Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-12-137

PANEL:	**Ms Karin Linnebach, Chairperson** **Mr. Tom Freeman** **Ms Susan Sookram**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.**
HEARING DATES	**October 20, 21 and 24, 2016 and December 13, 2016**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity benefits beyond March 22, 2012.**
RELEVANT SECTIONS:	**Section 86, 106, 110(1)(c) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

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

Reasons For Decision

Background

The Appellant was involved in a motor vehicle accident ("MVA") on September 27, 2009 in which he suffered injuries including fractures to his ribs, pelvis and vertebrae. As a result of these injuries, the Appellant received Personal Injury Protection Plan ("PIPP") benefits, including Income Replacement Indemnity ("IRI") benefits.

The Appellant was not working at the time of the MVA, was in receipt of Employment Insurance (EI) benefits, and did not have a job to which he could return. The Appellant was classified as a non-earner at the time of the MVA, which required MPIC to determine an employment for the Appellant from the 181st day after the MVA. The Appellant's employment was determined to be a welder. In a decision letter dated May 14, 2010, the case manager advised the Appellant that he was no longer entitled to IRI benefits as he was capable of performing the duties of his determined employment as a welder.

The Appellant filed an Application for Review of the case manager's decision on July 8, 2010. In a decision dated November 1, 2010, the Internal Review Officer reinstated the Appellant's IRI benefits, finding that there was no supplementary evidence on file that outlined the physical demands of the type of positions the Appellant normally would have held as a welder. The Internal Review Officer concluded that the default physical demand for the general category for welder under the National Occupational Classification is heavy and the medical information on file only supported the ability for the Appellant to hold a medium strength capacity of employment.

As a result of the November 1, 2010 Internal Review Decision, the case manager gathered more information regarding the type of welding the Appellant had done prior to the MVA and had a job demand analysis conducted at the last place of the employment where the Appellant worked as a welder. A Functional Capacity Evaluation (FCE) was also conducted. In a decision letter dated March 14, 2012, the case manager again concluded that the medical information indicated that the Appellant was capable of performing the occupational demands of a welder and terminated his entitlement to IRI as of March 22, 2012.

The Appellant filed an Application for Review of the case manager's decision. On May 30, 2012, the Internal Review Officer varied the decision of the case manager, finding that the Appellant was capable of holding his determined employment as a production welder. The Internal Review Officer noted that under the National Occupational Classification, the classification of welder is broken down into 166 different sub categories and includes the category of production welder. The Internal Review Officer found that, based on the totality of the medical and employment information, the case manager's decision to end the Appellant's entitlement to IRI benefits as of March 22, 2012 was supported.

The Appellant filed a Notice of Appeal, which was received by the Commission on August 31, 2012. The issue on this appeal is whether the Appellant is entitled to IRI benefits beyond March 22, 2012.

Evidence for the Appellant

In a letter to the Commission dated August 29, 2012 which accompanied the Appellant's Notice of Appeal, the Appellant indicated he felt that the assessments that were conducted were inadequately done. Regarding the determined employment of a production welder with a physical demand level of medium, the Appellant submitted that his position as a welder requires him to lift heavy weights up to and exceeding 100 lbs at times.

The Appellant also indicated that he was not physically fit to return to work. He described his symptoms as discomfort and numbness in his right foot and sore lower back and "butt area". He indicated that he still requires his foot, calf and lower back to be massaged daily to help relieve soreness and stiffness. He indicated that he has to prepare his body for the "daily grind" before

he leaves for work every day. The Appellant stated that he went back to work not because he was ready to go back to work, but because he has rent and bills to pay.

The Appellant began his oral testimony at the hearing by stating he had received "bad treatment" from MPIC since the beginning of his injury. He stated that although he tried to help himself recover from the beginning, he did too much too early.

The Appellant then focussed on the FCE that was conducted by [text deleted], an occupational therapist with [text deleted]. He stated that he was unhappy with the FCE and that it was inadequate in that he was not required to perform enough physical tests to truly assess his ability.

The Appellant stated that he spent 7 hours on one day and 1 hour on the second day for the FCE. He described in detail the location and layout of where the FCE was conducted. He described some of the exercises and tests he was required to perform and demonstrated some of the tests. He was required to secure squares using his hands and fingers, he did some stretching exercises and he was required to push his leg while [Appellant's occupational therapist] held the bottom of his foot with his hand. He remembers being required to push and pull with a sled. He was provided a 3 lb weight to do an exercise which [Appellant's occupational therapist] described as simulating welding. He did not feel the exercise simulated welding and felt he should have had his steel toes and welding jacket on. The Appellant pointed out that the tests were done on carpeting and that it is different to slide steel on cement than on carpet. He didn't recall some of the other exercises but remembers speaking with [Appellant's occupational therapist] about the FCE being inadequate because it wasn't physical enough. The Appellant indicated that he felt pain and discomfort in his hip in the afternoon of the FCE.

The Appellant stated he was left alone during the FCE for 20-30 minutes because [Appellant's occupational therapist] went home to retrieve a binder with his information that she had forgotten. The Appellant suggested that [Appellant's occupational therapist] was distracted during the FCE, often looking at the clock. In addition, other people were in the area of the FCE while it was being conducted.

With respect to her written report, the Appellant stated that [Appellant's occupational therapist's] analysis is confusing and that he disagreed with "the whole report". Regarding the jobs demands analysis of his welding position with [text deleted] before the MVA, the Appellant said that he does not know how the job demands analysis came about and that he never met the person who conducted the analysis. When asked by the panel what is missing from the analysis, he stated that "a lot of it is true", but that not everyone did light work at [text deleted]. He stated that he wasn't the guy that [text deleted] chose for light work because "they know what I can do". He stated that he didn't even know what welding station number [text deleted] is. He stated that he doesn't even know why [text deleted] was mentioned in the FCE report because he wasn't even working at [text deleted] at the time of the MVA and was never going back to [text deleted]. He stated that he wasn't sure how [Appellant's occupational therapist] came to her determination on standing. He pointed out that [Appellant's occupational therapist] at one point calls him by the wrong name in the report.

With respect to the conclusion by MPIC that he is a production welder, the Appellant said he is a welder who does production. He said he has also welded structural steel and shouldn't be called a production welder.

The Appellant testified that within days of his benefits being terminated on March 22, 2012, he worked once or twice per week doing temporary labour work for [text deleted]. He did warehousing work, emptied semi trailers, and stacked and re-piled pallets. He described physically demanding work of having to pick up pallets to waist height and then throw them.

The Appellant testified that after the termination of his IRI benefits he returned to work at [text deleted] by May 2012, working as a welder doing production work. He stayed at [text deleted] until May 2013. When he returned to [text deleted] after the termination of his benefits, he was welding parts that weighed close to 100 lbs. He said he was working on the end panel which he described as "one of the hardest parts" and at times this work was "so tough". He described at length the various parts he had to weld and how this was done. He stated that after the part is welded you have to pick it off the jig and place it on a pallet. When the part is together it weighs more than 60 lbs. The welding he was doing after he returned to [text deleted] was a very physical job, he worked with a quota, and the rotating shifts caused stress because he never felt rested. When he returned to [text deleted] after his IRI benefits were terminated, he never told anyone at [text deleted] that he was injured.

With respect to [Appellant's rehab specialist's] report, the Appellant stated that he was expecting more from the nerve conduction study as to what is wrong with him. He stated that all the testing that was done hasn't determined anything one way or another and that "nobody knows anything".

The Appellant described where he currently feels pain and indicated that he gets a sharp pain running from "his waist to his crotch". He also feels numbness in his foot and it radiates down his leg. He feels he is still very hurt even though if you see him walking down the aisle at work

"you would never know that I am hurt". He stated that every morning he has a routine to stretch to get ready for the day. He wears a back brace everyday which helps, but he finds wearing it uncomfortable.

On cross-examination by counsel for MPIC, the Appellant described working at [text deleted]. He stated that approximately 1500 welders work at [text deleted] and acknowledged that all of the welders at [text deleted], including himself, are considered production welders. The welders all work on different parts and he thought there were a "couple of hundred" different working stations. He acknowledged that some of the workstations are less physically demanding than others depending on what kind of parts are being worked on.

The Appellant was questioned on the job demands analysis that was conducted for his position at [text deleted] before the MVA. The Appellant agreed with the content of the sections entitled work assignment, general job description, and essential job functions. The Appellant stated that station number [text deleted] is a small parts station and that he had never worked on a small parts welding station. He stated that he has always worked on the bigger parts while at [text deleted]. He acknowledged that in his previous jobs before [text deleted] he did some production welding on smaller parts. He agreed that most production welding jobs don't deal with larger parts. He stated that it's still hard work when working on smaller parts but it is not as heavy.

When working at [text deleted] before the MVA, he was working on panels and would complete 9 to 10 panels per shift. By the end of his employment with [text deleted] in 2009, he was completing 12 panels per shift. He stated that while welding one may have to move the part during and after the weld is finished. While he initially estimated that he was moving and lifting parts weighing 100 lbs, he then stated they were at least 80 lbs but that he "could be wrong". He

then stated that he knows the parts weigh more than 50 lbs. It was suggested to the Appellant that he could get assistance with these heavier parts by using the overhead crane, but the Appellant insisted that it wasn't practical to use the crane and that it was "frowned upon".

The Appellant was questioned about returning to [text deleted] after the termination of his IRI benefits and why he didn't ask for a lighter job if he felt the job he was doing was too physically demanding. He stated that when he started back he was hired as a new employee on probation so didn't mention to anyone that he required a job that was less demanding. He did at one point tell his supervisor that welding the end panels, which is one of the bigger parts, was too hard for him. He was told by the supervisor that they liked him working there. The Appellant then went to a different supervisor and told him he had been doing that work for so long and needed a change. He was changed to another station but within a week or so he was laid off with severance. He felt he was laid off because he didn't go through the proper channels to get reassigned. This was approximately one year after he returned to work after the last termination of his IRI benefits. The Appellant acknowledged that he wasn't the only welder to be laid off at that time stating that a "whole bunch of people" were also laid off.

The Appellant was questioned as to why he thought the first supervisor wanted to keep him on that job welding the bigger parts. His response was that he has pride in what he does, does the job exactly the way it should be done and always met his quota. He stated that it was "so easy" for him to weld and do what he was supposed to do.

The Appellant was asked as to why he didn't return to welding after leaving [text deleted] in 2013. He stated that he felt he was laid off for no good reason and was put off by it. He knows

there is “tons of work” in welding, but finds welding physically hard for him and too taxing on the body.

The Appellant was questioned by counsel for MPIC regarding the FCE. The Appellant agreed that the description of the critical physical demands of welding on page three of the FCE report refers to a welder on a production line and is not specific to [text deleted]. The Appellant agreed that [Appellant’s occupational therapist] did not just consider the physical demands at [text deleted] but considered “Welder, Production Line, Combination” in the welding industry classification.

On page 4 of the FCE report, [Appellant’s occupational therapist] concluded that the Appellant demonstrated the functional tolerance to lift 48 lbs below to waist on an occasional basis of up to 1/3 of a day and this matches the job demands of welder on a production line. The Appellant did not agree with this conclusion. He stated that he was unsure about what weights he had lifted at the FCE, but said there was no 25 lb dumbbell provided. He stated he didn’t agree with the conclusion he could lift for up to 1/3 of the day because he did not spend an hour and one-half total on anything physical during the FCE. He stated that he carried a 3 lb weight maybe a minute or two. He told [Appellant’s occupational therapist] that the exercises she required him to do did not simulate anything. He said that shortly after that is when she started looking at her watch and other people came in the area.

Regarding pushing and pulling as described in the FCE report, the Appellant stated that this only lasted from the end of one room to the other even though [Appellant’s occupational therapist] concluded that the Appellant was able to push and pull up to 1/3 of the day.

The Appellant was questioned about working for [text deleted] after the termination of his IRI benefits. He acknowledged that he started working for [text deleted] within days after his IRI benefits were terminated and that he would have worked more than 1-2 times per week if more work was available. He also stated that on a few occasions he had to leave a job because it was too hard to complete. He recalled one job where he had pain in his hip from running up and down the stairs. The Appellant acknowledged that the pallets he was lifting on one job weighed more than 50 lbs and stated that "treated lumber is heavy".

The Appellant was questioned as to why he returned to [text deleted] in May 2012 after his IRI benefits were terminated. He stated that everyone was telling him he should go back. He said that he contacted [text deleted] and told them that one of the biggest mistakes he made was losing his job back at [text deleted] in 2009 and that he would appreciate the opportunity to return to work there. He said the next day someone called him and offered him a job. He thought he would try it because he wasn't getting enough work from [text deleted]. Once he returned to work at [text deleted] in 2012, he tried really hard to stay there. In the whole year he was there, he only missed two days of work because he had the flu. He felt he was lucky to get his job back at [text deleted]. The Appellant acknowledged that when he went back to [text deleted] after his benefits were terminated, the position working on the end panels was more physically demanding than the work he was doing at [text deleted] before the MVA. He stated that there was a lot more bending and banging of parts. He stated that this was part of the machinery that was more visible to the customer so he wanted it to be perfect.

The Appellant was questioned regarding the summary of his employment between 2001 and 2009 and confirmed that the summary as found on page 6 of the Internal Review Decision is correct. He confirmed he wasn't working at the time of the MVA and that [text deleted] wasn't

his last place of employment before the MVA. He stated that after [text deleted] and at various times throughout his work history he did different labour jobs, such as piling pallets, working at a car crushing plant, throwing garbage, and killing chickens. The Appellant acknowledged that welding was a better paying job than these jobs. He stated that he is currently working at [text deleted] and although it pays much less than welding, he is happy there. The Appellant acknowledged that he could get a welding job if he wanted one.

Evidence for MPIC

[Appellant's rehab specialist]

[Appellant's rehab specialist] testified at the hearing and was qualified as an expert in the field of physical medicine and rehabilitation.

The Appellant was referred to [Appellant's rehab specialist] by MPIC for electrodiagnostic evaluation which included nerve conduction studies and EMG evaluation. [Appellant's rehab specialist] stated that the Appellant attended to him on November 19, 2014 and a report regarding the evaluation was prepared on that same date. [Appellant's rehab specialist's] role was limited to the electrodiagnostic evaluation and he was not in any way involved in treating the Appellant. [Appellant's rehab specialist] confirmed that his November 19, 2014 report was the only report he prepared and the testing and subsequent preparation of the report were his only involvement with the Appellant.

[Appellant's rehab specialist] explained that the appointment with the Appellant began with a brief review of the Appellant's history after which a physical exam and the testing were performed. [Appellant's rehab specialist] explained that the Appellant was describing pain radiating into his lower limb and the testing was done to determine whether there was any

pathology or abnormality physiologically. In short, he was testing to see whether or not the nerves were functionally normally. The testing was to assess function but not symptoms; he was looking for abnormality of nerve function that would be the cause of the Appellant's symptoms.

[Appellant's rehab specialist] described the testing in detail, including how it was conducted, what he was assessing, and how he was assessing. During his explanation of his report, [Appellant's rehab specialist] referred the panel to the data set and data interpretation pages accompanying the narrative report. He advised that the testing was done in the order as it appears on the data set.

[Appellant's rehab specialist] stated that the testing that was conducted is uncomfortable and painful. The Appellant fully cooperated with the testing and provided good effort throughout. While [Appellant's rehab specialist] didn't record the time it took to complete the test, the test typically takes one and one quarter hours. At the end of the consultation, [Appellant's rehab specialist] advised the Appellant of the results, specifically that the Appellant's test results were normal and that the Appellant was able to dress and go.

[Appellant's rehab specialist] found no abnormality of the Appellant's nerve function but was clear that the Appellant could still be experiencing symptoms even though the testing results are considered normal. This is because there is "no test in the world" that assesses symptoms as symptoms are a subjective issue. He noted that it was not uncommon not to have an explanation for an individual's symptoms.

On cross examination of [Appellant's rehab specialist], the Appellant explained to [Appellant's rehab specialist] that he is still experiencing cramping and pain and numbness in his foot and

toes. The Appellant reviewed the testing procedure with [Appellant's rehab specialist] and the Appellant's responses during and after the testing. [Appellant's rehab specialist] agreed that the Appellant experienced pain during the testing. The Appellant questioned [Appellant's rehab specialist] about why he stopped the testing when he did. [Appellant's rehab specialist] stated that the test concluded when it did because there was no added information that he needed; he completed all the testing required.

[Appellant's rehab specialist] was questioned by the Appellant about how the numbers are generated during the testing. [Appellant's rehab specialist] explained that the numbers generated through the testing contain nothing subjective but are generated by the equipment that does the recording. [Appellant's rehab specialist] stated that, for the most part, it is an objective test and raw data is generated by the equipment which is then interpreted. [Appellant's rehab specialist] explained that "the numbers are the numbers" and it was not unlike a blood test in that respect.

[Appellant's rehab specialist] agreed with the Appellant that the testing does not determine pain and discomfort as there is no test that assesses symptoms or pain. [Appellant's rehab specialist] explained that he advised the Appellant during the consultation that he could not conclude whether or not the Appellant has symptoms and that he could only tell how the nerves are working. [Appellant's rehab specialist] stated that there is not a direct correlation between physiology and pain as one can have normal physiology and have pain and abnormal physiology and not have pain.

[Appellant's occupational therapist]

[Appellant's occupational therapist] testified at the hearing. She is an occupational therapist who is the owner of [text deleted]. She reviewed her curriculum vitae, describing her educational

background and work experience. [Appellant's occupational therapist] has been conducting functional capacity evaluations for more than twenty years. Given her education and work experience, [Appellant's occupational therapist] was qualified as an expert in occupational therapy with a speciality in functional capacity evaluations.

[Appellant's occupational therapist] indicated she received a referral from MPIC to complete a functional capacity evaluation on the Appellant. As part of her evaluation, [Appellant's occupational therapist] was required to assess whether or not the Appellant was capable of performing his pre-injury job as a welder.

After she received the request from MPIC, [Appellant's occupational therapist] reviewed the medical information provided by MPIC and contacted the Appellant to arrange the assessment. The purpose of reviewing the medical information is to get a clear background of the Appellant's injuries, learn what, if any, rehabilitation the Appellant has attended and whether there is anything outstanding. [Appellant's occupational therapist] stated she was informed that the Appellant was not working at the time of the MVA. She indicated this was very important information as she needed to know if she was considering a specific job or a more general category of employment. If the Appellant was returning to a particular job, she would need to know what that particular job requires. If the Appellant is not returning to a particular job, she needs to consider the occupation classification more generally as "you cannot guarantee that employer A and B are the same".

[Appellant's occupational therapist] stated that she had direct experience working with welders when she was an occupational therapist at the [text deleted] shops in [text deleted] prior to her entering private practice. She indicated that the welding done at [text deleted] was repair and not

the manufacturing of new product. She indicated that the welding that was described in the job demands analysis at [text deleted] was quite a bit lighter than the welding she saw at [text deleted]. Besides her work with welders at [text deleted], she has completed prior FCEs for welders, but was unsure how many she has conducted. She indicated that in her practice as an occupational therapist she sees a variety of work in a variety of industrial settings.

[Appellant's occupational therapist] explained that when she is referred for an FCE she always does the initial contacting of the individual. Her experience is that individuals have often already undergone a number of experiences and it is important for her to take the time to listen so the individual can share how their injury has affected them. She feels it is important to get the sense that the individual trusts what you are doing. She indicated that in difficult cases she may have a pre-meeting with the client before the evaluation is conducted. In this case, she contacted the Appellant and remembers having a long conversation with him on the telephone. After her initial conversation with the Appellant, the assessment was booked and ultimately rebooked, but she did not remember the details of why it was rebooked.

[Appellant's occupational therapist] recalled that the Appellant was denied benefits at one point and then the benefits were later reinstated. She stated that when this occurs, this creates a difficult emotional component as there is often a mistrust of the system. She stated that the Appellant had feelings of not being understood or believed in his rehabilitation program. She felt it was important for her to hear that.

In response to the question how she decides what is done at the FCE, [Appellant's occupational therapist] stated that she needs to make sure she obtains clear objective findings. In this case she was required to determine whether the Appellant could return to his pre-injury job as a welder so

she researched welder in the Dictionary of Occupational Titles. She could not rely on the jobs demand analysis conducted at [text deleted] because there was no indication that the Appellant would return to that workplace. She explained that the Dictionary of Occupational Titles is produced by the United States Department of Labor and provides a detailed account of the requirements of occupations. She researched welder and then the sub-area of welding which most closely matched what she was looking for, which in this case was Welder, Production Line. There is a variety of welding and she wanted to be inclusive otherwise the results could be misleading. She explained that the Dictionary of Occupational Titles gives her more information rather than simply relying on the Canadian National Occupational Classification which is mostly designed for career counselling. If she were to simply rely on the National Occupational Classification she would not have enough information. Currently there is no Canadian version of the Dictionary of Occupational Titles.

She stated that when doing FCEs, she wants to be sure that she has objective information as she is trying to take as accurate a picture as possible. She always takes a full day to conduct the FCE and then brings the client back on a second day. She explained that she does a musculoskeletal examination, assesses pain levels and conducts a series of functional testing of movement and lifting, carrying, pushing and pulling. She tries to include a work simulation and where there is a job to return to, she will conduct the testing at the work site if possible. With respect to ability to return to work, she is not assessing whether the individual is at “maximum ability” but rather “safe ability”. She indicated that if she needs to reassess something she will do that and if there are psycho-social components, she will assess that as well. She indicated that she is asked to provide an objective account of function and therefore has to have checks and balances included in the evaluation. One of the checks is measuring objective physical changes.

[Appellant's occupational therapist] indicated that she obtained the Appellant's consent to conduct the FCE and then proceeded to complete a symptom pain diagram with the Appellant. [Appellant's occupational therapist] referred to the Appendix of her report with provides a description of the tests that were administered during the FCE and the functional pain scale. She explained that she wanted to see what level of pain was affecting the Appellant. She learned that the Appellant has underlying pain that is constantly present; he has pain on a daily basis. Pain levels were assessed again at the end of the day of the FCE and the following day. She found that there was a slight increase in pain at the end of the day and the following day, with pain increasing in the right buttock and groin. She then compared the Appellant's reports of pain to physical changes making "objective physical measurements". She referred the panel to her conclusions in the last paragraph of page 21 of her report which state:

> ... Post test measurements reveal an improvement in cervical and shoulder range of motion. Hip rotation improved and there was a slight decline in hip flexion bilaterally. A slight decline in thoracolumbar side flexion is detected, and rotation improved slightly. Thoracolumbar forward flexion remained consistent as did ankle range of motion. Edema was not detected to the lower extremities.

[Appellant's occupational therapist] stated that the tests results were positive. However, because the Appellant reported a pain level of 4 with activity, [Appellant's occupational therapist] made recommendations in her report that the Appellant do stretching exercises. She observed that while the Appellant has strength in his abdomen, he is weaker in his back. A stretch of the groin muscle and a trunk stability exercises were reviewed with the Appellant. These exercises would help "make sure he is strong everywhere". [Appellant's occupational therapist] noted that the Appellant advised her that he walks on a daily basis. [Appellant's occupational therapist] stated that she encouraged the Appellant to incorporate walking stairs and wearing work boots with his daily walking.

[Appellant's occupational therapist] described the other testing that was conducted as part of the FCE, including grip testing, repetitive movement screening, strength testing and whole body range of motion testing. Whole body range of motion testing is broken down into above eye level reaching, bending, sustained low-level work and recovery from low-level work. Strength testing is broken down into pushing, pulling, carrying, and lifting. Validity testing was also incorporated into the FCE. [Appellant's occupational therapist] found that the Appellant had high effort on all the testing and that he was "clearly trying his hardest". She stated that she took notes through the day to record behaviour data. She stated that with each component she asked him how he was doing. It was important for her to document whether he had increased pain and how his body was feeling throughout the process.

She explained that she has a laptop computer with her for the entire assessment and that it has a software program for conducting FCEs that enables her to track changes in body position. Every time the Appellant changed his body movement, she was able to track on her computer what he was doing. The software helps her to determine what the Appellant was able to safely do as compared to the occupation as described in the Dictionary of Occupational Titles.

[Appellant's occupational therapist] explained that the Dictionary of Occupational Titles does not show overhead movements as being required for the Appellant's welding classification. However, from her experience, she stated that welding does require working overhead so she felt it was also necessary to consider whether the Appellant had the ability to work safely overhead and included this within her assessment.

The physical exercises and testing were completed by the end of the first day of the FCE and the Appellant returned the next morning at which time objective measurements were taken. The data

from the FCE was reviewed with the Appellant and he was asked how he felt during the evening after the FCE. She documented that the Appellant told her he went for his usual walk but that it was for a shorter duration. She did not recall the Appellant's reaction to their review of the data. She stated that they reviewed the stretches that were recommended and that he was advised to incorporate stair walking and walking with work boots with his regime.

[Appellant's occupational therapist] concluded that the Appellant could safely return to work with no restrictions as a welder in production. In coming to this conclusion, she was clear that, while she had the [text deleted] jobs demands analysis to compare to, she referred to the occupation as found in the Dictionary of Occupational Titles because there was no information that the Appellant would be returning to [text deleted]. At the time of the FCE, the Appellant did not have a job to go back to. She concluded that based on the comparison of the results of the FCE to the Dictionary of Occupational Titles, the Appellant was able to meet all of the critical physical demands of a welder, production line, which is categorized as a medium strength level position.

[Appellant's occupational therapist] also explained that she recognized that the Appellant had a chronic condition in that he experienced daily pain. She stated that the individual has to grieve the loss of who they were as a person as the new person is not perfect. It is an issue of having pain and limitations but still being able to work in their occupation. She stated while there was some decline in his abilities and increase in the pain levels towards the end of the Appellant's assessment, it was an issue of how this could be managed.

In response to the question whether the failure of the Appellant to wear work boots at the FCE had any bearing on her overall assessment, [Appellant's occupational therapist] responded that it

did not. She explained that the clinic simply has thin carpet over a concrete floor without any cushion. She stated that if his job required a lot of walking this would have been a limitation. Because the Dictionary of Occupational Titles lists his job as doing occasional walking and occasional sitting, she was confident that his failure to wear his work boots to the assessment had no significant bearing.

[Appellant's occupational therapist] was asked to explain her comments in the report regarding transition time to return to work given that the Appellant had no job to return to and if he was to obtain a new job, he likely couldn't expect his new employer to provide him with reduced work hours or a gradual return to work. In response, [Appellant's occupational therapist] stated that there are always transitions when returning to full time work when being off work. If the Appellant found a job, she made herself available for follow-up if necessary. She could provide strategies to assist in managing. She could visit the worksite to learn how equipment is being used and make suggestions if needed. She acknowledged that she is rarely called to do this in situations when a worker is not returning to his pre-injury employer.

[Appellant's occupational therapist] was asked to clarify her statement that the Appellant had "good potential to achieve" the job demands of static and dynamic standing as found on the [text deleted] jobs demand analysis. The job demand for static standing is listed as frequent (1/3 to 2/3 of the day) while dynamic standing is listed as constant (2/3 to a full day). Given the time constraints of the testing, [Appellant's occupational therapist] stated that she did not assess static or dynamic testing to that degree. Because she does not have the capability to test for these durations, she felt it would be unfair to say he can do it. However, she was clear that he had the potential based on the objective physical changes she had observed during the testing.

On cross-examination by the Appellant, [Appellant's occupational therapist] was questioned about her having to return home to get materials for the assessment and whether she had family members sitting in on the assessment. She explained that while she didn't have anything documented about returning home to pick up materials for the assessment, she lives close to the clinic and she leaves the client alone to complete the pain assessments in any event. She had no recollection of adults and children being present during the assessment, but stated that other clients use the clinic while she is conducting her FCEs as she does not have the whole building to her disposal. She indicated she tries to book times when the physiotherapy clinic is not as busy, but that there are typically always people there and the clinic owner is always there.

[Appellant's occupational therapist] was questioned on how much sitting the Appellant did during the first day of the assessment. She stated that he sat during the break times only. If the Appellant needed to sit due to pain or required to do stretching due to pain, she would have recorded it. As she did not, she stated the Appellant was likely on his feet throughout the assessment periods.

In response to questions about what the Appellant reported to her, [Appellant's occupational therapist] stated that it was important for her to hear about what has happened to the Appellant. She stated that she keeps the testing going and talks throughout as it is a delicate balance between doing everything required for the FCE and hearing the Appellant's story.

[Appellant's occupational therapist] acknowledged that the more physical component of the testing occurred in the afternoon. She explained that in the morning she checks posture, heart rate, sensation, range of motion and core stability. She repeats select checks at the end of the day and the next morning. The "physical stuff" started in the afternoon with gradually increasing the

weights. After the physical testing was completed, the visit ended with [Appellant's occupational therapist] doing repeat measures and psycho social testing. She confirmed that she checked the Appellant's gait throughout the assessment and at the end.

[Appellant's occupational therapist] was questioned about whether she was specialized in assessing nerve damage. She explained that her purpose is to assess the Appellant's ability to function. She stated that nerves are often assessed through a nerve conduction study and that she would have relied on that information if it was available.

[Appellant's occupational therapist] was questioned about whether she should have sent the Appellant home to get his steel-toed boots and welding equipment for the assessment. She referred the Appellant to the letter she provided him in advance of the FCE which states that he should bring his tool belt or hardhat with him if possible. She stated that many individuals bring equipment with them but some forget. She uses her best judgment whether this affects the assessment or not. If it would affect the assessment in a negative way she wouldn't continue with the assessment.

The Appellant questioned [Appellant's occupational therapist] about the concerns he voiced about his physical condition and being able to work. [Appellant's occupational therapist] acknowledged that the Appellant "appeared very truthful" when describing how his injuries had affected his life. [Appellant's occupational therapist] acknowledged that the accident was distressing and the Appellant had significant issues that affected him going forward.

In response to questions why [Appellant's occupational therapist] focussed on the Dictionary of Occupational Titles rather than [text deleted], [Appellant's occupational therapist] reiterated that

she used the Dictionary of Occupational Titles because [text deleted] rated their job as much less physically demanding than as listed in the Dictionary of Occupational Titles. Because the Appellant had no specific workplace to which he could return, she felt it would be misleading to compare his abilities to the [text deleted] job demands analysis. She also explained that she went "beyond the Dictionary of Occupational Titles too" because she knew that the Dictionary of Occupational Titles didn't include working overhead and she knew welding included overhead work. In response to the Appellant`s suggestion that is was unfair to use the U.S. Dictionary of Occupational Titles rather than a Canadian tool, [Appellant's occupational therapist] reiterated that National Occupational Classification does not include the detail that is found in the Dictionary of Occupational Titles.

[Appellant's occupational therapist] was asked whether the Appellant should have been referred to a work hardening program before being cleared to return to work. She stated that based on her objective findings, a work hardening program was not warranted. She recommended the Appellant do particular stretching, continue walking, and incorporate stair climbing when walking. She referred the Appellant to the recommendations in her report. She stated that the Appellant has a condition that is not likely to go away; the pain won't go away and the muscle tightness will continue. The question is whether the Appellant can work as a welder notwithstanding these conditions. Recommendations are made to incorporate techniques in his life so he can continue to work. In response to the question whether [Appellant's occupational therapist] still maintains that her assessment was adequate, she responded that she does.

Submission for the Appellant

At the commencement of closing submissions and after the evidence portion of the hearing was concluded, the Appellant sought to introduce a picture of a swather to show which parts he was welding at [text deleted]. Counsel for MPIC agreed to the inclusion of this picture on the basis that the Appellant would not be introducing new evidence. The Appellant clarified that he was providing the picture to show the right hand panel as he had spoken about this panel during his evidence. On that basis the picture was admitted into evidence without objection from counsel for MPIC.

The Appellant provided a written submission for the panel which was read by his friend who had been an observer for part of the hearing. The Appellant first addressed a report that was provided by [text deleted] Rehabilitation on April 29, 2010. The Appellant submitted that he felt under pressure to get the assessment done on the day the physiotherapist approached him for the assessment. He submitted that the exercises were rushed and that the physiotherapist was not listening to him. He submitted that this was just a partial assessment and although the physiotherapist had concluded he could return to work in a medium strength category of employment, he was not ready to return to work at that time.

Regarding the FCE, the Appellant submitted that [Appellant's occupational therapist] had performed inadequate assessments. He submitted that [Appellant's occupational therapist] failed to do in-depth testing, there wasn't enough physical testing, [Appellant's occupational therapist] admitted that she didn't test him to the best of her abilities, his strength level was never fully and adequately tested, and [Appellant's occupational therapist] failed to test for cramping, burning, stiffness, swelling, numbness or pain. The Appellant acknowledged that [Appellant's occupational therapist] was qualified as an expert at the hearing but he submitted that she was no

expert and was unprofessional. He submitted that her report was not in chronological order and was not thorough. The Appellant criticized [Appellant's occupational therapist's] reliance on the [text deleted] job demands analysis while never contacting [text deleted] herself.

Regarding his determined employment as a production welder, the Appellant submitted that it was improper to ignore his structural welding history and consideration of this history shows he should be classified at a heavy strength of employment. As the Appellant had not provided any evidence regarding his structural welding history during his oral testimony, the Appellant was questioned as to when he worked for the structural welding companies as listed in his written closing argument. The Appellant stated that [text deleted], [text deleted], and [text deleted] are listed in the work history summary in the Internal Review Decision and they are structural welding companies. He submitted that no-one contacted these companies to find out what kind of welding he did while he was there. He then stated that [text deleted] and [text deleted] are both omitted from this work history summary. He indicated that he worked at [text deleted] in May of 1997 for 2 ½ months. He was unable to remember when he worked at [text deleted] but he believed it was prior to 2000, so he asked the panel to disregard this company. Counsel for MPIC did not object to the admission of this evidence.

The Appellant submitted that weld shops are dark and dangerous places and "you have to have all your senses about you" and be physically fit to work there. He submitted that welding is not an easy job.

The Appellant submitted that the jobs demands analysis of his position at [text deleted] was incomplete. It failed to recognize that there were time pressures as all employee time is accounted for and that employees work rotating shifts with only two 12 minutes breaks and a 20

minute lunch each shift. He submitted that he was required to jostle the parts and reposition them to weld. After the part was completed, it needed to be pushed, pulled and steered to its next destination, which was physically demanding. The Appellant submitted that he's "a stick or arc welder, MIG and acetylene welder".

In conclusion, the Appellant submitted that MPIC, [text deleted] Rehabilitation, [Appellant's occupational therapist] and the job demands analysis do not consider his nerve damage, cramping, burning or pain in his right leg. He submitted enough research was not conducted by MPIC and [Appellant's occupational therapist] regarding his work history as all production welding is not the same. The Appellant submitted that the decision to terminate his IRI benefits had nothing to do with his strengths and abilities and that MPIC was looking for any reason not to reinstate his IRI benefits. The Appellant criticized [Appellant's occupational therapist's] reliance on "American" job classification standards and the reference to the US Department of Labour in the FCE.

Submission for MPIC:

Counsel for MPIC submitted that the issue is whether MPIC erred in ending the Appellant's IRI benefits as of March 22, 2012 because he was able to hold the determined employment. Counsel submitted that the Appellant displayed the ability to return to work in his determined employment at July 2011 when he attended to [Appellant's occupational therapist] for the FCE. However, the Appellant continued to receive IRI benefits until the benefits were terminated at March 22, 2012.

With respect to the determined employment, counsel noted that the Appellant was not working at the time of the accident and therefore was properly classified as a non-earner. Section 86 of the

MPIC act requires MPIC to determine an employment for a non-earner from the 181st day after the MVA in accordance with section 106 of the MPIC Act. The non-earner is entitled to IRI benefits if he or she is not able the hold employment because of the MVA. Subsection 86(2) states that MPIC shall determine the IRI for the non-earner on the basis of the gross income that MPIC determines the victim could have held from employment, considering whether the victim could have held full-time or part-time employment, the work experience and earnings of the victim in the five years before the accident and the regulations under the MPIC Act. Section 106 addresses the factors for determining employment and states that the corporation shall consider the regulations, and the education, training, work experience and physical and intellectual abilities of the victim immediately before the MVA.

Counsel for MPIC submitted that the Internal Review Officer provided a detailed explanation of how the determined employment of production welder was reached. Welding is a generalized category under the National Occupational Classification and therefore more specific investigation was done to determine that the Appellant worked as a production welder.

Counsel referred to the rehabilitation assessment conducted by [text deleted] Rehabilitation on March 31, 2010 and the section entitled "Employment". The assessment records that the Appellant reported he was not working at the time of the MVA, that his last job was at [text deleted] and that he did not have a job to go back to after the MVA. The Appellant reported that "the welder/fitter job duties included lifting/carry/push/pull up to 50 lbs, forward bending, twisting body, standing (static), [and] reaching forward". After attending the rehabilitation program at [text deleted] Rehabilitation for 10 days, the physiotherapist and occupational therapist concluded that the Appellant would place in the medium category of physical demands

and that there was no objective findings that indicated the Appellant could not return to full time hours and duties. On the basis of this information, the Appellant's IRI benefits were terminated.

Subsequent to filing an application for review, the Internal Review Officer noted that the case manager had not investigated the specific type of welder position. Even though the [text deleted] Rehabilitation report determined that the Appellant's job was in the medium category of physical demands, the National Occupational Classification has the general category of welding as a heavy category of physical demands. As the Appellant was found to be physically able to perform at a medium level and not a heavy level, the Appellant's IRI was reinstated, he was paid back IRI for the period of termination to reinstatement and further investigations would need to be done to determine the type of welding job. Counsel submitted that the Internal Review Officer made sure the proper process was done and correctly reinstated IRI benefits while case management investigated further. The Appellant continued to receive full IRI benefits while the information was being gathered by the case manager.

The case manager then looked more specifically at the job that the Appellant was doing as a welder before the MVA. A job demands analysis of the Appellant's position at [text deleted] was conducted followed up by a functional capacity evaluation of the Appellant. Consideration was also given to the description of his employment provided by the Appellant as documented in the [text deleted] Rehabilitation report. Counsel submitted that a thorough investigation was conducted.

Counsel noted that there are 166 different categories of welder in the National Occupational Classification and it was reasonable for MPIC to obtain a level of specificity to determine the Appellant's employment. Counsel submitted that given all the documented evidence, the

Appellant was a production welder. The Appellant freely admitted this on cross examination and in his testimony. Counsel referred the panel to the detailed reasons in the Internal Review Decision and submitted that it was reasonable for MPIC to come to the conclusion that the Appellant's determined employment is that of a production welder.

Counsel submitted that the real issue in this appeal is the termination of IRI benefits. He referred to subsection 110(1)(c) which states that a victim ceases to be entitled to IRI when the victim is able to hold an employment determined for the victim under section 106. Counsel submitted that the onus is on the Appellant to show that he was unable to hold his determined employment and he failed to meet this onus.

Counsel submitted that the Appellant testified he returned to [text deleted] after the termination of his IRI benefits. He admitted that the job he returned to was more physically demanding than the job he did prior to the MVA. While the Appellant stated that he asked to move to a different work station because he was finding the work difficult, he didn't make this request until almost a year after being back at work. The Appellant was laid off when hundreds of other employees were laid off at the end of a project. There was no evidence that the Appellant left his job due to injury. The Appellant acknowledged that he could take another welding job if he wanted to, but that he didn't because the experience of being laid off a second time had soured him. Counsel submitted that the Appellant's testimony was that he was able to go back to work for over a year and that was all the evidence necessary to show that the Internal Review Officer was correct in deciding that the Appellant could return to his job.

Counsel submitted that what actually happened is what is supported by the FCE report by [Appellant's occupational therapist] and she substantiated it further in her oral testimony.

[Appellant's occupational therapist] provided a lengthy description of her training and experience as an occupational therapist. She has been doing FCEs for over 20 years and has previous experience in dealing with a variety of welding positions. [Appellant's occupational therapist] has a holistic approach to her clients and tries to take a multifactoral approach to how she conducts the FCEs. [Appellant's occupational therapist] provided detail on the paramaters of assessment and her use of the Dictionary of Occupational Titles rather than simply relying on the National Occupational Classification, which is designed more for career counselling. [Appellant's occupational therapist] also had access to the job demands analysis of [text deleted] which indicates the Appellant worked in a light demands job. [Appellant's occupational therapist] relied on the Dictionary of Occupational Titles because the Appellant didn't have a position at [text deleted] to which he could return. [Appellant's occupational therapist] therefore tested the Appellant against the general classification of production welder. The Appellant admitted that there are production welding jobs that have a lighter physical demand, but, in any event, [Appellant's occupational therapist] referred to a medium strength demands as found in the Dictionary of Occupational Titles.

In her oral testimony, [Appellant's occupational therapist] provided a thorough explanation of the FCE testing. She explained that the first day took 6 hours and 39 minutes with follow up the next day to see if there was any detrimental effect of the testing. She measured the Appellant's heart rate, range of motion, and lifting ability. She acknowledged that the Appellant made complaints of pain and she gave him some coping strategies. Counsel submitted that her assessment was thorough and MPIC relies on this assessment in large part.

Counsel also submitted that there is an absence of any objective medical evidence supporting the Appellant's inability to perform in his determined employment. All of the medical evidence

supports the Appellant's ability to work. As such, the Internal Review Officer's decision should be upheld and the appeal should be dismissed.

The Appellant's Reply Submission

The Appellant again submitted that the FCE only had physical testing in the afternoon on the first day and that the physical testing as a whole was inadequate. The Appellant again submitted that [Appellant's occupational therapist] did not do a proper job and that she admitted this herself.

With respect to the conclusion that he is a production welder, the Appellant stated that at no time did he ever express that production welder is what he does. He can weld in all positions and a welder like himself would not be welding small parts. He submitted that if anyone took the time to contact [text deleted], they would find out that he was working on the end panels and these end panels were very important for the customer to see. The Appellant submitted that you cannot classify a person as a production welder unless you go to the facility and see what the welder is doing.

Decision

The onus is on the Appellant to prove on a balance of probabilities that his IRI benefits were improperly terminated as of March 22, 2012. While the panel accepts that the Appellant experiences symptoms that impact how he feels and functions, the panel does not accept the Appellant's submission that he is unable to work in his determined employment as a result of these symptoms. For the reasons that follow, the panel concludes that the Appellant has not met

his onus to prove on a balance of probabilities that his IRI benefits were improperly terminated as of March 22, 2012.

The Appellant`s Determined Employment

The Appellant argued that he should be considered a structural welder with a physical demands rating of heavy. The panel disagrees and find the Appellant's determined employment was correctly identified as a production welder with a physical demands rating of medium. The legislative provisions addressing the determination of employment are as follows:

> **Entitlement to I.R.I. after first 180 days**
>
> 86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.
>
> **Determination of I.R.I.**
>
> 86(2) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering
>
> (a) whether the victim could have held the employment on a full-time or part-time basis;
>
> (b) the work experience and earnings of the victim in the five years before the accident; and
>
> (c) the regulations.
>
> **Factors for determining an employment**
>
> 106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.
>
> **Type of employment**

> 106(2) An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

Regulation 39/94 is entitled the Determination of Income and Employment (Universal Bodily Injury Compensation) Regulation. It addresses the determination of yearly employment income for occupational classifications and references the National Occupational Classification and the general category of "welders and related machine operators". The regulation provides the income level for the purposes of calculating IRI for the general category of welder and does not address any specific categories of welders and their corresponding physical demands or strength levels.

Counsel for MPIC relied on the Internal Review Decision that outlined how MPIC determined the Appellant's employment to be a production welder rather than simply a welder. The Internal Review Officer noted that while Regulation 39/94 references the National Occupational Classification and the general category of welder, the National Occupational Classification breaks down the classification of welder into 166 different subcategories and includes the category of production welder. The Appellant did not dispute that there are many sub categories of welder under the National Occupational Classification; he did not dispute that there are many different kinds of welders.

[Appellant's occupational therapist] of [text deleted] was retained by MPIC to conduct an FCE of the Appellant and one of the questions posed to [Appellant's occupational therapist] was whether the Appellant was capable of performing his pre-injury job as a welder. Relying on the jobs demands analysis of [text deleted] provided by MPIC, [Appellant's occupational therapist] concluded that the Appellant's target job was Welder, Production Line and she then used the

more detailed Dictionary of Occupational Titles to measure whether the Appellant was able to return to work in his target job.

The last welding job the Appellant held before the MVA was at [text deleted]. The Appellant's job title on his job description was "welder – production" and the Appellant confirmed on cross-examination that all the welders at [text deleted] were production welders. While the Appellant stated that he never worked on small parts and didn't know which station was station #46, he agreed with the content of the sections in the [text deleted] job demands analysis entitled work assignment, general job description, and essential job functions. The general job description in the job demands analysis states that it is the responsibility of the employee to perform semi-repetitive assembly operations to mass-produce products. The worker assembles parts, securing them together by hand using the welding whip/gun and works independently to transport the product onto the next stage of assembly. Given the evidence of the welding done at [text deleted] as a whole, the panel finds that the Appellant's last welding job before the MVA was as a production welder.

The Appellant asserted in his submission that it was improper to ignore his structural welding history when determining his employment and consideration of this history shows he should be classified as a structural welder with a heavy strength of employment. The panel disagrees. The Appellant provided no evidence of what kind of welding he did before [text deleted] other than to state the companies listed on his resume did structural welding and note his position title as MIG Welder. In his submission he also referred to himself as "a stick or arc welder, MIG and acetylene welder". The panel notes that the Appellant's target job as described by [Appellant's occupational therapist] from the Dictionary of Occupational Titles states "may use different equipment and be designated Brazer, Production Line (welding); Welder, Production Line, Arc

(welding); Welder Production Line, Combination (welding); Welder Production Line, Gas (welding)".

On cross-examination by counsel for MPIC, the Appellant acknowledged that all the welders at [text deleted] are considered production welders and that in his previous jobs before [text deleted] he did some production welding on smaller parts. In the last five years before the MVA, the Appellant listed 5 places of employment where he worked as a welder with [text deleted] being by far the longest employer. In fact, all other periods of employment combined are almost the same duration as his one period of employment with [text deleted]. The panel also notes that when looking for welding work after the termination of his IRI benefits, the Appellant chose to return to [text deleted] as a production welder.

Based on the foregoing, the panel concludes that the employment for the Appellant was correctly determined as a production welder.

The Appellant asserted that the strength level for his determined employment should be heavy rather than medium. Having found that the Appellant's employment was correctly determined to be production welder, the panel accepts the evidence of [Appellant's occupational therapist] that the appropriate strength level for a production welder is medium. [Appellant's occupational therapist] explained that, because the Appellant did not have a specific workplace to which he could return, she was required to look at the category of production welder and the strength demands for this category rather than consider the strength category for a specific production welding position. [Appellant's occupational therapist] explained that she used the Dictionary of Occupational Titles and her rationale for doing so to determine the appropriate strength level for a production welder.

The panel notes that in his evidence regarding his pre-injury [text deleted] employment, the Appellant initially estimated that he was moving and lifting parts weighing 100 lbs. He then stated they were at least 80 lbs but that he "could be wrong". He then stated that he knows the parts weighed more than 50 lbs. The [text deleted] Rehabilitation report documented that the Appellant described his employment as lifting, carrying, pushing and pulling up to 50 lbs, which [text deleted] determined to be a medium strength of employment. Using the Dictionary of Occupational Titles, the job demands analysis for [text deleted] determined the position to be a strength demand of light, requiring lifting of less than 20 lbs on an occasional basis.

Considering the evidence as a whole, the panel finds that the appropriate strength level for the category of production welder is medium.

Was the Appellant Able to Return to Work in his Determined Employment?

The MPIC Act 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;
>
> (b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);
>
> (c) the victim is able to hold an employment determined for the victim under section 106;

[Text deleted] Rehabilitation did an assessment of the Appellant and prepared a report dated March 31, 2010. The report concludes that, based on his functional testing results, the Appellant would place in the light category of physical demands. However, the report also concluded that it

would be reasonable for the Appellant to return to work as a welder or to a job that places him in the medium category of physical demands after participation in a reconditioning program. After the Appellant completed 10 sessions of rehabilitation, the physiotherapist and occupational therapist at [text deleted] Rehabilitation concluded in a report dated April 29, 2010 that the Appellant would place in the medium category of physical demands and that there were no objective findings that would indicate that the Appellant could not return to full time hours and duties as a welder.

An FCE of the Appellant was conducted in July 2011. The Appellant was required to undergo a series of functional testing to determine whether he could return to work as a production welder with a medium strength level. While the Appellant asserted that the FCE did not include enough physical testing, the panel finds that the report of [Appellant's occupational therapist] and her oral testimony explaining the testing and her report show that comprehensive, objective testing was conducted to determine that the Appellant could return to work with no physical restrictions. The panel notes the conclusion by [Appellant's occupational therapist] in her report that, while the Appellant provided high level of physical effort on the testing, the Appellant can do more at times than he states or perceives. The panel also notes [Appellant's occupational therapist's] comments that she is not testing for "maximum ability" but rather for "safe ability" to return to work, recognizing that this does not mean that the Appellant must be symptom-free.

The Appellant's case manager referred the issue of whether the Appellant could return to work to an MPIC Health Care Services Consultant. In a memorandum dated February 2, 2012, the Health Care Consultant referred the case manager back to the results of the FCE for the specific testing and determination. The Consultant concluded that the FCE report should "stand by itself with regards to the opinion provided regarding employability".

Given the medical evidence as a whole, with particular attention to the FCE report and oral evidence of [Appellant's occupational therapist], the panel finds that the Appellant was able to return to work as a production welder as at March 22, 2012. The panel notes that despite asserting that his IRI benefits should not have been terminated as at March 22, 2012, the Appellant began doing labour work for [text deleted] within a few days of the termination of his IRI benefits. The Appellant's evidence was that he did warehousing work, emptied semi trailers, and stacked and re-piled pallets. The Appellant acknowledged that the pallets he was lifting weighed more than 50 lbs and stated that "treated lumber is heavy". The panel also notes that by May 2012, the Appellant returned to work as a welder in production at [text deleted] and worked for a year in this occupation before being laid off. The evidence of the Appellant was that the welding work he performed after his IRI benefits were terminated was heavier than the work he performed as a welder in the year before the MVA. Despite reporting ongoing symptoms, the Appellant only missed 2 days of work due to the flu after he returned to [text deleted] in 2012 and he only stopped working at [text deleted] because he was laid off only with many other employees.

After a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing and giving careful consideration to the testimony of all the witnesses and the submissions of the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation, the Commission finds that the Appellant has not met the onus of establishing that MPIC erred in terminating his IRI benefits as at March 22, 2012.

Disposition:

For the reasons outlined herein, the Commission finds that the Internal Review Officer's decision of May 30, 2012 should be upheld and the Appellant's appeal is dismissed.

Dated at Winnipeg this 9th day of February, 2017.

KARIN LINNEBACH

TOM FREEMAN

SUSAN SOOKRAM