



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-68

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Diane Beresford
Ms. Deborah Stewart

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representative]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: May 18, 2004

ISSUE(S): 1. Entitlement to Income Replacement Indemnity benefits beyond June 30, 2002
2. Entitlement to funding for a Dr. Ho Electrical Stimulation Machine

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation ('MPIC') Act and Section 8 of Manitoba Regulation P215-37/94

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

Reasons For Decision

[The Appellant], was involved in a motor vehicle accident on November 12, 2000 while he was a passenger in a motor vehicle. The Appellant was treated by [Appellant's doctor #1] who, based on an examination of the Appellant on December 8, 2000, stated that the Appellant suffered from a whiplash injury, was complaining of headaches and neck pain to the left side of his chest. [Appellant's doctor #1] further reported that the Appellant had less than full function due to symptoms and was unable to work at any job. On January 3, 2001 MPIC advised the Appellant

he was entitled to Income Replacement Indemnity ('IRI') benefits commencing November 20, 2000.

[Appellant's doctor #1], in a report based on an examination of the Appellant on January 10, 2001, stated that the Appellant had "full function with symptoms" and was capable of working "modified duties". He further stated he "can't do his normal work roofing 6-8 weeks".

The Appellant attended at a physiotherapist for treatment in respect of his neck and shoulder injuries and the physiotherapist in an Initial Health Care Report dated January 17, 2001 stated that the Appellant had "less than full function due to symptoms and/or functional deficits" and was capable of working "supernumerary".

[Appellant's doctor #1's] report, dated April 5, 2001, continued to diagnose a whiplash injury and reported that the Appellant continued to complain about neck pain and pain to his lower back and indicated that the Appellant had "less than full function due to symptoms and/or functional deficits".

MPIC referred the Appellant for a Job Demands Analysis assessment by Occupational Therapy & Rehabilitation Consultants. [Text deleted], the Occupational Therapist, conducted the assessment and forwarded a report to MPIC dated May 16, 2001 wherein she provided an analysis of the Appellant's job as a self-employed roofer. [Appellant's occupational therapist] reviewed the Appellant's written job description to MPIC and indicated that the Appellant reported performing the following main duties:

- Eavestroughing (cleaning, repairing, and installing) – majority of the company's work
- Roofing – replacement and repair

- Soffits – installation and repair
- Estimates – involves approximately 20 minutes to 3 hours per work day; physically requires driving to a site, walking around the area, and measuring for the work to be completed. Does not involve climbing.
- Purchasing and transporting supplies from the local building products distributor to the work site.
- Office duties – business partner completes the majority of these tasks

The report further described the physical demands of the job duties as follows:

Physical Demands of the Job Duties

Definitions:

Rarely	-	less than 1% of the work day, or not daily
Infrequent	-	1 to 5% of the work day
Occasional	-	6 to 32% of the work day
Frequent	-	33 to 65% of the work day
Constant	-	66 to 100% of the work day

1) Postures and Body Positions

- **Standing/Walking** – FREQUENT standing and walking is required during the full shift, except when driving between work sites. Standing and walking surfaces vary from concrete, grass, soft mud, ladders, roofs.
- **Sitting** – INFREQUENTLY required such as when driving between work sites and during office duties. Sitting intervals are usually less than 20 minutes.
- **Squatting/Kneeling** – FREQUENT job demand; several job activities require work at low levels and therefore squatting or kneeling may be performed repetitiously and continuously throughout the work day (i.e. such as when installing shingles on a roof).
- **Overhead Work** – FREQUENT job demand; several job tasks require repetitious or sustained overhead work, such as when installing or cleaning eavestroughing. Overhead work is also performed while standing on a ladder and therefore the worker is regularly in a trunk extension posture.
- **Stooping** – rarely required if work is performed using optimal posture and body mechanics.
- **Reaching** – job demands require repetitious full vertical and horizontal reach of both arms or either arm. Also required to sustain overhead reach with both arms for up to approximately 5 minute intervals (i.e. such as when installing eavestroughing).
- **Climbing** – OCCASIONALLY to FREQUENTLY required to climb ladders; maximum height climbed is up to 50 feet (i.e. to height of the roof of a 3 story

building). Worker is regularly carrying when climbing and therefore only one hand is available for support on the ladder. Worker will regularly stand on the ladder to complete work tasks, and must be able to balance and stabilize himself when working from a ladder.

- **Awkward Work Postures** – sustained and repetitive overhead work, squatting/kneeling, and trunk extension are required. Sustained and repetitive work in trunk forward bending such as when kneeling/squatting to install shingles is required.
- **Hand or Finger Dexterity/Coordination** – requires average hand and finger dexterity and average hand strength to complete job tasks. Sustained and forceful grip on tools and equipment required.

In respect of material handling, the report stated in part as follows:

Weight Handled	Object Handled	Frequency Handled
85 to 125 lbs/39 to 57 kgs	Bundles of roof shingles	50 to 100 repetitions per roofing job
Up to 120 lbs/55 kgs. Up to approx. 45 lbs/20 kgs.	Largest extension ladder Tool belt	Regularly but not daily Constant, except when Driving
Between 1 to 15 lbs. 7 kgs.	Hand tools	Constant, except when Driving

In conclusion, the report stated:

Summary

The physical demands of the job of Self Employed Roofer are categorized as HEAVY to VERY HEAVY work according to the CCDO description of the Physical Activities of jobs. A summary of the critical physical demands of the job of a Self Employed Roofer is as follows: (underlining added)

- Maximum Lift/Handle/Carry – weights ranging from approx. 100 to 200 lbs/45 to 90 kgs. in a 2-person lift. Maximum weights are handled rarely to infrequently.
- Regular Lift/Handle/Carry – weights ranging from 15 to 125 lbs/7 to 57 kgs., handled constantly
- Frequent standing or walking
- Repetitive and sustained work at low and overhead levels – requiring squatting/kneeling, overhead reaching, trunk extension, or trunk forward bending.
- Frequent ladder climbing
- Sustained forceful grip such as when using tools and equipment
- Safety concerns related to working at heights

MPIC referred the Appellant for a rehabilitation assessment by [rehab clinic] who provided a report to MPIC dated July 16, 2001. In respect of his current symptoms the Appellant stated:

1. **'Neck Pain'**. This is a dull and continuous pain. As [the Appellant] mentioned, the neck pain is mostly on the right side and it is his worst pain; he suffers from this pain 7 days a week, 24 hours a day. He takes Advil to ease this pain, and he believes that Advil helps him to control the pain problems.
2. **'Right Shoulder Pain'**. The claimant mentioned that this pain is also constant and dull in nature. [The Appellant] believes that the pain starts from his shoulder and travels to his neck.
3. **'Low Back Pain'**. [The Appellant] is not too concerned with this pain. He stated that with physiotherapy treatments this pain went away to a great degree. He stated that he has to be careful because with standing more than 1-2 hours and lifting of heavy objects his back pain can be exacerbated. (underlining added)
4. **'Dizziness'**. [The Appellant] denies any dizziness before the accident in question. The dizziness started after the accident. This symptom "comes and goes" and can get worse with quick movements.
5. **'Right and Left Thigh Pain'**. [The Appellant] experiences stabbing pain in front aspect of both his thighs sometimes. He stated that this pain goes away by itself.

The claimant states that he is in discomfort 24 hours a day, 7 days a week. Overall, his worst pain is 5/10 on the visual analog scale. The least pains are 4/10, and the average is 4/10. Activities such as standing more than 1-2 hours and lifting heavy objects aggravate his pain. Lying down gives him some relief. Also, he stated that pain prevents him from walking more than 1 mile. [The Appellant] can travel anywhere but it gives him extra pain.

In respect of his work history the Appellant reported that he was self-employed as a roofer for thirty years and he stopped working on November 12, 2000 after the motor vehicle accident. He indicated that he worked two hours every day to supervise his company activities and he was unable to lift heavy objects and this was the reason why he could not do his job.

The [rehab clinic] report further states:

Diagnoses

The diagnoses are listed in rank order, with most prominent difficulties listed first.

1. Myofascial Pain Syndrome – Neck – Moderate Severity
2. Myofascial Pain Syndrome – Right Shoulder – Moderate Severity
3. Myomechanical Low Back Pain – Resolving

[Rehab clinic], in a report to MPIC dated August 3, 2001, advised that the Appellant was scheduled to commence an 8-week work hardening program in order to assist the Appellant to return to his pre-accident employment full time with full duties and without restrictions. In a Patient Progress Summary Report completed by [rehab clinic] the Appellant reported his neck was still sore and stiff, not as bad as it was, and his back was very sore.

On October 17, 2001 [rehab clinic] provided a Discharge Summary Report to MPIC. In respect of flexibility the report indicates that the Appellant's cervical range of motion was measured using the CROM unit and was below normal in respect of flexion, extension, right lateral bending, left lateral bending, right rotation, left rotation. This report further indicated that in respect of lumbar range of motion this was measured using the digital DUALER inclinometer and was below normal in respect to flexion, extension, right lateral flexion, left lateral flexion.

The report further stated:

Summary

[The Appellant] has successfully completed an 8-week Work Hardening Program at our facility. Upon conclusion of his Work Hardening Program he achieved a MEDIUM strength demand, which is less than the required strength demand of HEAVY to VERY HEAVY required for his occupation as a Roofer. Therefore [the Appellant] is restricted (at this time) from performing work that requires lifting and/or pushing or pulling above the capacity of a MEDIUM worker. [The Appellant] did demonstrate necessary postural tolerances for stooping, kneeling, reaching, balancing, and working on an inclined surface. Therefore, he is not restricted from performing those aspects of his occupation which require those demands such as supervising his staff, estimating contracts, and performing tasks on the roof such as "Nailer" which correlates with [the Appellant's] self description of his pre-accident duties as per the team meeting of August 20, 2001.

Dr. Peter Polatin, (Spine Care: Diagnosis and Conservative Treatment) defines Maximal Medical Improvement (MMI) at which a patient is "as good as he is going to get, and is

therefore at the end point for further medical treatment. This does not necessarily mean that the patient is “cured” and symptom-free, nor that further improvement may not occur over time. A patient who has progressed through secondary or tertiary medical and rehabilitative care such that he or she is able to return to full duties may be at a point of Maximal Medical Improvement, even though some symptoms are still present.¹ Thus, [the Appellant] can be considered at Maximum Medical Improvement due to his completion of a secondary Work Hardening Program, such that he may return to his pre-accident occupation of a Roofer, despite ongoing painful symptomatology in the above related physical restrictions. (underlining added)

In respect of recommendations, the report stated:

Recommendations

1. [The Appellant] return to his pre-accident employment as a Self Employed Roofer full time, with the above-noted restrictions. (underlining added)

The report further recommended upon the Appellant’s return to work he should be provided with ongoing supportive care.

On November 5, 2001 [rehab clinic] provided a Work Site Visit report to MPIC:

The purpose of this assessment is to inform you that a worksite visit was performed on October 26, 2001. The individuals present were: [text deleted] an employee working for [the Appellant], and the Occupational Therapist from [rehab clinic].

[The Appellant] reported that he was only performing the estimations which he does from the ground, setting up work sites and scheduling his employees, and over seeing the duties of his employees where he drives from work site to work site. Reportedly, there are days that [the Appellant] only works several hours due to the amount of work required. He is currently not climbing to the roof as he is apprehensive due to his low back pain and pain within his right knee. Reportedly his family physician has put a restriction of no lifting for [the Appellant] and has ordered alternate x-rays of his low back. At this present time [the Appellant] is not performing any of the duties that is required of a roofer. It is recommended that any additional x-rays taken be reviewed by [Appellant’s rehab doctor]. (underlining added)

On November 7, 2001 MPIC wrote to the Appellant and terminated his IRI benefits on the

¹ White, Arthur H. MD., Schofferman, Jerome A. MD., Ed. Spine Care: Diagnosis and Conservative Treatment Volume I, Mosby-Yearbook Inc. St. Louis, 1995.

following grounds:

You completed an 8-week work hardening program at [rehab clinic] on September 21st 2001. The discharge report from [rehab clinic] is attached for your information. Medical evidence on file indicates that you are now capable of returning to work. Since you are capable of returning to work you will no longer be entitled to Income Replacement Indemnity as of October 7th 2001. Section 110(1) Events that end entitlements to IRI is attached for your information. (underlining added)

On November 22, 2001 the Appellant wrote to MPIC disagreeing with MPIC's decision to terminate his IRI benefits. The Appellant indicated that he was unable to return to his pre-employment status as a roofer, he further indicated he was only able to work two hours a day in non-physical activities.

In a report to MPIC dated December 6, 2001 [Appellant's doctor #1] stated:

This man is still complaining of low backache related to the motor vehicle accident on November 12, 2000, and is not much improved despite a work hardening program.

It was noted in the office that he had some difficulty in getting up from the sitting position and forward flexion of the spine was painful. He has mechanical low back pain. It is unlikely that any further improvement will occur. He is a roofer and obviously could not lift or carry shingles. He can supervise. He claims that he has to pay someone to do the work he normally does.

[Appellant's rehab doctor] of [rehab clinic] was requested by MPIC to review [Appellant's doctor #1's] letter dated December 6, 2001 and, in a report to MPIC dated January 21, 2002,

[Appellant's rehab doctor] stated:

It has been a main issue with [the Appellant] since the beginning of his involvement with our facility that he is very pain-focused and he is not compliant with the recommended treatment procedures (as it was addressed in the team meeting of August 24, 2001). (underlining added)

MPIC requested [text deleted], a Medical Consultant with MPIC Health Care Services, to review this matter:

I have the opportunity to meet with the Case Manager on January 23, 2002 to discuss issues regarding this case.

According to documentation within the file from [Appellant's doctor #1] and [Appellant's rehab doctor], the claimant continued to have limitation in low back range of motion and ability to perform heavy lifting that would be required by his job. According to the discharge summary from [rehab clinic] on file, the claimant's functional ability was measured to be in the medium duties capacity and not of the heavy to very heavy duties required in his job as a roofer. The basis for the functional limitation appeared to be pain related as documented by [Appellant's rehab doctor] in his January 21, 2002 letter. Despite the claimant's pain-focus, documented in [Appellant's rehab doctor's] assessment, he still stated that the claimant likely had functional limitations that would prevent him from performing heavy-duty occupations.

Previously, the [rehab clinic] consultants had requested further treatment to help treat the claimant's pain. Previous to this, however, they stated that the claimant had reached maximum medical improvement, which would indicate that further medical intervention would be unlikely to lead to improvement in the claimant's condition. Thus, any further treatment would be unlikely to alter the claimant's functional status. The claimant was provided with a home exercise program that he was to continue to follow to maintain his functional level and decrease his pain.

....

In this case, the treatment modalities recommended by [Appellant's rehab doctor] have already been used as part of the claimant's rehabilitation program. As these modalities have not altered the claimant's overall pain levels (as evidenced by the most recent report from [Appellant's rehab doctor] and the request for more therapy), it would be unlikely, in my opinion, that long-term pain modification would result from continuation of the same therapeutic modalities. In keeping with my comments above, I would recommend that attempts be made to educate the claimant on self pain control techniques. Any further provision of therapeutic injections or acupuncture would be elective, in my opinion. (underlining added)

Upon receipt of that report MPIC wrote to the Appellant, by letter dated February 7, 2002 and stated:

On December 31, 2001, you requested that a decision of your Income Replacement benefits be reviewed by Internal Review. As discussed in our telephone conversation of January 31, 2002, recent medical information has been obtained and I will discuss the details below of our decision regarding your Income Replacement benefits.

Our Health Care Services Team reviewed recent medical information from [Appellant's doctor #1] and [Appellant's rehab doctor]. Based on the review, we will be reinstating your Income Replacement benefits effective October 8, 2001. (underlining added)

At the request of MPIC, [independent doctor] conducted an independent examination of the Appellant on April 30, 2002. [O

Independent doctor] is a medical doctor and also is trained as a physiotherapist and he provided a report to MPIC dated May 13, 2002. In this report [independent doctor] indicates that the Appellant described himself as a supervisor of a roofing business who worked one to two hours per day only. He further informed [independent doctor] that he does some hands-on duties including nailing but no longer does the stripping of shingles as well as applying the shingles to the roof. He further informed [independent doctor] that he usually had helpers bring the shingles up to the roof but when a helper was unavailable he was required to carry out this activity.

[Independent doctor] concluded that the Appellant was capable of performing most of his work duties at this time and he could not see any specific reason why the Appellant was not able to supervise for a full day. He further indicated as long as the Appellant was capable of taking frequent breaks and to stand and stretch while he is performing his duties, that there was no reason for him to attempt to perform them. As a result, [independent doctor] indicated that the Appellant was capable of returning to his job as a roofer on a full-time basis and should he have difficulty, frequent rests could be taken on an as-needed basis. In respect of heavy lifting, the Appellant could use a regular assistant to do the heavy lifting for him.

In a Inter-Departmental Memorandum dated June 17, 2002 [MPIC's doctor] was requested to review [independent doctor's] report of May 13, 2002. [MPIC's doctor] agreed with [independent doctor's] opinion that the Appellant was capable of returning to work as a roofer on

a full-time basis. He further agreed with [independent doctor's] view that if the Appellant had difficulty with returning to work frequent rests should be utilized on an as needed basis to allow his pain to subside. In respect of heavy lifting the Appellant could utilize a regular assistant to do the heavy lifting for him.

On July 3, 2002 the case manager wrote to the Appellant and stated:

I have attached a copy of the assessment that was completed by [independent doctor] on May 13, 2002. A review of the medical information as provided by [independent doctor] has indicated the following:

- You are capable of returning to your job as a roofer on a full time basis. Should you have further difficulty, frequent rests could be undertaken on an as needed basis.
- Further treatment is not required as it relates to musculoskeletal concerns.

Our Health Care Services Team also reviewed the assessment that was completed by [independent doctor] and it is their opinion that you can return to your pre-accident employment.

Therefore your entitlements to income replacement benefits has ended as of June 30, 2002 in accordance with Section 110(1)(a). I refer you to Section 110(1)(a) of the Manitoba Public Insurance Corporation Act, 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:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;

On July 24, 2002 the Appellant made application to MPIC for a review of the case manager's decision.

At the request of the Internal Review Officer, [Appellant's rehab doctor] wrote to her by letter dated September 3, 2002 and confirmed his earlier view as set out in [rehab clinic's] Discharge Report dated October 17, 2001 and stated that he was in agreement with [independent doctor's]

findings and opinions.

The Internal Review Officer, after reviewing the medical reports of [Appellant's rehab doctor] and [independent doctor], by letter to the Appellant, dated March 14, 2003, confirmed the case manager's decision and dismissed the Appellant's Application for Review in respect to the termination of IRI benefits.

In his decision the Internal Review Officer noted that both [independent doctor] in his report dated April 30, 2002 and [Appellant's rehab doctor] in his report dated September 3, 2002, concluded that the Appellant was capable of returning to work as a roofer on a full-time basis. The Internal Review Officer also noted that [Appellant's rehab doctor] in his letter stated that he felt that the Appellant's subjective complaints were the primary cause for restrictions and limitations mentioned in [rehab clinic's] documentation in respect of the capacity of the Appellant's return to work.

The Appellant was seen by [Appellant's doctor #2] on four occasions between August 31, 2001 and May 6, 2003 and who provided a report to the Appellant's solicitor, dated May 19, 2003 wherein he indicated:

Summary and comment:

From my involvement in this case I feel that [the Appellant] sustained a permanent disability causing working as a roofer limited to supervisory duties only on a part time basis. Time has shown that he is unable to get up on a roof and do roofers work which requires strength in his arms, stability (he is unsteady frequently) and leg strength. I feel he has progressed as far as he will. In addition he requires Vioxx to help him to cope with the pain. He can perform as an advisor to his staff, to instruct them how to do a job as required. I don't feel any further investigation is necessary, will change his prognosis. He has been instructed to do quadriceps exercises at least 10 times a day to his right leg to strengthen the right quadriceps muscle. When I saw him for the examination May 6, 2003 he confirmed that when he is able to go to work supervising he is able to do so for 2 to 3 hours on that day. The week prior to seeing me on May 6, 2003 he was able to put in 6 hours (April 30 – May 6).

[Appellant's doctor #2's] report was provided to the Internal Review Officer and, as a result thereof, the Internal Review Officer requested [MPIC's doctor] to review the medical documentation that was on the Appellant's file including and specifically the report of [Appellant's doctor #2] dated May 19, 2003. [MPIC's doctor] provided a Inter-Departmental Memorandum dated July 17, 2003 to MPIC wherein he rejected [Appellant's doctor #2's] opinion as to the Appellant's capacity to return to work and agreed with [independent doctor] and [Appellant's rehab doctor] that the Appellant would likely be able to return to his pre-accident employment as a roofer.

Appeal

The relevant provisions of the MPIC Act and Regulations governing this appeal are as follows:

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;

M.R. 37/94

Meaning of unable to hold employment

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

Legal counsel for the Appellant advised the Commission that the Appellant did not intend to pursue his appeal in respect of the funding for a Dr. Ho Electrical Stimulation Machine.

[Text deleted]. who, like the Appellant, has a great deal of experience as a self-employed roofer, testified as to the nature of this work and stated that:

1. he would hire a younger person to carry the bundles of shingles up a ladder to the

- roof and assist him in removing the shingles from the roof.
2. he earned his living directly as a result of his own sweat labour and not as a result of persons that he employed to do the roofing work.
 3. the process by which he took a single shingle from a bundle of shingles, physically placed the shingle on the roof and then nailed the shingle into the roof, was physically hard work which was required to be done at a very steady pace for a period of eight to twelve hours per day.
 4. the work of a self-employed roofer was similar to piece-work in which a worker earns more money the faster he or she works.
 5. the work of a roofer involved a great deal of squatting, kneeling, twisting and bending in order to place a single shingle onto the roof before it was nailed.
 6. this work was repetitive and must be sustained over a period of eight to ten to twelve hours per day in order for a self-employed roofer to earn a decent living.

[Text deleted] further testified that during the course of the day there was a requirement to regularly lift and handle reasonably heavy weights constantly, frequently standing and walking and frequently ladder climbing as well as forcibly gripping tools and equipment. He also testified that all of these activities were performed on a roof where safety concerns are essential when working at heights.

The Appellant testified as to the nature of the work of a self-employed roofer and corroborated the testimony of [text deleted]. He further testified that as a result of the injuries he sustained in the motor vehicle accident he was unable to substantially perform the essential duties of his employment and therefore he was entitled to continue to receive IRI benefits. He stated he was only capable of acting as a supervisor for several hours each day and was unable to perform the

jobs of estimating or doing the physical work required in carrying bundles of shingles up a ladder to the roof and then proceeding to remove shingles from the roof and proceeding to nail new shingles to the roof. He further stated that he could not afford to hire people to replace him and that he was losing money operating his business because he was required to hire staff to carry out the duties he did himself prior to the accident.

Submissions

The Appellant's legal counsel in his submission to the Commission referred to the Occupational Job Demands Analysis Report prepared by [Appellant's occupational therapist] which clearly demonstrated that the physical demands of the job of a self-employed roofer was very heavy work and corroborated the testimony of both the Appellant and [text deleted] as to the nature of this work.

The Appellant's legal counsel further submitted that:

1. the [rehab clinic] Discharge Report dated October 17, 2001 determined that, as a result of the eight week work hardening program, the Appellant had achieved a medium strength demand which was significantly less than the very heavy demand consistent with the job description of the Appellant's occupation.
2. the [rehab clinic] summary further indicated that the Appellant had achieved maximum medical improvement and recommended that he could return to work but with conditions, a medium strength demand being applicable.
3. notwithstanding the conclusions in the [rehab clinic] Discharge Report, MPIC advised the Appellant on November 7, 2001 that the medical evidence indicated he was capable of returning to his pre-accident employment status.
4. as a result, he was no longer entitled to IRI benefits as of October 7, 2001.

The Appellant's legal counsel further submitted that:

1. as a result of the Appellant's objections in respect of his inability to return to his pre-accident employment and [Appellant's doctor #1's] report to MPIC that the Appellant was physically incapable of carrying out his duties, MPIC requested [MPIC's doctor] to review this matter.
2. [MPIC's doctor], in his report to MPIC, concluded that the [rehab clinic] Discharge Report (signed by [Appellant's rehab doctor]) had recommended the Appellant's return to work with some limitations but it also determined that the Appellant had functional limitations which prevented him from doing his work as a roofer.
3. as a result of [MPIC's doctor's] report, MPIC reinstated the Appellant's benefits effective October 8, 2001.
4. surprisingly, several weeks later, MPIC requested [independent doctor] to assess the Appellant.
5. [Independent doctor], after physically examining the Appellant and reviewing the medical information, concluded that the Appellant was physically capable of returning to work.
6. [Independent doctor's] report is inconsistent with the initial reports of [rehab clinic], [MPIC's doctor] and the more recent report of [Appellant's doctor #2].
7. MPIC erred in terminating the IRI benefits based on [independent doctor's] report.

The Appellant's legal counsel concluded his submission by stating that the Appellant had established, on a balance of probabilities, that he was incapable as a result of the motor vehicle accident of returning to work as a self-employed roofer and that MPIC should reinstate the Appellant's IRI benefits.

In reply, MPIC's legal counsel in his submission to the Commission stated that:

1. the medical evidence, on a balance of probabilities, established that the Appellant, as of June 30, 2002, was capable of returning to work full time as a roofer.
2. having regard to the medical reports of [Appellant's rehab doctor], [independent doctor] and [MPIC's doctor], the Appellant, with some assistance, was capable of carrying out the core duties of a roofer.
3. the medical reports of [Appellant's doctor #1] and [Appellant's doctor #2], the Appellant's caregivers, did not provide any objective basis when they asserted that the Appellant was physically incapable of returning to work as a self-employed roofer.
4. [MPIC's doctor], in his Inter-Departmental Memorandum dated July 17, 2003 to MPIC, had reviewed the ranges of motions documented by [Appellant's doctor #2] and noted that they were greater than previously documented by the other caregivers.
5. [MPIC's doctor] was of the opinion that the Appellant's ranges of motions were within normal parameters and, as a result, in [MPIC's doctor's] view the Appellant was likely to be able to return to his pre-collision occupation as a roofer.

MPIC's legal counsel therefore submitted that having regard to the report of [independent doctor], and the most recent reports of [MPIC's doctor] and [Appellant's rehab doctor], the Appellant had not established, on a balance of probabilities, that he was physically incapable of returning to work as a roofer and that the decision of the Internal Review Officer should be confirmed and the appeal dismissed.

Discussion

The Commission is satisfied that the Appellant has established, on a balance of probabilities, that the physical demands of the job of a self-employed roofer were heavy to very heavy work.

The Commission notes that the Occupational Job Demands Analysis Report prepared by [text deleted], an Occupational Therapist, clearly demonstrated that the physical demands of the job were heavy to very heavy work. [Appellant's occupational therapist] stated in her report dated May 16, 2001 that a summary of the critical physical demands of the job of a self-employed roofer were:

- Maximum Lift/Handle/Carry – weights ranging from approx. 100 to 200 lbs/45 to 90 kgs. in a 2-person lift. Maximum weights are handled rarely to infrequently
- Regular Lift/Handle/Carry – weights ranging from 15 to 125 lbs/7 to 57 kgs., handled constantly
- Frequent standing or walking
- Repetitive and sustained work at low and overhead levels – requiring squatting/kneeling, overhead reaching, trunk extension, or trunk forward bending.
- Frequent ladder climbing
- Sustained forceful grip such as when using tools and equipment
- Safety concerns related to working at heights

The Commission finds that the Appellant was a credible witness who testified in a straightforward manner without equivocation. The Appellant is a stable, hard-working family man with no previous problems with stress or illness nor previous lost time from work. [Appellant's rehab doctor], in his report of July 9, 2001, described him as a “pleasant, cooperative and answering all questions the best he could”. The Appellant's testimony as to the heavy physical demands of the job is corroborated not only by the evidence of [text deleted], the self-employed roofer, but by the Job Demands Analysis Report performed by [Appellant's occupational therapist], dated May 16, 2001. The Commission finds that in regard to the testimony of the Appellant and [text deleted] and [Appellant's occupational therapist]'s report, the work performed by the Appellant as a roofer was extremely heavy, physical work.

The Commission finds that the testimony of the Appellant that he is physically incapable of carrying out the core duties of a roofer is also corroborated by the Discharge Summary Report prepared by [rehab clinic], and signed by a number of physicians including [Appellant's rehab doctor]. This report concluded that as a result of the work hardening program the Appellant could achieve a medium strength demand which was less than the required strength for heavy or very heavy work required for his occupation as a roofer. This report indicated that:

1. the Appellant was restricted from performing work that requires lifting and/or pushing or pulling above the capacity of a medium worker.
2. the Appellant was not restricted from performing those aspects of his occupation which require those demands such as supervising his staff, estimating contracts and performing tasks on the roof such as a nailer.
3. the Appellant had functional limitations which prevented him from performing heavy duty occupations.
4. the Appellant had reached maximum medical improvement and that further medical intervention would be unlikely to lead to improvement in the Appellant's condition and therefore unlikely to alter his functional status.

On November 5, 2001 [rehab clinic] provided a report to MPIC and indicated that the Appellant was not carrying out the essential duties as a roofer but was performing only estimating duties and supervisory duties in respect of his employees for several hours each day. Notwithstanding the conclusions in the Discharge Report and the Work Site Visit report from [rehab clinic], MPIC wrote to the Appellant on November 7, 2001 informing him that the medical evidence indicated that he was now capable of returning to his pre-accident employment and, as a result, is no longer entitled to IRI benefits as of October 7, 2001.

There is a contradiction between the physical findings of the [rehab clinic] team and their conclusion which becomes particularly manifest with the conditions imposed for the Appellant's return to work. It is clear from the evidence that the Appellant could not return to work other than as an advisor, without engaging an assistant to help with the lifting, pushing and pulling, which would nullify [rehab clinic's] return to work conclusion. In the Commission's view the limitations imposed by [rehab clinic] in its Discharge Summary would negate the Appellant's ability to return to self employment or even being employed as a roofer by another firm.

The Commission is unable to determine the objective basis upon which MPIC concluded that there was medical evidence which indicated that the Appellant was physically capable of returning to his pre-employment status as of October 7, 2001. Notwithstanding this lack of medical evidence, MPIC determined that the Appellant was no longer entitled to IRI benefits.

This lack of medical evidence is confirmed by what occurred following the decision of MPIC to terminate the Appellant's IRI benefits. The Appellant objected to this decision and in writing advised MPIC that he was physically incapable of continuing to work as a roofer. [Text deleted], who was the Appellant's doctor, wrote to MPIC on December 6, 2001 that the Appellant was physically incapable of carrying out the duties of a roofer and could only supervise. [Appellant's rehab doctor], on review of [Appellant's doctor #1's] report, confirmed his earlier assessment.

As a result of the Appellant's complaints that he was unable to carry out his pre-employment work, the medical opinion of [Appellant's doctor #1], and confirmation by [Appellant's rehab doctor] of his earlier assessment, MPIC requested [MPIC's doctor], who is a member of MPIC's Health Care Services Team, to review the matter. [MPIC's doctor] noted that [Appellant's rehab

doctor] found that the basis of the Appellant's functional limitations were pain related but despite the Appellant's pain focus, [Appellant's rehab doctor] still found that the claimant likely had functional limitations which prevent him from carrying out his heavy duty occupation. [MPIC's doctor] concluded that notwithstanding [rehab clinic]'s recommendation that the Appellant return to work, it also concluded the Appellant had functional limitations which prevented him from doing the job of roofer.

As a result of [MPIC's doctor's] initial report which demonstrated that the [rehab clinic's] Discharge Report was contradictory, MPIC reinstated the Appellant's IRI benefits. It is clear that MPIC erred when it initially terminated the IRI benefits and quickly reinstated these benefits after receiving [MPIC's doctor's] report.

The Commission also notes that on February 19, 2002 MPIC wrote a further letter to the Appellant indicating that MPIC's Health Care Services Team had reviewed the most recent report from [rehab clinic] which determined that no further medical treatment would be effective in dealing with the Appellant's pain complaints and, as a result, MPIC would no longer fund any further treatment beyond February 28, 2002.

Surprisingly, on March 7, 2002, MPIC without any further medical evidence wrote to [Appellant's doctor #1] and advised him:

[The Appellant] is able to perform most of his job requirements with the exception of heavy lifting on the job.

We have outlined a return to work plan for [the Appellant] and would like you to review this program.

Week 1 and 2 March 18, 2001 to March 29, 2002

Return to Medium Work duties (exerting 20-50 pounds of force occasionally, and/or

10-25 pounds of force frequently and/or 10-20 pounds of force constantly to move objects.

Week 3 and 4 April 1, 2002 to April 12, 2002

Return to Very Heavy Work Duties (exerting an excessive 100 pounds of force occasionally and/or 50 pounds of force frequently, and/or an excessive 20 pounds of force constantly to move objects.

The Commission notes that MPIC's letter to [Appellant's doctor #1], dated March 7, 2002, is approximately five weeks after [MPIC's doctor's] report to MPIC dated January 28, 2002 which indicates that the Appellant still had functional limitations which would prevent him from performing heavy duty occupations. Based on [MPIC's doctor's] assessment dated January 27, 2002, MPIC reinstated the Appellant's IRI benefits. However, five weeks later, MPIC advised the Appellant's doctor that the Appellant would have to undertake a work plan and that by the second week of April he would be able to return to very heavy duties. The Commission finds that MPIC's expectation that the Appellant would be able to return to his very heavy duties as a self-employed roofer as of April 12, 2002 flies in the face of [rehab clinic's] Work Site Report, [Appellant's doctor #1's] report of December 6, 2001 and [MPIC's doctor's] report dated January 28, 2002 to MPIC.

It is clear to the Commission that MPIC was not satisfied with [MPIC's doctor's] review of [rehab clinic's] Discharge Report and [Appellant's doctor #1's] report and its own decision to reinstate the Appellant's IRI benefits. This is demonstrated by MPIC's actions, when only a few weeks after they reinstated the Appellant's IRI benefits they were seeking the Appellant's return to work and if this occurred they would then be able to terminate his IRI benefits.

The Commission notes that [independent doctor] conducted an extensive examination on April 30, 2002. He performed significant testing which indicated the Appellant's subjective neck pain to be 5/10 or higher, with 0/10 being normal. [Independent doctor] also carried out *physical examinations* of the Appellant on: (i) **The Neck** – which indicated a left rotation of ½ of normal and a right rotation of 1/3 of normal, left and right side flexions were 1/3 or normal, while extension was ½ of normal. (ii) **The Lumbar Spine** - indicated ½ normal range for flexion and extension, while side flexions were between ¼ and ½ of normal range. (iii) **Right knee** – [independent doctor] expressed some concern for the Appellant's knee function, without identifying the knee, although [Appellant's doctor #2] later described the *right* knee as unstable and the right quadriceps weakened.

The Commission has concerns as to the medical opinion of [independent doctor] that the Appellant was physically capable of returning to work as a roofer. An examination of the range of motion in respect of the Appellant's neck, lumbar spine and knee, as measured by [independent doctor], demonstrates marked reduction in the Appellant's neck, back and right knee movements and is inconsistent with the ability of the Appellant to perform the duties as described by [Appellant's occupational therapist] in her Job Analysis Report.

The Commission also notes that [independent doctor] failed in his report to objectively analyze the nature of the Appellant's work. In his report, [independent doctor] does not indicate what work duties the Appellant was specifically capable of doing as a roofer and what work duties he was incapable of doing as a roofer. [independent doctor] does not consider in arriving at his opinion:

1. the finding by [Appellant's occupational therapist], Occupational Therapist, that the work of a roofer was very heavy; and

2. the finding by [rehab clinic] in their Discharge Summary Report that the Appellant had achieved medium strength demand did not achieve very heavy strength demand which was consistent with the job description of the Appellant's occupation.

The Commission further notes that [independent doctor] indicates that the Appellant could do certain activities but he does not state that the Appellant could perform these activities for an entire work day of eight to twelve hours. The Commission, therefore, is not satisfied that [independent doctor] in his report really considered the nature and scope of the Appellant's essential duties which would have to be performed over an eight to twelve hour period each day. It does not appear from the report that [independent doctor's] examination of the Appellant's range of motion of his neck and back movements took into account that the Appellant be required to carry out these neck and back movements over a period of eight to ten to twelve hours per day.

The Commission, therefore, for these reasons does not give a great deal of weight to the medical opinion of [independent doctor] that the Appellant was capable of returning to work as a roofer.

The Commission as well cannot give a great deal of weight to the medical opinions expressed by [Appellant's rehab doctor] that the Appellant was capable of returning to work as a self-employed roofer. The Commission notes that [rehab clinic's] Discharge Summary Report dated October 17, 2001 indicates the Appellant achieved medium strength demand which is significantly less than the very heavy strength demand consistent with the job description of the Appellant's occupation. This report further found that the Appellant achieved "maximum medical improvement" which translates into "as good as he can get". Despite these observations [Appellant's rehab doctor], who is a principal consultant in this report, concluded that the

Appellant was able to return to his pre-accident employment but with the conditions of medium strength demand being applicable.

This contradiction between the physical findings of [rehab clinic] and their conclusion, is noted by [MPIC's doctor] in his initial report to MPIC. [MPIC's doctor] confirmed [Appellant's rehab doctor's] assessment that the Appellant had functional limitations which prevent him from doing the job of a roofer. The Commission therefore cannot give a great deal of weight to the subsequent opinions of [Appellant's rehab doctor] that the Appellant was capable of returning to work.

[MPIC's doctor], in his initial report to MPIC dated February 25, 2002 concludes that [Appellant's rehab doctor] had determined that the Appellant had functional limitations which would prevent him from performing heavy duty occupations. On June 18, 2002 [MPIC's doctor], after reviewing [independent doctor's] report dated May 13, 2002, agreed with [independent doctor] that the Appellant is capable of returning to work. However, [MPIC's doctor's] opinion, as set out in his letter of June 18, 2002, appears to contradict his findings in his report to MPIC dated February 25, 2002 and his report to MPIC dated July 17, 2002.

[MPIC's doctor], in his report of July 17, 2002, relies on the measurements of the Appellant's range of motion as found by [Appellant's doctor #2] in his report to MPIC. It should be noted that [Appellant's doctor #2] in his report does not provide the objective basis for the tests which he did to measure the range of motion of the Appellant. The Commission notes, however, that [independent doctor] did conduct an extensive examination and his tests illustrate a marked reduction in the function of the Appellant's neck and back and [independent doctor's] findings are inconsistent with [Appellant's doctor #2's] findings. [MPIC's doctor] therefore did not

consider the conflict between [independent doctor's] measurements and [Appellant's doctor #2's] measurements in arriving at his opinion.

It should further be noted [MPIC's doctor] in his report to MPIC dated July 17, 2003 also contradicts [Appellant's rehab doctor's] initial examination of the Appellant on July 9, 2001 where [Appellant's rehab doctor] found "*The Claimant's prognosis for complete restoration of function is fair (and that) the overall prognosis is poor-fair*".

The Commission, therefore, for these reasons, does not give a great deal of weight to the two latter medical reports of [MPIC's doctor] relating to his opinion as to the capacity of the Appellant to return to work as a roofer.

The Commission finds that the medical evidence that MPIC relies upon from [Appellant's rehab doctor], [MPIC's doctor] and [independent doctor] to justify the termination of the Appellant's IRI benefits are contradictory in nature. On the other hand, the initial assessment by [rehab clinic], [Appellant's rehab doctor] and his associates in their Discharge Summary of October 17, 2001 as to the functional limitations of the Appellant and the Initial Report by [MPIC's doctor] are consistent with the findings of [Appellant's occupational therapist], corroborate both the testimony of the Appellant and [text deleted], who the Commission finds are both credible witnesses.

The Commission finds that both [Appellant's doctor #1] and [Appellant's doctor #2], who over a period of time examined the Appellant and interviewed him, are consistent in their medical opinions that the Appellant was incapable of returning to work as a roofer. The Commission therefore accepts the medical opinions of these two doctors in respect of the Appellant's inability

to return to his pre-accident employment. Their opinions corroborate the testimony of the Appellant that he was incapable of returning to work as a result of the injuries he sustained in the motor vehicle accident.

The Commission therefore finds that, having regard to the totality of the evidence presented at the hearing, the Appellant has established, on a balance of probabilities, due to the injuries he sustained in the motor vehicle accident his is unable to substantially perform the essential duties of a self-employed roofer, which was the employment he held at the time of the motor vehicle accident. The Commission therefore determines that MPIC erred in terminating the Appellant's IRI benefits as of June 30, 2002 in accordance with Section 110(1)(a) of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review decision dated March 14, 2003 is, therefore, rescinded.

Dated at Winnipeg this 21st day of July, 2004.

MEL MYERS, Q.C.

DIANE BERESFORD

DEBORAH STEWART