Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-56

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Mr. Neil Cohen** **Mr. Neil Margolis**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf, together with his wife [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Kathy Kalinowsky.**
HEARING DATE:	**April 23, 2008**
ISSUE(S):	**Entitlement to further Income Replacement Indemnity benefits**
RELEVANT SECTIONS:	**Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')**

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

[The Appellant] was involved in a motor vehicle accident on September 12, 2006. The Appellant was a seat-belted driver of a vehicle that was rear-ended. As a result of the accident the Appellant reported low back pain on his left side as well as soreness to his left wrist and headaches.

At the time of the motor vehicle accident he was employed, full time, as a [text deleted]. His

employment duties involved driving a truck, lifting and carrying uniforms, linens and heavy mats to approximately fifty (50) customers on a daily route in [text deleted]. His daily hours of work were twelve (12) hours per day, four (4) days per week.

As a result of the injuries, the Appellant commenced receiving chiropractic treatments two (2) days after the motor vehicle accident and continued to see the chiropractor two (2) or three (3) times per week.

The Appellant attended at the office of his personal physician, [Appellant's Doctor], on October 5, 2006. [Appellant's Doctor], in her clinical notes of that date, indicated that the Appellant:

1. Reported to her that he was suffering low back pain after walking for one-half (1/2) hour and had been off work since September 27, 2006;
2. Reported to her that he was suffering from a low back strain and recommended that he continue chiropractic treatments;
3. *"May benefit from returning to work on part-time, modified duties".*

On October 6, 2006, the Appellant, in a self report to MPIC, indicated that he was suffering from low back pain after walking, standing and sitting for fifteen (15) to thirty (30) minutes and suffered low back pain after driving thirty (30) to sixty (60) minutes. He further indicated that he had limited bending with low back pain.

The Appellant also made Application for Compensation to MPIC on the same date and described his injuries from the motor vehicle accident as low back pain on the left side, and headaches. He further reported that could not perform his duties and stated: "*can't lift (low back)".*

On October 11, 2006, the case manager wrote to [Appellant's Doctor], requesting a report in respect of her examination of the Appellant in respect of injuries he sustained in the motor vehicle accident. [Appellant's Doctor] provided a report, dated October 20, 2006, wherein she stated that:

1. The Appellant suffered a low back strain;
2. His clinical condition precluded him from traveling to and from the workplace which resulted in his inability to perform the required tasks of his work;
3. His return to the workplace would adversely affect the natural history of his clinical conditions.

In a Memorandum to File, dated October 24, 2006, the case manager reported that the Appellant's employer has advised that:

1. There were no light duties available;
2. The Appellant was working full time, after the accident, but required a helper for lifting;
3. The Appellant was not improving and his chiropractor recommended he be off work for a few weeks;
4. They were paying a temporary employee $20.00 and they could not continue to do that so they would need to have the Appellant carry out his full duties upon return to work.

In this Memorandum the case manager further reported that he advised the employer that the Appellant would be involved in a rehabilitation program for approximately six (6) weeks, at the end of which "*he would be RTW (return to work) full duties".*

The case manager arranged for the Appellant to attend for an assessment at [Rehab Clinic].

On October 31, 2006, the case manager wrote to the Appellant and advised him that he would be entitled to receive Income Replacement Indemnity ('IRI') benefits.

[Rehab Clinic] provided an Assessment Report to MPIC on November 1, 2006, which indicated that the Appellant:

1. would be provided with six (6) weeks of reconditioning and job simulation activities;
2. would attend daily for progressive strengthening back and neck exercises.

In a Note to File, dated November 1, 2006, the assistant physiotherapist from [Rehab Clinic] advised the case manager that the initial assessment indicated that:

1. a six (6) week reconditioning program was recommended;
2. minimal objective findings would be determined upon assessment;
3. there would be a return to work date of December 18, 2006.

The case manager, in a letter to the Appellant dated November 17, 2006, indicated that MPIC had reimbursed the Appellant for forty (40) medically required chiropractic visits. He further stated that the chiropractor did not provide any further evidence suggesting that the Appellant required treatments beyond the maximum forty (40) visits and, as a result, MPIC will not be reimbursing the Appellant for any further chiropractic treatments.

On January 4, 2007, [Rehab Clinic] provided a final report to MPIC. This report indicated that the Appellant had regularly attended his reconditioning program between October 31, 2006 and December 29, 2006 and further stated:

PROGRESS OVER THE PAST 8 WEEKS:

SUBJECTIVE:

[The Appellant] reports unchanged symptoms in his neck, reporting left greater than right side pain and stiffness. He reports a headache almost daily and relates it to exercise. [The Appellant] reports an overall feeling of fatigue but reports that his sleep is OK. In regards to his back, he has vague symptoms that he perceives is dependant on activity. He perceives his tolerance to sitting is 2 hours, standing 1 ½ hours, walking 1 ½ hours, lifting and carrying 70lbs. [The Appellant] reports that he is able to squat and lunge without limitation. [The Appellant] reports that he has attempted snow shovelling with pain after. In regards to RTW, [the Appellant] reports some concern about not being able to fulfill his 10-12 hour shift but is willing to attempt it and has planned to RTW as discussed on January 2, 2007. (underlining added)

…

Comments:

[The Appellant] has attended regularly, arrives early, is cooperative, attempts and completes all activities requested. He has some pain behaviors and is deconditioned. We have had extensive discussions with [the Appellant] regarding hurt vs harm, perceived vs demonstrated function and pain perception over the past 8 weeks and there has been less discussion in the past 2 weeks. (underlining added)

…

Over the past 8 weeks, [the Appellant] has demonstrated his lifting requirement to meet the 80lbs job demand, and has demonstrated side carries of 40lbs to simulate his mat carries in conjunction with stair climbing. In regards to push and pull, [the Appellant] has exceeded his job demand of 33lbs and has demonstrated 50, 60lbs. All of his current activities in the concentrated 2 ½ hour program include frequent standing, walking, lifting, carrying and stair climbing which are the main physical demands of his job.

[The Appellant] has shown some pain focused behavior and the inconsistencies with specific testing have now been resolved. It is our opinion that by the December 29, 2006 date, [the Appellant] will have demonstrated the PDA and medium/heavy category of demand required for his job as a [text deleted]. AS of January 2, 2007, [the Appellant] will RTW without restriction.

In a Note to File, dated January 2, 2007, the case manager documented a conversation with the Appellant's employer, wherein the case manager was advised that the Appellant was quite negative about returning to work and had great concerns that he would be able to return. The employer further indicated that the Appellant returned to work on January 2nd and, due to his concerns, was given a helper but that the use of a helper could not continue.

In a Note to File, dated January 8, 2007, the case manager documented a conversation with the employer who informed the case manager that:

1. the Appellant returned to work last week, from January 2-5, 2006 (sic);
2. three (3) out of the four (4) days the Appellant had a helper;
3. the helper did the bulk of the physical work and the Appellant did not attempt a lot of things on those days;
4. on Friday the Appellant indicated that he was in too much pain and would likely not attend at work on January 8th.

The Internal Review Officer, in a decision dated March 21, 2007, reported a conversation the case manager had with the Appellant on January 8, 2007 as follows:

> Your Case Manager documented a conversation with you on January 8, 2007 wherein you advised you had returned to work but your back and neck were "killing" you. You reported that you could not work a 10 hour day due to pain and spasm and you were provided with a helper but that you could no longer count on the assistance. (underlying added)

In a Note to File, dated January 9, 2007, the case manager documented a conversation he had with the Appellant who advised him that he had attended his family doctor on January 8, 2007. The Appellant further indicated that [Appellant's Doctor] had given him a note to complete a gradual return to work starting at three (3) hours per day and that the Appellant had spoken to his employer who is not sure that they would be willing to accommodate these restrictions.

Case Manager's Decision

On January 8, 2007, the case manager wrote to the Appellant informing him that his IRI benefits had ceased on January 1, 2007 in accordance with Section 110(1)(a) of the MPIC Act. The case

manager informed the Appellant that he had successfully completed an eight (8) week reconditioning program administered by [Rehab Clinic] in which he demonstrated and met the job demands for employment he held at the time of the accident as a [text deleted] Representative for [text deleted]. The case manager further stated that, since the Appellant did regain his capacity to hold his pre-accident employment, he is no longer entitled to receive IRI benefits in accordance with Section 110(1)(a) of the MPIC Act.

Application for Review

The Appellant filed an Application for Review of the case manager's decision dated February 10, 2007.

> I was unable to go back to the current job I had at the time of the accident. My back and neck continued to hurt and I felt terrible all day everyday. I could not return to work on light duties or gradually as they only wanted me back at 100%. There was no other options so I had to apply at other less physical jobs. I am now working again making less money. I was cut off of the PIPP benefits in accordance with 110(1)a of the MPI corp. act, and I could not and was not able to return to work.

On February 13, 2007, [Appellant's Doctor] wrote to the case manager in response to his request for information dated January 11, 2007 and stated:

> I have told [the Appellant] to go back to work on a graduated return to work schedule because I do not think it is reasonable to expect him to go from a 2 ½ hours a day rehabilitation program to 10 – 12 hours a day medium/heavy physical duties overnight, after a three month absence from work. I do not see in the physiotherapist's report any mention to a return to a full time schedule. I do agree with the return to work with no restriction in the type of duties as he has had practiced duties simulation activities during the Rehab program.
>
> I do think that with the progressive schedule promoting progressive reconditioning, he will be able to return to a full time schedule within a few weeks. (underlining added)

On March 6, 2007, the case manager requested [MPIC's Doctor] of MPIC's Health Care Services Team to review the Appellant's medical file and to provide a report. [MPIC's Doctor],

based on his paper review of the Appellant's file, was of the opinion that the Appellant had recovered from the medical condition arising from the motor vehicle accident and that he was physically capable of returning to his full time work duty on the date that he was discharged from the reconditioning program. [MPIC's Doctor] noted:

1. The Appellant was involved a rear end collision, which was documented, resulting in minor damage to the Appellant's motor vehicle leading him to conclude that the Appellant would not have been subjected to a level of trauma that would in turn lead to a significant musculoskeletal injury and/or a prolonged period of physical impairment or work disability.
2. Documentation indicating the Appellant's condition improved despite exhibiting pain behaviours and inconsistencies during the functional evaluation.
3. An absence of documentation indicating that the Appellant had a physical impairment of function which, based on an objective evaluation, prevented him from returning to work on a full-time basis.
4. The information obtained from [Appellant's Doctor] leads him to conclude that the recommendation to return to work on a gradual basis was to accommodate the Appellant's subjective complaint which, in all probability, is adversely affected by the Appellant's pain behaviour.

Internal Review Decision

The Internal Review Officer conducted a hearing on March 16, 2007 and confirmed the case manager's decision and dismissed the Appellant's Application for Review. In arriving at the review decision on March 21, 2007, the Internal Review Officer reported:

> At the Hearing, you indicated that you had quit your job at [text deleted] since you felt unable to complete the physical demands of that employment and had sought a new employment with [text deleted] a week after concluding your employment with [text

> deleted]. You indicated that your employment with [text deleted] was less physically demanding but that it paid less and that you are required to work 5 days per week rather than 4.
>
> You indicated that you wanted Manitoba Public Insurance to provide you with the difference in salary between the [text deleted] job and your job at [text deleted]. As well, you indicated that although your wife was currently on maternity leave, when she returns to work as a [text deleted], you would be required to pay for 5 days of childcare rather than 4 days that would be required with your job at [text deleted]. You asked for this additional day of childcare to be reimbursed.
>
> In response to [MPIC's Doctor's] report which was shown to you at the Hearing, you indicated that although you may be able to get through a day at work at [text deleted], you are extremely tired and in pain for the rest of the day and are therefore unable to do anything in the evenings including carrying your child around.

The Internal Review Officer, in rejecting the Appellant's Application for Review, stated:

> Section 110(1)(a) of the Act provides that a claimant ceases to be entitled to an Income Replacement Indemnity benefit where he or she is functionally capable of returning to their pre-accident employment.
>
> Since the objective medical information on your file indicates that you are functionally capable of performing the essential duties of your pre-accident employment, I am unable to find that you were required to quit your job at [text deleted] as a result of motor vehicle accident related injuries. As a result, there is no provision for the difference in salary between your jobs at [text deleted] and [text deleted].

Notice of Appeal

The Appellant filed a Notice of Appeal dated June 1, 2007.

In the note attached to his Notice of Appeal the Appellant stated:

> In summary, I was involved in an automobile accident which caused ongoing pain and discomfort, resulting in my not being able to resume 100% of my responsibilities the day after completion of an 8 week reconditioning program. I was basically advised by MPIC that their support was finished. [Text deleted] was not able to provide the assistance required to facilitate my gradual return to work. Because of my existing family situation, I did not have the luxury of waiting and hoping this situation would be resolved and actively sought out other less strenuous employment.
>
> I did find employment with [text deleted]. The salary is only $12.50 per hour compared to $18.75 at [text deleted]. In addition this is a 5 day position whereas the [text deleted] job was extended hours Monday to Thursday. As a result,

> starting in September my wife and I will be paying an additional $30 weekly for day-care (5 days @ $30 each).
>
> I am not trying to abuse the public insurance system. I was the victim of an accident and do not feel I should be financially hurt because of that accident. I enjoyed my job at [text deleted] and was good at it. I enjoyed my clients and provided very good service. I have now had to change jobs for both my ongoing back pain and to provide an income to help support my family.
>
> I believe some kind of loss of income compensation is not unreasonable and look forward to a re-evaluation of my injury claim.

Appeal

The relevant provision in this appeal is:

> **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;

The Appellant was represented by his wife, [text deleted], at the appeal hearing. In his testimony he essentially confirmed the statements he made in his Application for Review of the case manager's decision and the statements he made to the Internal Review Officer as set out in the Internal Review Officer's decision dated March 21, 2007. The Appellant testified that:

1. After completing the eight (8) week reconditioning program with [Rehab Clinic] he continued to have significant lower back pain after walking, standing and sitting and, as a result he was physically incapable of returning to his employment with [text deleted], where he had worked for many years.
2. Although [Appellant's Doctor] recommended a gradual return to work, no such accommodation was made by his employer.
3. The employer had provided him with a helper for several days to assist him in lifting heavy items, but terminated that employment after several days.

4. He was expected to carry out the full duties of his job without any assistance but physically he was unable to continue to do so.
5. [Appellant's Doctor] also recommended he could returned to work by undertaking modified duties but his employer did not permit a return to work were he could perform light duties only.
6. Due to his financial conditions (his wife was on maternity leave and was not in receipt of her regular pay cheque and was only receiving a small government supplement) he was forced to seek alternative employment because he was physically incapable of performing the job demands at [text deleted].
7. As a result he was forced to terminate his employment at [text deleted] and he obtained employment at [text deleted], where he was physically capable of performing the job duties.
8. There was a significant reduction in pay at his new employment and he was required to work five (5) days rather than four (4) days as he did in previous job with [text deleted].
9. He has continued employment with [text deleted] and, as a result, there has been a significant reduction in his back pain.

During the course of the Appellant's testimony he was questioned by members of the Commission. MPIC's legal counsel chose not to cross-examine the Appellant.

Submission

The Appellant's wife made a submission on behalf of the Appellant, wherein she summarized the Appellant's testimony and submitted that the Appellant was the victim of a motor vehicle accident and was required to change his employment. She asserted that MPIC should not have terminated his IRI benefits but should have topped up his present salary at [text deleted] so that

he could enjoy the same salary that he earned at [text deleted].

MPIC's legal counsel submitted that:

1. the Appellant's appeal should be dismissed;
2. the Appellant had successfully completed an eight (8) week reconditioning program administered by [Rehab Clinic];
3. The physiotherapy report from [Rehab Clinic] concluded that the Appellant demonstrated the "PDA and medium/heavy category" demand required for his job as a [text deleted] Service Representative and further stated that as of January 2, 2007 he would return to work without restrictions.

MPIC's legal counsel referred to [MPIC's Doctor's] report, dated March 6, 2007, who had concluded that, based on his review of the Appellant's file, it was his opinion that the Appellant had recovered from the medical condition arising from the motor vehicle accident and, as a result, he was physically able to return to his full time employment and he was discharged from his reconditioning program.

MPIC's legal counsel further submitted that:

1. The Internal Review Officer had correctly concluded that the objective medical information on the Appellant's file indicated that he was functionally capable of performing the essential duties of his pre-accident employment.
2. The Internal Review Officer correctly concluded that she was unable to find that the Appellant was required to quit his job at [text deleted] as a result of the motor vehicle accident injuries.
3. The Appellant's request to be provided with a difference in salary between the [text

deleted] job and the [text deleted] job was not justified

4. The Appellant's appeal should be dismissed and the Internal Review Officer's decision confirmed.

Discussion

IRI Benefits

The Commission rejects the submission of MPIC's legal counsel that the Internal Review Officer correctly terminated the IRI benefits of the Appellant. The Commission finds that the Appellant testified in a direct and unequivocal manner and accepts his evidence in all issues in dispute between the Appellant and MPIC. The Commission finds that the Appellant was unable, due to his chronic back pain arising from the motor vehicle accident, to continue his pre-accident employment with [text deleted]. As a result, the Appellant was forced to terminate his employment with [text deleted] and find employment with [text deleted], which he was physically capable of doing.

MPIC, in support of its position, asserted that the Appellant was physically capable of returning to work after successfully completing the rehabilitation program and at the physiotherapist's recommendation that, as of January 2, 2007, the Appellant could work without any restriction. The Commission notes there is significant difference in the ability of the Appellant to participate in a rehabilitation program, in which he participated fully in a two and one half (2 ½) hour simulation program provided by the therapist, and having the physical capacity to actually work twelve (12) hours each day at a physically demanding job at [text deleted]. The Commission finds that the better test to determine whether the Appellant was capable of returning to his work at [text deleted] was for MPIC to assess the Appellant's work performance by arranging for a physical capacity assessment which MPIC failed to do.

[Appellant's Doctor] recommended that the Appellant return to work on a graduated return to work program until the Appellant had fully recovered from his motor vehicle accident injuries. The employer, however, refused to recognize the return to work program and required the Appellant to return to work carrying out all the duties that he carried out prior to the motor vehicle accident. The only concession that the employer made in assisting the Appellant in returning to work was to provide an assistant for several days and thereafter required the Appellant to do all of the physically demanding work without any assistance.

When the Appellant complained to [Appellant's Doctor] that he was unable to physically continue to carry out the full duties of the [text deleted] job, due to his back pain, [Appellant's Doctor] recommended that the Appellant be provided with only light duties until he made a full recovery, but the employer refused to accommodate the Appellant in this respect. The Commission finds that the employer ignored the recommendations of [Appellant's Doctor] and, as a result, guaranteed that the Appellant would not be able to make a successful return to his pre-accident employment.

As well, MPIC ignored the medical opinion of [Appellant's Doctor] and accepted the medical opinion of [MPIC's Doctor] that the Appellant was physically capable to return to work to immediately and carry out all of the job duties of his pre-accident employment. [MPIC's Doctor], in his report to MPIC, which was based on his paper review, was of the opinion that the Appellant had recovered from the medical condition arising from his motor vehicle accident and was physically able to return to his full time work the day that he had been discharged from the reconditioning program. [MPIC's Doctor] concluded, as a result of the motor vehicle accident, there was no objective evidence indicating that the Appellant had any physical impairment of function which prevented him from returning to his pre-accident employment on a full time

basis. However, an examination of [MPIC's Doctor's] report clearly indicates that he did not consider or assess whether the Appellant's complaints of chronic pain prevented him from carrying out the physical duties of his job at [text deleted].

Unlike [MPIC's Doctor], [Appellant's Doctor] based her medical opinion not on a paper review of the Appellant's medical reports, but on her own personal examination of the Appellant and her discussions with the Appellant. Unlike [MPIC's Doctor], [Appellant's Doctor] was able to assess the credibility of the Appellant in arriving at her opinion that, due to the Appellant's complaints of back pain, the Appellant could not immediately return to work to carry out the full duties of his pre-accident job, but to return only on the basis of a modified return to work program or doing light duties only.

The Commission in these circumstances gives greater weight to the medical opinion of [Appellant's Doctor] than it does to the medical opinion of [MPIC's Doctor] in respect to the Appellant's physical ability upon his return to work to immediately carry out all of the job duties that the Appellant carried out prior to motor vehicle accident.

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 finds that MPIC failed to assist the Appellant in receiving the compensation he was entitled to, as a result of the injuries he sustained in the motor vehicle accident, pursuant to Section 150 of the MPIC Act. When the Appellant's employer was not prepared to follow the

recommendations of [Appellant's Doctor] to have the Appellant return to work on a graduated return to work program or conduct light duties, MPIC relied on the physiotherapy report and [MPIC's Doctor's] report, neither of which dealt with the issue of chronic pain, and terminated the Appellant's IRI benefits. In these circumstance, having regard to the Appellant's persistent complaints that due to his back pain he could not carry out the full duties of his pre-accident employment, and on the recommendations his physician, [Appellant's Doctor], MPIC should have referred the Appellant to a physiatrist who would have been able to assess the Appellant's complaints of chronic pain and determine whether or not the Appellant was capable of returning to the full duties of his pre-accident employment and MPIC failed to do so. As a result, the Appellant, in order to survive financially, was forced to quit his job at [text deleted] and seek a job that he was physically capable of doing.

The Appellant testified that, prior to the motor vehicle accident on September 12, 2006, he had no back pain which would have prevented him from returning to the work place. However, after the motor vehicle accident, the Appellant testified that he had immediate persistent and severe back pain, which ultimately resulted in his inability to continue his employment with [text deleted]. The Commission finds that the Appellant testified in direct and unequivocal fashion and accepts his testimony that, due to his back pain, he was unable to continue his employment at [text deleted]. The Commission finds that the Appellant's testimony in this respect is corroborated by the medical opinion of [Appellant's Doctor].

The Commission further finds that there is ample evidence to support the Appellant's position.

1. The motor vehicle accident occurred on September 12, 2006.
2. In a Note to File, dated September 28, 2006, the case manager reported that the Appellant advised him that, as a result of the injuries he sustained in the motor vehicle accident, he

commenced seeing a chiropractor two (2) days after the accident.

3. The Chiropractor, in his Initial Chiropractic Report, dated September 20, 2006, notes the Appellant's complaint of back pain.
4. The Appellant, in his Application for Compensation, dated October 6, 2006, complains of back pain as a result of injuries sustained in the motor vehicle accident.
5. [Appellant's Doctor], in the Primary Health Care Report to MPIC dated October 20, 2006, diagnosed a low back strain and her prognosis was that the Appellant would recover in six (6) to eight (8) weeks.
6. On December 11, 2006, the physiotherapist, at [Rehab Clinic], reported to the case manager that there had been an increase in the Appellant's symptoms and, as a result, a two (2) week extension was put in place and the Appellant's return to work was scheduled for January 2, 2007.
7. On January 2, 2007, the case manager reported that on his return to work the Appellant reported to his employer that he had great concerns about his ability to return to his job and, as a result, the employer advised the case manager that the Appellant was given a helper that day but the assistance of a helper could not be continued in the future.
8. On January 4, 2007, [Rehab Clinic] provided a final report to MPIC. This report states:

> [The Appellant] reports unchanged symptoms in his neck, reporting left greater than right side pain and stiffness. He reports a headache almost daily and relates it to exercise. [The Appellant] reports an overall feeling of fatigue but reports that his sleep is OK. In regards to his back, he has vague symptoms that he perceives is dependant on activity.
> …
> In regards to RTW, [the Appellant] reports some concern about not being able to fulfill his 10 – 12 hour shift but is willing to attempt it and has planned to RTW as discussed on January 2, 2007.

9. The Appellant worked January 2 to 5, 2007. On January 5, 2007, he advised his employer that he was in too much pain and would likely not return to work on January 8, 2007.
10. The Internal Review Officer, in her decision dated March 21, 2007, reported a conversation

the case manager had with the Appellant on January 8, 2007 wherein the Appellant advised the case manager that he had returned to work but his back and neck were "killing" him and that he reported he could not work a ten (10) hour day due to pain and spasm.

For these reasons the Commission finds that the Appellant has consistently complained that, between the date of the motor vehicle accident on September 12, 2006 and his inability to return to work on January 8, 2007, due to his chronic back pain he was physically incapable of immediately returning to work to carry out his pre-accident employment at [text deleted].

The Commission has in the past recognized that as a result of chronic pain a claimant would be entitled to receive IRI benefits. In the case of Re [text deleted] (AC-03-66) the Commission, on page 9 stated:

> Despite the Appellant's ongoing complaints of pain, little weight was given to her subjective concerns. Judicial treatment of subjective pain complaints in disability cases is considered by Richard Hayles in his book, Disability Insurance, Canadian Law and Business Practice, Canada: Thomson Canada Limited, 1998, at p. 340, where he notes that:
>
> > Courts have recognized that pain is subjective in nature. They have also acknowledged that there is often a psychological component in chronic pain cases. Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary*, Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:
> >
> > > In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.
> >
> > In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that

> the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

The Supreme Court recognized the validity of chronic pain in its decision of *Nova Scotia (Worker's Compensation Board) v. Martin et al [2003]* S.C.J. No. 54 wherein Mr. Justice Gonthier stated:

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

In the case of [text deleted] (AC-04-115) the Commission referred to the text Disability Insurance, Canadian Law and Business Practice, (Supra) wherein the author at p. 340 stated:

> . . . Nevertheless, the lack of any physical basis for pain does not preclude recovery for total disability, nor does the fact that the disability arises primarily as a subjective reaction to pain. In *McCulloch v. Calgary,* Mr. Justice O'Leary of the Alberta Court of Queen's Bench expressed a common approach to chronic pain cases as follows:
>
> > In my view it is not of any particular importance to determine the precise medical nature of the plaintiff's pain. Pain is a subjective sensation and whether or not it has any organic or physical basis, or is entirely psychogenic, is of little consequence if the individual in fact has the sensation of pain. Similarly, the degree of pain perceived by the individual is subjective and its effect upon a particular individual depends on many factors, including the psychological make-up of that person.
>
> In many chronic pain cases there is no mechanical impediment which prevents the insured from working, and the issue is whether or not it is reasonable to ask that the insured work with his pain. So long as the court believes that the pain is real and that it is as severe as the insured says it is, the claim will likely be upheld.

McCulloch v. Calgary (City) (1985), 16 C.C.L.I.222 (Alta. Q.B.)

The Commission, having reviewed all of the documentary evidence and testimony, finds that the Appellant has established, on a balance of probabilities, that as a result of the motor vehicle accident injuries, he suffered from chronic back pain and, as a result, he is unable to hold the employment that he held prior to the motor vehicle accident. The Commission therefore finds that MPIC, contrary to Section 110 (1)(a) of the MPIC Act, erred in terminating the Appellant's IRI benefits effective January 1, 2007. As a result, the Commission rescinds the decision of the Internal Review Officer dated March 21, 2007 and allows the Appellant's appeal.

Dated at Winnipeg this 24th day of July, 2008.

MEL MYERS

NEIL COHEN

NEIL MARGOLIS