

After a brief recuperation, the Appellant returned to [text deleted] on reduced hours and was assisted in respect of the heavier tasks required in his position by his co-workers.

As a result of the injuries which the Appellant suffered in the motor vehicle accident, he attended for chiropractic treatments. [Text deleted], his chiropractor, wrote a letter dated August 13, 1999, to [text deleted], the occupational therapist who was assisting the Appellant with his return to work. In his report, [Appellant's chiropractor] states:

"The prognosis for this patient is generally good for most complaints, but guarded for left hand numbness. The patient's age, previous history of occupation increases susceptibility of this patient's increased symptomatology of left hand due to accident of November 9, 1998. This patient should avoid all repetitive activities that will stress or place load on the left hand and wrist. He should not expose himself to any occupational duties or responsibilities that would result in risk to this specific region for fear of deterioration of the condition. This patient will require ongoing supportive care for this condition until he is retired from employment."

The Appellant was diagnosed with a moderate carpal tunnel syndrome by [text deleted], neurologist, following an EMG performed on January 26, 1999. He was subsequently referred to [text deleted], plastic surgeon, to look into surgical interventions for this. [Appellant's plastic surgeon] first saw the Appellant on March 23, 1999. The Appellant complained about numbness in the fingers of his left hand since November 1998, and to a lesser extent the right hand. The Appellant was placed on a resting splint at night and then reassessed. At his follow-up visit the left hand was feeling better and the Appellant went back to work. However, the Appellant was not able to work a full day's work due to symptoms in the hand. The Appellant's next visit with [Appellant's plastic surgeon] was on November 8, 1999, and the Appellant reported to [Appellant's plastic surgeon] that he found the symptoms were worse at work and his hands felt better at rest.

Repeat nerve conduction tests in October 1999, showed mild to moderate bilateral carpal tunnel syndrome and [Appellant's plastic surgeon] recommended a carpal tunnel surgery. However, the Appellant was not keen on surgery but preferred to continue to work on reduced hours for a longer duration. [Appellant's plastic surgeon] reassessed the Appellant on June 14, 2000, after the Appellant had undergone a trial of physiotherapy to determine whether his symptoms were improved. There was improvement to the Appellant's shoulder but no improvement in respect of his carpal tunnel symptoms.

[Appellant's occupational therapist], in a report to MPIC dated August 31, 1999, advised that the Appellant reported that he was unable to increase his hours beyond 5 hours per day at [text deleted]. The Appellant occasionally worked 6 hours if there was a rush on some work, but stated he could do this rarely, because of the pain and numbness in his left hand. In regard to the Appellant's physical limitations, [Appellant's occupational therapist] reported that:

"Medical:

1. Left Hand Pain and Numbness: [the Appellant] reports continued pain and numbness in index finger and medial side of middle finger of his left hand. Reportedly limits his speed and quality of work as he has to extend these two fingers up when working. Also limits the amount of time he can spend working, after four to five hours the symptoms of pain and numbness increase forcing him to stop work altogether.
2. Right Hand Pain and Numbness: [the Appellant] reported he is now having some pain and numbness with his right hand. It is not as severe as the left hand and does not limit his ability to work, however he has an appointment for a nerve conduction study and then will see [Appellant's plastic surgeon] Shortly after.
3. Other Complaints: [Appellant's chiropractor] reports that [the Appellant] has mild left cervicothoracic spinal and lower back discomfort. [Appellant's chiropractor] is currently treating [the Appellant] three times per week. [The Appellant] reports that his shoulder and back pain are much improved and do not affect his ability to work or complete his activities of daily living.

.....

Vocational:

1. Return to Work: [the Appellant] is unable to return to work full time in modified or

regular duties at [text deleted]. [Appellant's chiropractor] feels he can work full time if he is not using his hands repetitively, however the employer is unable to accommodate this at work. Until his symptoms resolve [the Appellant] does not have medical clearance to increase his work load."

Despite ongoing rehabilitation efforts, including physiotherapy, it was determined that the Appellant would not be able to increase his tolerance for his employment at [text deleted] to enable him to return to full-time hours. Accordingly, on May 30, 2001, the Appellant underwent a Functional Capacity Assessment ("FCA") conducted by [Appellant's occupational therapist]. The purpose of the assessment was to determine the Appellant's current functional ability and thereby to assist him in determining suitable alternative employment.

The FCA concluded that the Appellant demonstrated the ability to work full-time in a medium strength occupation with restricted fine motor capabilities. The Appellant had consistent difficulty with tasks requiring fine motor skills due to pain and numbness in both wrists and hands (more pronounced on the left). It was recommended that any employment which the Appellant undertook should involve only occasional handling of items with his left hand, although more frequent handling of items with the right hand was within his capabilities.

The Functional Capacity Assessment Report indicated that the Appellant demonstrated the following limitations:

- Left hand handling and finger dexterity limited to occasional frequency
- Mildly limited grip and pinch strength on left side (not consistently limited)
- Static strength measurements in the medium strength category
- Limited cervical extension and right rotation due to soft tissue tightness

Under the caption of the summary of physical findings in respect of hand function, [Appellant's occupational therapist] stated, "Left hand grip and pinch limited, but not consistently. Left hand

fine motor ability limited to occasional basis." In respect to overall performance this report stated:

"During grip strength [the Appellant's] ability decreased as the handle size increased... His left hand graphs (page 13) show low and erratic strength results for position four and five, positions which require increasing contact with the distal aspects of the fingers. This is one example of demonstrated function consistent with reported symptomatology."

Following the FCA, a Transferable Skills Analysis ("TSA") was conducted to assess the Appellant's skills and abilities with respect to suitable alternative employment. The TSA was completed on June 14, 2001. The Internal Review Officer in his decision dated January 14, 2002, summarizes that process as follows:

"The TSA involved:

- (a) an interview with you;
- (b) an interview with your former supervisor at [text deleted];
- (c) a review of the available medical information, the FCA results, your education and employment history, and your work-related interests;
- (d) a review of the National Occupational Classification and Career Handbook; and,
- (e) a survey of the [text deleted] labour market.

The TSA considered a wide spectrum of possible occupations and eliminated all but two - Supervisor, Fabric, Fur and Leather Products, and Watchman. It was determined that you had the requisite physical abilities and education for either of these occupations, and that both of these occupations exist in the Winnipeg labour market."

In the TSA report dated June 14, 2001, [text deleted], the Rehabilitation Consultant who conducted this assessment stated:

"For the position of SUPERVISORS, FABRIC, FUR AND LEATHER PRODUCTS (NOC #9225), [the Appellant] meets the necessary requirements to be considered suitable for the position. The strength level for this position is listed as Limited in the NOC and Career Handbook with the body position listed as sitting, standing and walking and limb co-ordination indicated as not relevant. Based on labour market information, the position exists in [text deleted]. In speaking with the recruitment officer at [text deleted], he indicated 5 years of supervisory experience is required. He stated the claimant's employment history qualifies him for the position of Production Supervisor. It is not necessary for Production Supervisors to have experience in working with upholstery material, noting that supervisory experience is a generic term and it is the supervisory experience per se that is required for this position."

The Appellant's employment with [text deleted] was subsequently terminated. In explaining the circumstances surrounding the Appellant's termination, [text deleted], Cutting Room Manager of [text deleted] in a letter to the Commission dated March 28, 2002 stated:

"I am writing to inform you that [the Appellant] had worked for our company as a supervisor in our cutting room. We have computerized part of our operation and as a result, it would be compulsory to learn the computer in order to fulfill the responsibilities as a supervisor. The job is eight hours a day, five days a week with the possibility of overtime in our peak season. The position of supervisor not only requires the supervision of the cutters and making sure the production runs smoothly, he is also a cutter. This requires the lifting and loading of the rolls of fabric, which weigh between 30 - 40 pounds onto the spreading machine, spreading the fabric, cutting with a circular knife and then stacking of the bundles. This means that he must be physically capable of performing the above functions over an eight hour period."

Two Year Determination Section 107

Based on the results of the FCA and the TSA, MPIC completed a two year determination of the Appellant's employment pursuant to Section 107 of the MPIC Act.

Section 107 of the MPIC Act states:

New determination after second anniversary of accident

107 From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The two year determination also took into consideration Sections 109(1) and (2) of the MPIC Act, which read as follows:

Consideration under section 107 or 108

109(1) In determining an employment under section 107 or 108, the corporation shall consider the following:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program

approved under this Part;

(c) the regulations.

Type of employment

109 (2) An employment determined by the corporation must be

(a) normally available in the region in which the victim resides; and

(b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

Section 7 of Manitoba Regulation 37/94 states:

Meaning of employment normally available

7 For the purpose of clause 109(2)(a) of the Act, an employment is normally available to a victim when, at the time the corporation determines an employment for the victim,

(a) the employment is being performed or is about to be performed by the victim;

(b) the employment or the category of employment is the subject of an advertisement for employment; or

(c) the employment or the category of employment exists and is likely to continue as an employment or category of employment within the foreseeable future.

The case manager who conducted the two year determination wrote to the Appellant on August 31, 2001, and advised him that after a consideration of Section 107 and 109 of the Act, the position of MPIC was as follows:

"Having completed a Transferable Skills Analysis and given your level of function, skills and abilities, you have been determined as a Supervisor which, in accordance with Schedule C, which is a Table of Classes of Employment in the Manitoba Public Insurance Regulations 39/94, is included in Category 17 as Supervisors, Fabric, Fur and Leather Products Manufacturing. The area of occupation stated has a potential annual income of \$30,321.00 based on your level of experience (2001 Schedule C). Once you have been determined, you have one year to locate the employment, in accordance with Section 110(1)(d), which reads:

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:

- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108.

During this one year, from the date of this letter, job search assistance will be provided to assist you in locating employment in the determined field.

Should you locate employment, during this one year, your Income Replacement Indemnity benefit will be reduced by 75% of the net income earned, in accordance with Section 116 of the Manitoba Public Insurance Corporation Act, which reads:

I.R.I. reduction if victim earns reduced income

116(1) Where a victim who is entitled to an income replacement indemnity holds employment from which the victim earns a gross income that is less than the gross income used by the corporation to compute his or her income replacement indemnity, the income replacement indemnity shall be reduced by 75% of the net income that the victim earns from the employment.

It is important that any income earned be reported to us so that your Income Replacement Indemnity benefits may be adjusted.

As the determined employment has a higher potential gross income than your current Gross Yearly Employment Income (GYEI), your entitlement to Income Replacement Indemnity benefits ends on August 30, 2002. This applies even if you do not actually hold the determined employment..."

[We note that according to the information provided by the IRI calculator, the position of Supervisors, Fabric, Fur and Leather Products Manufacturing (NOC 9225) actually corresponds to the Occupation heading - "Other Processing Occupations" included in Category 15 of the Table of Classes of Employment forming Schedule C to M.R. 39/94 and not Category 17 as set out by the Case Manager in her decision].

On October 18, 2001, [text deleted], the Appellant's chiropractor, provided a report in respect of the status of the Appellant's injuries and stated:

"...As stated originally, this patients' symptomatology will be ongoing and intensifying as a result of activities from time to time. He has stated that his only benefit has been chiropractic care. His injuries prevent him from doing his original occupation. With his advance age, specialized skill training, and limited educational willingness, it is unlikely any employer will hire and re-train this individual for alternate employment. It is unlikely that this patient will find alternate employment as a result of his injuries,

disability, advanced age, and his accommodating capabilities to endeavor a new career.

Any attempt to find this individual a new career or occupation is not feasible or realistic. Due to his advanced age, he should be offered a partial permanent disability classification until the age of retirement.

His need for chiropractic care is supportive in nature and will be indicated by presenting symptomatology. As the patient further ages, activities will decrease over time, and exposure to factors that result in aggravation of those injuries will also decrease, thus resulting in decreased treatment. But if the patient is forced to re-train for future alternate employment, the risk of re-injury, or aggravation exists and potential increases further needs of treatment and care, which may precipitate further dependency...."

On October 19, 2001, the Appellant made application for a review of the case manager's decision. The Internal Review Hearing was conducted on December 17, 2001, and on January 14, 2002, the Internal Review Officer, in a written decision, dismissed the Appellant's application for review and confirmed the decision of the case manager.

In the Internal Review decision, the Internal Review Officer stated:

"Section 109(1) of the *Act* sets out the various factors which go into selecting a "determined employment" for a claimant. This is not the same as finding you an actual job - it is merely a process for determining the types of employment which are consistent with your present abilities and interests. The FCA and the TSA considered all of these factors and considered as well, the factors set out in Section 109(2) of the *Act*.

In my view, the case manager gathered the appropriate material and arrived at a determined employment for you which was entirely consistent with the spirit and intent of Section 109 of the *Act*.

The FCA confirmed your ability to perform the determined employment and it was, therefore, entirely appropriate for the case manager to invoke Section 110(1)(d) of the *Act*. I note in passing that the physical limitations and difficulties you described at the hearing were noted in the FCA and, in fact, given due consideration in the TSA and the determination processes."

The Appellant filed a Notice of Appeal in respect of the Internal Review Officer's decision rejecting his application for review.

Appeal

The issues under appeal are:

- 1 The determination of the Appellant as a Supervisor, Fabric, Fur and Leather Products Manufacturing pursuant to S. 107 and 109 of the MPIC Act.
- 2 Whether the termination of the Appellant's Income Replacement Indemnity benefits on August 30, 2002 was appropriate.

At the Appeal Hearing, legal counsel for MPIC submitted that in having regard to the Functional Capacity Assessment report of [Appellant's occupational therapist] dated June 6, 2001, and the Transferable Skills Analysis report by [Appellant's rehab consultant] dated June 14, 2001, the case manager was correct in determining the employment of the Appellant under Section 107(1) of the Act as a Supervisor of Fabric, Fur, and Leather Products. [Appellant's occupational therapist] and [Appellant's rehab consultant] both testified at the hearing in support of their respective reports.

In response to the TSA conducted by [Appellant's rehab consultant], [text deleted], representative of the Appellant, wrote to [text deleted], Employment Services Manager of [text deleted] by letter dated September 25, 2002, and asked a number of questions of [Employment Services Manager]. [Employment Services Manager] responded to [Appellant's representative] in a letter dated September 26, 2002, and both these letters were filed in evidence before the Commission. In his written reply [Employment Services Manager] stated:

- 1 ...[Text deleted] is a "promote from within" organization and Team Leaders would be selected through the Internal posting process.
- 2 Team Leader positions are "hands on" leadership roles. They are required to provide manual labour in support of their teams (throwing full leather hides, moving sofas, etc), as well as the administrative aspect of the role. There would be a heavy strain on both hands.
- 3 [Appellant's rehab consultant] provided some verbal description of physical restrictions, but only briefly, since the conversation focused much more on the

applicant's experience.

- 4 I disagree with [Appellant's rehab consultant's] assessment that [the Appellant] would be a great match for a Team Leader because of his lack of leather/upholstery experience, and because of the physical nature of the position. The position is certainly not as physical as if he was in production, but the demands are still quite high. There is also no indication of prior leadership experience, which a Team Leader must have. This certainly would not have been to [the Appellant's] benefit during the consideration process. That is one of the main reasons that [text deleted] promotes from within their own employees.
- 5 Team Leader positions are generally not posted outside of the company. If there were an external posting for a Team Leader position, he would apply to the posting directly. As mentioned before...these roles are usually promoted up from the production floor.

The Appellant testified at the Appeal Hearing that he made application for employment at [text deleted] and that he was not called in for an interview. Having regard to the comments of [Employment Services Manager] that the physical demands of the Team Leader were quite high, and the results of the FCA, it is clear that the Appellant would not have had the physical ability of being a supervisor and/or Team Leader with [text deleted].

The Appellant further testified that he was not physically capable nor did he have the manual dexterity to act as a supervisor in the garment industry. The Appellant testified that he had worked in a number of different garment factories over a period in excess of 40 years and in each factory, the supervisor was required to carry out the duties of a working foreman. These duties included not only supervision of other employees, but also required the foreman, on a regular and recurring basis, to cut fabric, spread the fabric, bundle the fabric and often lift heavy bolts of material. The Appellant testified that:

- (a) He was physically incapable of carrying out the duties of a supervisor/working foreman in the garment industry for a period of 8 hours a day, 5 days a week.
- (b) As a supervisor, he was required on a regular and recurring basis to cut material requiring him to use his left hand and fingers to hold the material down. He was

then required to spread the material with his left hand, cut the material with his right hand, and to stack the bundles.

- (c) In regard to the lack of manual dexterity of his left hand and the continuous pain to his wrist and fingers in his left hand, he was physically unable to carry out these cutting duties.

The Appellant's testimony was confirmed by his employer at the time of the accident, [text deleted] As indicated earlier in this decision, the Commission received a letter from [text deleted] dated March 28, 2002, issued by [text deleted], Cutting Room Manager wherein he states:

"I am writing to inform you that [the Appellant] had worked for our company as a supervisor in our cutting room. We have computerized part of our operation and as a result, it would be compulsory to learn the computer in order to fulfill the responsibilities as a supervisor. The job is eight hours a day, five days a week with the possibility of overtime in our peak season. The position of supervisor not only requires the supervision of the cutters and making sure the production runs smoothly, he is also a cutter. This requires the lifting and loading of the rolls of fabric, which weigh between 30 - 40 pounds onto the spreading machine, spreading the fabric, cutting with a circular knife and then stacking of the bundles. This means that he must be physically capable of performing the above functions over an eight hour period."

[Text deleted] of [text deleted] also provided a handwritten statement that was filed with the Commission and corroborated the Appellant's position. [Text deleted] stated:

"[The Appellant] was working for me at [text deleted] part-time as a cutting room supervisor from 1995 - 1998 (Nov 1). This job description included cutting with the straight-knife, sound knife, marking patterns onto material, spreading cloth and adjusting patterns as well as bundling and lifting material onto the spreader. The average weight of a bolt of material 65/35 polycotton was 120 lbs., melton about 90 lbs. After the accident he was no longer capable of performing his duties lifting and cutting."

The testimony of the Appellant, in regards to the duties of a supervisor in the garment industry, was also corroborated by the testimony of [text deleted], who is employed as a foreman in the cutting room of [text deleted]. [Cutting room foreman] testified that his duties included not only supervising other employees, but also required him, on a regular and recurring basis, to fill in for

employees, which would require him to cut material, bundle material, spread material and to lift heavy bundles of material. [Cutting room foreman] had extensive experience in the garment industry and corroborated the evidence of the Appellant, [text deleted] and [Appellant's cutting room manager] as to the duties of a supervisor in the garment industry.

The testimony of the Appellant and [cutting room foreman], together with the correspondence of [Appellant's cutting room manager] of [text deleted], [text deleted] of [text deleted], and [Employment Services Manager] of [text deleted] contradicts the TSA report of [Appellant's rehab consultant] in respect to the duties of a supervisor. In the TSA, [Appellant's rehab consultant] states that, "*[the Appellant] meets the necessary requirements to be considered suitable for the position. The strength level for this position is listed as Limited in the NOC and Career Handbook with the body position listed as sitting, standing and walking and limb coordination indicated as not relevant*".

According to the NOC, Supervisors of Fabric, Fur and Leather Products Manufacturing, supervise and coordinate the activities of workers in the following unit groups: Sewing Machine Operators (9451), Fabric, Fur and Leather Cutters (9452), Hide and Pelt Processing Workers (9453) and Inspectors and Testers, Fabric, Fur and Leather Products Manufacturing (9454). They are employed by clothing and textile manufacturers, tanneries and other manufacturers of fabric products. Several years of experience in the unit group being supervised are required. According to the testimony of [Appellant's rehab consultant] at the Appeal Hearing, [the Appellant] has the requisite years of experience with the unit group Fabric, Fur and Leather Cutters (9452) and would qualify to supervise that unit group.

According to the NOC, his duties in this capacity would include:

- supervise, coordinate and schedule the activities of workers who cut fabric, fur, or leather garments and other products in the manufacturing process
- establish methods to meet work schedules and coordinate work activities with other units
- requisition materials and supplies
- resolve work problems and recommend measures to improve productivity and product quality
- train staff in job duties, safety procedures and company policies
- recommend personal actions such as hirings and promotions
- prepare production and other reports.

The evidence presented to this Commission also establishes that the position of a supervisor of fabric and leather cutters is required to take a hands-on approach to the supervision of workers. They are required to provide manual labour in support of the employees that they are supervising, and fill-in for those employees during an absence or assist in the production line when necessary to meet production deadlines. As such, we find that [the Appellant] does not meet the necessary requirements to be considered suitable for this position.

The testimony of the various witnesses at the Appeal Hearing and the documentary material filed with the Commission confirms that the physical demands of this position, on a full-time basis, exceeds [the Appellant's] physical abilities. We find that limb coordination is highly relevant to the position of supervising fabric, fur and leather cutters, since a supervisor would be required to perform the functions of a cutter. The TSA found that [the Appellant] was not able to work full-time as a cutter, as a result of pain, numbness and hypersensitivity in his left fingers. The FCA concluded that [the Appellant's] left hand handling and finger dexterity was limited to occasional frequency (i.e. up to 33% of the workday). We find that as a supervisor of fabric and leather cutters, [the Appellant] would be required to use his left hand on more than just an occasional basis. Accordingly, the Commission finds that [the Appellant] does not meet the necessary physical demands of such an occupation.

The Commission is satisfied in regard to this evidence that, on the balance of probabilities, in the garment industry where the Appellant had in excess of 40 years of experience and where he was most likely to be employed, the supervisors were working foreman and not merely supervisors as determined by [Appellant's rehab consultant] in her TSA report. The Commission rejects [Appellant's rehab consultant's] assessment that [the Appellant] met the requirements to be considered suitable for the position of Supervisor, Fabric Products as set out in NOC 9225.

MPIC also determined that [the Appellant] met the requirements to be considered suitable for the position of Supervisor, Fur Products as set out in NOC 9225. However, MPIC presented no evidence to establish the nature of the duties of a fur supervisor or that [the Appellant] had the physical capacity and the manual dexterity to be capable of performing the duties of a fur supervisor.

The Commission has examined the documentation in respect of the position of SUPERVISORS, FABRIC FUR AND LEATHER PRODUCTS (NOC 9225) which sets out a number of occupational titles including the following:

- boot and shoe foreman/woman
- canvas products manufacturing foreman/woman
- cutting department foreman/woman, fabric
- embroidery supervisor, fabric products
- fur dressing foreman/woman
- hat and cap maker foreman/woman
- sample room foreman/woman, leather products
- sewing machine operator supervisor
- stitching department supervisor
- tannery foreman/woman

Having regard to the evidence submitted by the parties in this Appeal, the Commission determines that the core duties of persons employed in the position of Supervisor, Fabric, Fur

and Leather Products as set out in NOC 9225 are that of working foreman/woman not that of a supervisor, not engaged in manual labour. The evidence submitted by the parties to the Commission in this Appeal satisfies the Commission that the Appellant has established, on the balance of probabilities, that:

- A. pursuant to Section 109 of the Act, he did not have the physical capacity or the manual dexterity to meet the requirements of the position of Supervisor, Fabric, Fur and Leather Products as set out in NOC 9225; and
- B. MPIC did not make a correct two-year determination as to the nature of employment of the Appellant pursuant to Sections 107 and 109 of the MPIC Act.

The Commission, therefore, determines that:

- (a) MPIC incorrectly terminated the Income Replacement Indemnity benefits of the Appellant pursuant to Section 110(1)(d) of the Act.
- (b) [The Appellant's] IRI benefits be reinstated as of August 30, 2002. Interest shall be added to the amount due and owing to [the Appellant] in accordance with Section 163 of the MPIC Act.
- (c) The Commission shall retain jurisdiction in this matter and, if the parties are unable to agree on the amount of compensation, either party may refer this issue back to this Commission for final determination.

Dated at Winnipeg this 10th day of January, 2003.

MEL MYERS, Q.C.

YVONNE TAVARES

DEBORAH STEWART