite often he was required to spend a significant period of the work day performing these heavy duty tasks.

The Appellant further testified at the appeal hearing that:

1. as a result of the combination of his work as a lay-up technician and composite fabricator the physical demand status of this work was at a heavy level and that [rehab clinic] had incorrectly defined the nature of his job duties at [text deleted] and, as a result, incorrectly assessed his job as having a physical demand status at a medium level rather than at a heavy level.

2. he had informed [rehab clinic] of his duties which included working as a composite fabricator but [rehab clinic] had ignored this information when determining the physical demand level of his job.
3. [Rehab clinic] relied on a job description from [text deleted], who was not the Appellant's employer, in order to determine his job duties.
4. as a result, the Work Hardening Program Intake Assessment provided by [rehab clinic] to MPIC, dated July 20, 2004, did not accurately set out his work duties or that the physical demand status of this work was at a heavy rather than medium level.
5. the [rehab clinic] work assessment report had recommended to MPIC that a physical demands analysis be performed in order to accurately assess the physical demands of his job and that if such an analysis could not be obtained or completed, a work site visit was recommended to better understand the Appellant's job so that he could return to work in a safe manner.
6. in determining the nature of the physical demands of his job, [rehab clinic] did not conduct a physical demands analysis or conduct a work site visit, contrary to its recommendation in its work assessment report.
7. Instead [rehab clinic] relied on a definition in the Dictionary of Occupational Titles to determine that the physical demand level of his job was that at a medium demand level rather than at a heavy demand level.
8. MPIC erred in failing to require [rehab clinic] to conduct a physical demand analysis or a work site assessment in order to determine the job duties and the physical demand status of these job duties.

The Appellant further testified that:

1. on September 27, 2004 [rehab clinic] forwarded a Work Hardening Program Progress Report to MPIC and stated that at the completion of the Appellant's work hardening program the Appellant should be able to enter into a short GRTW program.
2. notwithstanding this recommendation, on September 27, 2004, [rehab clinic] reversed its position and on the conclusion of the Appellant's work hardening program issued a Discharge Report to MPIC on October 22, 2004 wherein [rehab clinic] stated that the Appellant was "*fit for an immediate, unmodified return to pre-injury employment*".
3. MPIC ignored [rehab clinic's] initial recommendation that the Appellant return to work on a GRTW program.
4. MPIC ignored [Appellant's doctor's] recommendation that the Appellant be placed on a GRTW program and accepted [rehab clinic's] recommendation that the Appellant be returned to work without a GRTW program.
5. His employer ([text deleted]) rejected MPIC's decision to permit the Appellant to return to work on an immediate, unmodified program and was only prepared to return the Appellant to work on a GRTW program.
6. He returned to work on the GRTW program and MPIC failed to top up his regular salary during the period of time he was on this program, which resulted in a loss of pay to the Appellant.

In his submission the Appellant reviewed his testimony and submitted to the Commission that:

1. [Rehab clinic] had conducted a flawed investigation to determine his job duties and the physical demand status of his job.

2. MPIC had failed to require that [rehab clinic] conduct a physical demands assessment or worksite assessment in order to determine the physical demand status of the Appellant's job.
3. MPIC ignored the advice of the Appellant's physiotherapist who indicated the Appellant should only return to work initially on light duties.
4. MPIC ignored the advice of the Appellant's personal physician (who had treated him in respect of the motor vehicle accident injuries) that the Appellant should return to work on a GRTW program.
5. ignored the position of the Appellant's employer ([text deleted]) who was prepared to take the Appellant back to work only on a GRTW basis.

The Appellant further submitted that, having regard to his medical condition, as reflected in a series of progress reports by [rehab clinic] to MPIC:

1. he was not capable of returning to work full time to a job which required him to work at a physical demand status of a heavy level and, as a result, he was unable to carry out the essential duties of his pre-accident employment on his return to work.
2. he was only capable of returning to work in a GRTW program.
3. as a result, MPIC erred by refusing to top-up his pay during the course of his return to work program and that the Commission should direct MPIC to do so at this time.

MPIC's legal counsel, in response, submitted that:

1. MPIC had arranged with [rehab clinic] for the Appellant to participate in a reconditioning program followed by a six (6) week work hardening program.

2. MPIC accepted [rehab clinic's] recommendation in its discharge report of October 22, 2004 that the Appellant was fit for an immediate unmodified return to his pre-injury employment.
3. based on [rehab clinic's] assessment the Appellant was capable of returning to his work after being discharged from his work hardening program in accordance with Section 110(1)(a) of the MPIC Act.

Discussion

The Internal Review Officer dismissed the Appellant's Application for Review of the case manager's decision on the grounds that, pursuant to Section 110(1)(a) of the MPIC Act, the Appellant was capable of carrying out the essential duties of his pre-accident employment and, as a result, MPIC was justified in terminating the Appellant's IRI.

The Commission disagrees with the decision of the Internal Review Officer that the Appellant was capable of returning to his pre-accident employment without a GRTW program. The Appellant was employed at [text deleted] for over fifteen (15) years as a composite fabricator/plastic lay-up technician and testified in a clear, unequivocal and convincing manner and the Commission accepts his testimony in all issues in dispute between himself and MPIC in respect of the termination of the Appellant's IRI.

The Commission finds that MPIC failed to comply with Section 150 of the MPIC Act in prematurely terminating the Appellant's IRI.

Section 150 of the MPIC Act states:

Corporation to advise and assist claimants

> 150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Commission determines that MPIC failed to recognize that [rehab clinic] conducted a flawed investigation in determining the Appellant's job duties and the physical demand status of his job. Instead of requiring [rehab clinic] to carry out its initial decision to conduct a physical demand assessment or worksite assessment to determine the:

(a) Appellant's job description, MPIC relied on an improper job description, obtained by [rehab clinic], from another employer. The Commission notes that in the Internal Review decision the Internal Review Officer states:

> . . . Although no actual worksite visit had been carried out, they had apparently used a [text deleted] job description (which, you advised me at the hearing, was similar to your actual job duties, although you had some other duties which you felt moved you from the Medium category into the Heavy category). (underlining added)

(b) physical demand level of the Appellant's job, MPIC relied on the Dictionary of Occupational Titles (DOT), Fourth Edition, and as a result classified the Appellant's job as a medium demand level rather than the heavy demand level as asserted by the Appellant.

For these reasons, the Commission concludes that MPIC accepted the results of a flawed investigation by [rehab clinic] in order to determine the nature of the Appellant's job duties and the physical demand level of these duties. As a result, the Appellant failed to advise and assist the Appellant in obtaining the compensation he was entitled to under Section 150 of the MPIC Act.

The Appellant testified that he was not physically capable of returning to work on a full time basis having regard to the physical injuries he suffered in the motor vehicle accident. An examination of [rehab clinic's] progress reports to MPIC, which commenced on July 28, 2004 and were completed when [rehab clinic] issued its discharge report on October 22, 2004, clearly indicated that the Appellant had not fully recovered from the injuries he sustained in his motor vehicle accident and that he was only able to perform at a medium strength level and not at a heavy strength level. The Commission finds that these progress reports:

a) on the whole, corroborate the Appellant's testimony as to his medical status at the time [rehab clinic] issued its discharge report.
b) are inconsistent with MPIC's decision that the Appellant was capable of returning to his pre-employment job on a full-time basis.

The Commission further notes that on September 27, 2004 [rehab clinic] provided a Work Hardening Program Progress Report to MPIC in which it recommended that at the completion of the Appellant's work hardening program the Appellant should be able to enter into a short GRTW program. However, contrary to its assessment, [rehab clinic], on October 22, 2004, (approximately three (3) weeks after issuing its September 27th report), and, contrary to its own progress reports in respect of the Appellant's medical condition, wrongly concluded that the Appellant was capable of performing at a medium strength level and was "*fit for an immediate, unmodified return to pre-injury employment".* The Commission finds that [rehab clinic's] medical progress reports and [Appellant's doctor's] medical opinion as to the Appellant's status, corroborate the Appellant's testimony that he was "not fit for an immediate, unmodified, return to pre-injury employment".

The Commission determines that, as of October 22, 2004 (the date of the Appellant's discharge from [rehab clinic's] program), MPIC erred in failing to conclude that the Appellant:

a) had not fully recovered from his motor vehicle accident injuries
b) was not able to perform his pre-accident duties on a full time basis at the physical demand status of a heavy level
c) was only capable of returning to work on a GRTW program.

The Commission also finds that both [text deleted], the Appellant's physician, and the Appellant's employer, were correct in disagreeing with MPIC's decision to return the Appellant to work without a GRTW program on November 2, 2004. [Appellant's doctor] was fully aware of the Appellant's medical status and, as a result, had prepared a GRTW schedule for the Appellant's return to work, which was adopted by the Appellant's employer.

The Commission concludes, for these reasons, that the Appellant has established, on a balance of probabilities, that he was not capable of carrying out the essential duties of his pre-accident employment as of October 22, 2004 and MPIC was not justified in terminating the Appellant's IRI benefits at that time, contrary to Section 110(1)(a) of the MPIC Act.

Correct calculation of IRI

The Appellant challenged the calculation that MPIC made in respect to his entitlement to IRI. During the course of the hearing, at the request of the Commission, MPIC's legal counsel explained to the Appellant the reasons why he was not entitled to an augmentation of his IRI based on either a cost of living increase or any increases available in overtime which came into effect after the date of the motor vehicle accident. Upon receipt of that explanation, and as a

result of further discussion with the Commission, the Appellant indicated that he now understood MPIC's position in this respect. The Commission finds, upon a review of the Internal Review Officer's decision, in respect of which MPIC calculated the Appellant's IRI, that MPIC was correct in these calculations.

Decision

1. In respect of the termination of the Appellant's IRI, for the reasons outlined above, the Commission allows the Appellant's appeal and rescinds the Internal Review Officer's decision dated March 18, 2005 in respect of this issue. The Commission directs that MPIC pay the Appellant the IRI he is entitled to during the period of time the Appellant was employed on a GRTW program, and until he returned to his full time pre-accident employment.

2. In respect of the calculations made by MPIC in respect of the IRI payments that the Appellant received prior to the termination of IRI, the Commission, for the reasons outlined herein, dismisses the Appellant's appeal and confirms the decision of the Internal Review Officer dated March 18, 2005 in this respect.

Dated at Winnipeg this 31st day of May, 2007.

MEL MYERS, Q.C.

HONOURABLE WILFRED DE GRAVES

DR. PATRICK DOYLE