Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-126

PANEL:	**Mr. Mel Myers, Q.C., Chairman** **Ms. Deborah Stewart** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Kathy Kalinowsky.**
HEARING DATE:	**March 10, 2005**
ISSUE(S):	**1. Entitlement to Income Replacement Indemnity benefits beyond July 8, 2003** **2. Was the Appellant capable of returning to the determined employment as a truck driver as of July 8, 2003**
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 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 July 22, 2000. The Appellant was brought to the Emergency Department of the [hospital] and was diagnosed with having an open wound on his left shin associated with a comminuted, displaced, fracture of his tibia and fibula. [text deleted], Orthopaedic Surgeon, in his report to MPIC dated June 4, 2001 states:

> Following further clinical assessment and radiological survey, he was taken to the Operating Room on that day. Under satisfactory anaesthesia, his compound wound of the left shin was thoroughly rinsed with a copious amount of normal saline

> while he was receiving intravenous antibiotic therapy. The wound edges were excised. His tibial fracture was openly reduced through an appropriate exposing incision using interfragmentary screws, together with a ten hole dynamic compression plate which was secured to the shaft of the tibia with eight screws. His shin wound was closed in the usual fashion.
>
> Through a separate incision, his knee joint was exposed. His avulsed tibial tubercle was reduced adequately and stabilised with the help of a lag screw. His tibial plateau fracture was reduced and secured with cancellous screws. For additional stabilisation, his ligamentum patellae was wired to the upper tibia using two tension band wires.

The Appellant was seen from time to time by [Appellant's orthopaedic surgeon] and a course of physiotherapy was undertaken by the Appellant. [Appellant's orthopaedic surgeon] indicated that he last saw the Appellant on June 1, 2001 and he stated:

> 3. His functional deficit is mainly due to ache and stiffness of the left knee joint, in addition to the left ankle and subtalar joint.
>
> 4. Presently he is continuing with his course of physical therapy. He will require to have his left tibial ccmpression plate and screws removed in the future. Whether he needs to have reconstructive surgery for his torn cruciate ligament, remains to be evaluated in the future.
>
> 5. His permanent impairment is mainly due to intra articular fracture of his left knee associated with multiple ligament injuries. <u>The probability of subsequent post traumatic osteoarthrosis of his left knee is considerable</u>. (underlining added)

At the time of the motor vehicle accident the Appellant was a part-time school bus driver and part-time cement truck driver.

On August 21, 2001 [Appellant's orthopaedic surgeon], in a letter MPIC, indicated that he examined the Appellant on August 3, 2001 and reported:

> [The Appellant] stated that he was ready to resume his work as a school bus driver within the next month or two. However, he was concerned about his ability to use his left foot for clutch control during manual gear change. Additionally, he felt that squatting and moving around in order to wash the bus may be problematic for him.

> [The Appellant] was given a certificate stating that he is able to resume work in the Fall of 2001 provided that his bus is equipped with automatic transmission. Additionally he was advised to avoid strenuous activities such as lifting heavy objects or washing his vehicle.

[Appellant's orthopaedic surgeon] provided a further report to MPIC dated May 15, 2002 where he reported that he operated on the Appellant on April 10, 2002 and [Appellant's orthopaedic surgeon] had removed a long compression plate and nine (9) screws from the Appellant's left tibia as well as a stainless steel wire around the Appellant's tibial tubercle.

[Appellant's orthopaedic surgeon] further reported that he then saw the Appellant on April 22, 2002 and noted that the multiple surgical wounds had healed soundly. [Appellant's orthopaedic surgeon] further stated:

> [The Appellant] has an appointment to see me early next month when his fitness for returning to work will be further evaluated.
>
> I am afraid that he still suffers from laxity of the anterior cruciate ligament of his left knee joint due to his road traffic accident on 22nd July, 2000. Whether he requires to have reconstruction of this ligament, remains to be assessed in the future. (underlining added)

The case manager in a Memo to File dated October 1, 2002, stated that he had discussed with the Appellant's employer his return to work as a bus driver and the employer had indicated that he would require a medical report to demonstrate that the Appellant was capable of returning to work. The case manager further stated:

> When I spoke with [the Appellant] about the return to work I noted that we had completed the 180 day determination and determined him into the position of truck driver. Discussed this work with [the Appellant]. The driving of a school bus would be the same as driving a truck. With the school bus he is require (sic) to do a lot of clutching. This would be similar to that of driving a truck. Explained that if he is cleared to return to drive a bus then we would be looking to discontinue IRI.

The case manager further stated that he had sent a fax to [Appellant's orthopaedic surgeon]

requesting an updated report and comments on the Appellant's ability to return to work.

In reply, [Appellant's orthopaedic surgeon] on October 8, 2002 provided a report to MPIC wherein he indicated that he had examined the Appellant on June 5, 2002 and stated:

> Clinically he could tip toe satisfactorily as well as walk on his heels. However, [the Appellant] had difficulty in squatting. His anterior cruciate ligament of the left knee was found to show some evidence of laxity. Standing on one leg, Trendelenburg's sign was negative bilaterally. He had a good range of motion of both hip joints.

[Appellant's orthopaedic surgeon] further stated in this report that he did not at the present recommend the Appellant for surgical reconstruction of the cruciate ligament. [Appellant's orthopaedic surgeon] also stated:

> I found him unable to squat on the left leg on examination. However, he could tip toe and heel walk satisfactorily. Passive range of motion of the left knee was found to be very reasonable. He still showed some laxity of his cruciate ligament. (underlining added)

[Appellant's orthopaedic surgeon] further reported:

> I felt that [the Appellant] could resume his pre accident work on a gradual basis. Being a school bus driver, it may be appropriate for his ability to control all the necessary gadgets in the bus to be tested by a qualified instructor prior to his returning to his job. His injury was mainly on the left knee and leg. {The Appellant] has normal power and range of motion of his right lower limb and, therefore, I feel he will be able to control the acceleration and brake pedals satisfactorily.
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> . . .
>
> 2) His functional deficit at present seems to be due to his inability to squat on the left leg. However, as mentioned above, I feel, with some genuine trial, he should be able to resume his previous work as a school bus driver on a gradual basis. (underlining added)
>
> 3) His permanent impairmants (sic) are due to ongoing post traumatic osteoarthrosis of the left knee joint. (underlining added)
>
> 4) In the distant future, he may require to have some surgical intervention such as left knee replacement arthroplasty. However, I feel that [the Appellant] has made a very reasonable recovery from his severe injury to the left knee and leg.

The case manager produced a Memo to File dated October 16, 2002 wherein [Appellant's orthopaedic surgeon] had indicated that the Appellant should be able to resume his previous work as a school bus driver on a gradual basis. The case manager further stated that a copy of [Appellant's orthopaedic surgeon's] report was provided to the employer and further stated:

> On October 15, 2002 I received a call from [text deleted], [the Appellant's] boss. He advised me that [the Appellant] had given him a copy of the report from [Appellant's orthopaedic surgeon] (sic). He said that with this job he cannot allow a graduated return to work. He said that the drivers are responsible for all duties of driving as well as cleaning and washing the bus. I asked about sending [the Appellant] out with another driver, on a supernumerary basis. He felt that the other driver should not have to be worried if something happens to [the Appellant] while he is driving.
>
> In the end, [Appellant's boss] advised that he will need something to say that [the Appellant] is 100% to return to work.
>
> After speaking with [Appellant's boss], I spoke with [the Appellant]. I advised him of my conversation with [Appellant's boss] and advised that I would have to look at other options.
>
> We talked a bit more about his job. We have determined him into the position of a truck driver. In previous conversation with [the Appellant] we talked about if he is capable of driving the school bus then he would be able to drive a truck. [The Appellant] advised that the job of driving the cement truck may be more physical then (sic) the school bus. He said that he has to climb up the back of the cement truck to wash out or shovel out the cement spout. (underlining added)

MPIC referred the Appellant to the [rehab clinic] for a Functional Capacity Evaluation, who provided an undated report to MPIC sometime in the middle of November 2002. In this report the Appellant was tested on November 13 and 14, 2002 and the report stated:

> **DESCRIPTIONS OF TEST DONE**
> [The Appellant] participated in a standardized IWS Functional Capacity Evaluation (FCE). In addition to the standardized protocol, a simulated clutch with a required force of 55 lbs to operate was utilized throughout the testing procedure in order to assess [the Appellant's] tolerance to same. He operated the simulated clutch 10 times every 1-5 minutes throughout the evaluation. The client gave maximum, consistent effort on both days. (underlining added)

This report concluded:

> In summary, [the Appellant] has the physical capacity to perform those reported duties associated with his position as a school bus driver for [text deleted] School Division. It

> would be appropriate for [the Appellant] to return full time, full duties, however a gradual return to work (GRTW) would prove to be beneficial as would operating an automatic transmission vehicle versus a standard transmission vehicle. The recommendation for a GRTW is based on the length of time [the Appellant] has been away from this type of activity. In the event a GRTW cannot be accommodated, the assessment findings support [the Appellant's] return to full time, full duties. (underlining added)

On November 22, 2002 the case manager prepared a memo to file wherein he indicated he had a discussion with [text deleted], the supervisor of bus services for the [text deleted] School Division, and the case manager informed [supervisor of bus services] that the [rehab clinic] report had not yet been received and he further stated:

> [Supervisor of bus services] asked what our plans were for [the Appellant]. I explained that our goal is always to return people to their pre-accident employment. [Supervisor of bus services] said that he is concerned that [the Appellant] will not be able to do the job. I advised him that there is no medical reason to say that [the Appellant] will not be able to return to the job. I advised him that the main reason I had him assessed at [rehab clinic] was for his ability to do the clutch work on the bus. I advised him that we would be willing to have [the Appellant] return for a period of supernumerary work so that they could send him out with another driver. [Supervisor of bus services] said that he would be concerned that [the Appellant] would have problems while in the process of driving and something could happen.
>
> [Supervisor of bus services] said that the one report makes note that [the Appellant] has some problem with squatting. He said that the bus drivers are supposed to be able to help children if there is an emergency. He said that the drivers are supposed to be able to carry 150lbs the length of the bus. (underlining added)

On November 22, 2002 the Assistant Superintendent – Human Resources, for the [text deleted] School Division, wrote to the Appellant and indicated that the School Division had received a copy of [Appellant's orthopaedic surgeon's] report dated October 8, 2002 which indicates:

> . . . which indicates that you could resume your 'pre-accident' on a gradual basis. The letter goes on to indicate however, that it may be appropriate for his ability to control all the necessary gadgets in the bus to be tested by a qualified instructor prior to his returning to work.
>
> Given the obvious safety concerns. We do need to hear [Appellant's orthopaedic surgeon's] point and we do require you to be tested for your current ability to drive a bus safely.
>
> [The Appellant], I sincerely hope that the testing can be conducted promptly, successful,

> and as a result, you can return to work. I will have [text deleted] – Assistant Transportation Supervisor contact you immediately to discuss how the testing will take place.

On November 29, 2002 the case manager received a report from the Occupational Therapist at the [rehab clinic] which indicated:

> The following outlines information collected on November 29, 2002 at [text deleted]:
>
> A 3800 passenger school bus was assessed using a Chatillon force gauge in order to determine the force necessary to operate the clutch control. Three measurements were taken with the bus turned off as well as with the bus running which yielded no difference between the two situations. The average force required was **46 lbs.** The simulated clutch push force used at the time of [the Appellant's] FCE was **55 lbs**. As such, the objective information collected at [text deleted], supports the recommendation that [the Appellant] could safely resume operating a standard transmission vehicle. (underlining added)

On December 4, 2002 the case manager produced a memo to file which indicated that he had informed [supervisor of bus services] of the [text deleted] School Division of the [rehab clinic] report dated November 29, 2002 and that [supervisor of bus services] had indicated that he would arrange for the Appellant to be tested.

A review of the discussions that the case manager held with the [text deleted] School Division indicated that they were reluctant to return the Appellant to his position as a school bus driver. In a report to file dated March 5, 2003 the case manager stated:

> A full FCE was done at the [rehab clinic]. When we were discussing a return to work, with his school bus employer they wanted to make sure he could do all the functions of his job. They said that driving the bus was only one part of the job. They said that [the Appellant] would have to do inspections of the bus which includes climbing up to the engine area and to inspect under the vehicle. Also he is required to carry an injured child or help children off the bus, in case of an emergency. They advised that the driver is also responsible for washing and cleaning their bus. It was felt that a full FCE would satisfy their concern and he would be allowed to return to work. Unfortunately this did not happen as planned. (underlining added)

> Once [the Appellant] had returned to work as a school bus driver he would also return to his cement truck driving job in the summer and he would then be doing the same work as prior the accident.
>
> I had [text deleted] at IRI provide me with the NOC job descriptions of the jobs as truck and bus drivers. Truck drivers include lone (sic) and short hauling under code 7411. School bus drivers are in the next code 7412. The job description for school bus drivers just notes the driving aspect of the job. In the truck driving job they list some of the items (perform pre trip inspection, communicate with dispatcher on Radio, oversee all aspect of the vehicle) and the employment requirements are very similar.
>
> I will wait a couple weeks to see what happens with his work with the school division. If it looks like they will not give him his job back then we will have to look at ending IRI on the basis that he can do his job and look at providing a temp extension on his IRI.
>
> There are currently IRI reserves for about 2 months. This should be sufficient for the period to decide on end of entitlement and the temp extension.

The case manager produced a document for file dated July 8, 2003 wherein he indicated:

> The focus of [the Appellant's] rehab was to return his (sic) to his pre-accident employments as a school bus driver and as a cement truck driver. The 180 day determination process determined [the Appellant] into the position of a truck driver. As the both pre-accident employments are similar to the truck driving determination I continued with trying to return him to his pre-accident employers. Cement truck driving and school bus driving are listed in the same category as truck drivers in the NOC Motor Vehicle and Transit Drivers. Cement truck drivers are listed under the truck driver code 7411 and bus drivers are in the next code 7412.
>
> An FCE was done at the [rehab clinic]. The focus of the FCE was [the Appellant's] bus driving job and not truck driving in particular. The FCE noted that [the Appellant] was able to return to his employment as a bus driver.
>
> The FCE was in March and the cement truck driving job would not become available until the end of May. I felt that when [the Appellant] returned to school bus driving then we would consider him capable of truck driving.
>
> [The Appellant] had attempted to return to his school bus driving job but they do not have a position for him. Another driver had taken over his route and there are no openings at this time. [The Appellant] also contacted the employer for his cement truck job. They had also replaced him and do not have work for him. [The Appellant] has also called the other cement company in [text deleted]. He had work there a few years ago and they also have no openings.
>
> I spoke with [the Appellant] a while back and advised that we were going to have to consider him as being able to do his perform the duties of his determined employment. I advised that he would be entitled to a temp extension of his IRI. In his case the period

> would be for one year. I had not acted on this yet. I had spoken with [the Appellant] a couple times since then and he says that he has been applying for jobs but had not had any luck.
>
> I spoke with [the Appellant] again on July 8, 2003. He advised that he had not yet found any employment. I again reviewed that the FCE had deemed him capable of doing the bus driving job and that I felt that was close to the same job as a truck driver. I advised that I would at this time send him a decision letter ending his IRI. Again explained that he would be entitle (sic) to the temporary extension of IRI, this in his case is for a period of one year. [Fhe Appellant] understood this and did not disagree. I advised that the letter would be sent out shortly. (underlining added)

Case Manager's Decision

On July 8, 2003 the case manager wrote to the Appellant and stated:

> Further to our discussion of July 8, 2003, wherein we discussed the end of your entitlement to IRI and the Temporary continuation of IRI. Below is an explanation of this decision
>
> As discussed, the Functional Capacity Evaluation done at the [rehab clinic] confirms that you are capable of holding your determined employment. As such you are no longer entitled to IRI benefits. As you have lost your employment as a result of the accident you are entitled to a temporary continuation of IRI, in order that you may find alternate employment. In your case the temporary continuation is for the period of one year. This one year period starts from the date of this letter.
>
> Please note that the temporary continuation benefits are paid on the condition that you actively seek employment.

Internal Review Officer's Decision

On March 19, 2004 the Appellant applied for a review of the case manager's decision to terminate his IRI after July 8, 2004. In his Application for Review the Appellant stated:

> These are some of my reasons for appealing the decision of canceling my job replacement income after July 8/04.
> 1. I have not found a job yet. Due to my injury's (sic) sustained on July 22/2000. I held two job positions prior to accident.
> 2. I cannot work fast enough for an employer or safe enough due to my injury's (sic).
> 3. I experience stiffness, pain, weakness & limping due to my injury's (sic) along with unstability (sic) at times.
>
> . . . .

> To summarize my appeal, I am a [text deleted] year old man with approximately 25 years work experience in the trucking field and from knowing these types of jobs I know that physically I cannot keep up with the demands of these types of jobs due to my injury.
> I have gone looking for jobs and the employer asks me what I have been doing for the past 3 ½ years, I explain it to them and then I do not hear from them again. I do not feel that I will be able to find a job and earn what I did before my accident again and I should not have to take a cut in pay because of an accident that was not my fault. I feel that my age and injury will hinder my chances of employment with a decent wage. The last two jobs I held before my injury was cement mixer driver and school bus driver. My adjuster [text deleted] gave me the application for review of injury claim decision on March 19, 2004, so it could be reviewed.
> Thank you for your time.

The Internal Review Officer forwarded a memo to the case manager on July 11, 2004 wherein she stated that when she was attempting to dictate her decision on the file she noted:

> Finally, the FCE was done on school bus driver but the determined employment was a truck driver. I need to know as soon as possible what force is required to puch (sic) in a truck clutch. We know a bus is 46 lbs and we know he is capable of 55 lbs but I don't know what force is required for a truck clutch. Can you tell me that by the end of the day on Monday July 12th?

The Internal Review Officer issued her decision to the Appellant dated July 13, 2004 wherein she confirmed the decision of the case manager and rejected the Appellant's Application for Review wherein his IRI was terminated effective July 8, 2003 on the grounds that the Appellant was capable of holding his determined employment as a truck driver. In the reasons for the decision the Internal Review Officer stated:

> A Functional Capacities Evaluation was done at the [rehab clinic] November 13 and 14, 2002 and a report was provided to your Case Manager November 22, 2002. An additional letter was provided November 29, 2002 advising that the average force required to push down the clutch of a 3800 passenger school bus was 46 lbs and your F.C.E. reported that you were capable of pushing down 55 lbs.
>
> You may have already noted that the Functional Capacity Evaluation dealt with your job as a school bus driver and cement truck driver, however, your determined employment is that of truck driver. In the National Occupational Classification, truck drivers are listed under number 7411 and school bus drivers are listed under number 7412. <u>It is clear from the F.C.E. that you were capable of performing the required duties of a school bus driver. The duties of a truck driver are quite similar and in fact may be less physically taxing than the 150 lbs that you are required to carry on a seldom basis with a school bus</u>

> driver job. It would seem that the cleaning duties required of the school bus would require the same physical abilities that would be required as a truck driver in securing their loads. The only difficulty I have with your Functional Capacity Evaluation is that there was a recommendation that you operate an automatic transmission vehicle versus a standard transmission vehicle due to osteoarthritis and the strong likelihood that you will experience progressive difficulties over time associated with arthritis to which a standard transmission vehicle may contribute, particularly with prolonged use. However, despite this, the F.C.E. recommended that you are fully capable of returning to your pre-accident employment as a school bus driver using a standard transmission and therefore I see no reason to disagree with your Case Manager's decision and I am confirming that you are capable of returning to your determined employment as a truck driver January 8, 2003. (underlining added)

Appeal

The appeal hearing was held on March 10, 2005. The Appellant appeared on his own behalf and MPIC was represented by Kathy Kalinowsky.

The relevant provision of the MPIC Act is 110(1)(a) which states:

> **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;

At the appeal hearing the Appellant testified that:

1. he desired to return to work as a school bus driver but that the [text deleted] School Division found a replacement and that they were reluctant to return him to his position.
2. he had complained to the Union but the Union had not been able to assist him to regain his employment.
3. he would be able to drive a school bus but did not feel that in an emergency he would be capable, having regard to the condition of his left knee, to be able to jump off the back of the bus in order to assist children to leave the bus.
4. the school division had a legitimate safety concern in respect of his employing him as a

school bus driver.

He further testified that:

1. as a result of the termination of his IRI on July 8, 2003 he needed to earn a living and therefore he was forced to continue to work as a truck driver.
2. during the course of his work shift as a truck driver he was required to constantly push down on the truck clutch and this resulted in a great deal of pain to the knee that he had injured in the motor vehicle accident.
3. the force he was required to push down the clutches in respect of the two trucks he had driven far exceeded the force which he was required to push down the clutch in respect of the 3800 passenger school bus.
4. he tested the force required to push down a truck clutch while he was operating a truck and his test result indicated a force of 68 lbs of pressure.
5. in this test he used a bathroom scale which he acknowledged may not be totally accurate.
6. although he was capable of pushing down 55 lbs of pressure as set out in the [rehab clinic] Functional Capacity Evaluation, he could not on a continuous basis, during a work shift, push down a truck clutch because the constant clutching caused extreme pain to his left knee.
7. after working a regular shift on the truck his left knee was stiff and painful, he was extremely exhausted, and he was unable to carry out his normal household chores which included looking after his extremely ill wife, who was suffering from arthritis and fibromyalgia.
8. in these circumstances he was unable to undertake long haul trucking assignments because this would take him away from his home for long periods of time and there

would be no one available to assist his wife.

In her submission legal counsel for MPIC stated:

1. the Functional Capacity Evaluation conducted by the [rehab clinic] did not attempt to measure the average force required to push down the clutch of a truck and therefore MPIC was not in a position to assert that the Appellant was physically capable of driving a truck if the force required to push the truck clutch was above 55 lbs.
2. she had personally conducted an investigation to determine that various truck manufacturers had been unable to establish an average force required to push down a clutch of their respective trucks.
3. she determined that some trucks required a force less than 55 lbs and some trucks required a force beyond 55 lbs.

MPIC's legal counsel also submitted that:

1. notwithstanding that MPIC was unable to establish the average force required to push down a clutch, the Appellant had demonstrated that he was capable of returning to his pre-employment occupation as a truck driver since he had been employed by two different trucking companies after the termination of his IRI benefits.
2. the Appellant, at the time of the appeal hearing, was employed as a truck driver by a trucking company.
3. the Internal Review Officer had correctly applied the provisions of Section 110(1)(a) of the MPIC Act in determining that the Appellant was capable of being employed as a truck driver and, as a result, the appeal should be dismissed.

Discussion

The Internal Review Officer, in arriving at her decision dated July 13, 2004, indicated that the Functional Capacity Evaluation conducted by the [rehab clinic] dealt with the Appellant's job as a school bus driver and cement truck driver. The Commission finds that this statement is inconsistent with the comments of MPIC's case manager's memo to file dated July 8, 2003 wherein the case manager stated:

> The focus of [the Appellant's] rehab was to return his (sic) to his pre-accident employments as a school bus driver and as a cement truck driver.

And further stated:

> An FCE was done at the [rehab clinic]. The focus of the FCE was [the Appellant's] bus driving job and not truck driving in particular. The FCE noted that [the Appellant] was able to return to his employment as a bus driver.

Although MPIC had determined the Appellant's employment as a truck driver, the Appellant had indicated in discussions with the case manager that he preferred to return to work as a school bus driver. However, the focus of the Functional Capacity Evaluation, which MPIC had requested the [rehab clinic] to conduct, was to determine whether or not the Appellant was physically capable of operating a 3800 passenger school bus and not a truck. This assessment demonstrated that the Appellant was physically capable of operating a 3800 passenger school bus.

Unfortunately, the school division employer concluded that the Appellant was not physically capable of carrying out all of the essential duties of a school bus driver. In particular, the School Division had safety concerns as to the Appellant's ability to deal effectively in an emergency situation while he was operating a school bus occupied by school children. At the appeal hearing the Appellant's testimony confirmed the School Division's safety concerns. The Appellant informed the Appeal Commission that in emergency situations he would not be able to jump off the back of the school bus in order to assist the students from evacuating the bus through the

back exit of the bus.

As a result of the decision of the School Division not to employ the Appellant, the Appellant was unable to return to his previous employment as a school bus driver. Unfortunately, the case manager, without conducting a proper investigation as to the physical capacity of the Appellant to operate a commercial truck, concluded that the Appellant could operate a commercial truck and, as a result, terminated the Appellant's IRI.

It appears to the Commission that an appropriate investigation to determine the physical capacity of the Appellant to operate a commercial truck may have included, for example, for the case manager to arrange a Functional Capacity Evaluation to determine whether the Appellant had the physical capacity, during a normal work shift, to push down on the truck clutches of the several trucks the Appellant was operating while he was employed by a trucking company. The Commission finds that the case manager, having made no investigation as to the physical capacity of the Appellant to operate a truck, concludes that the case manager had no objective basis to determine that the Appellant in fact was capable of returning to work as a truck driver.

As indicated earlier, the Internal Review Officer had raised a concern in respect of the force required to push down a truck clutch in a memorandum she forwarded to the case manager on July 11, 2004 wherein she stated:

> Finally, the FCE was done on school bus driver but the determined employment was a truck driver. I need to know as soon as possible what force is required to puch (sic) in a truck clutch. We know a bus is 46 lbs and we know he is capable of 55 lbs but I don't know what force is required for a truck clutch.

However, an examination of the Internal Review Officer's decision indicates that:

1. she had not received any information to satisfy her concern as to the force required to

push down a truck clutch when she issued her decision on July 13, 2004.

2. MPIC failed to conduct or cause to be conducted any investigation to determine the force that was required to push down a truck clutch on any of the trucks that the Appellant was operating prior to the time the Internal Review Officer's decision was issued on July 13, 2004.
3. The Internal Review Officer arrived at her decision by determining without any evidence that since the duties of a truck driver were similar to that of a bus driver, and that the truck driver duties were maybe less physically taxing, the Appellant was physically capable of driving a truck and therefore was capable of returning to his determined employment as a truck driver on July 8, 2003.

The Commission finds that:

1. the Internal Review Officer did not have sufficient evidence to establish that the duties of a truck driver were similar to that of a bus driver and that these duties were maybe less physically taxing.
2. the Internal Review Officer had no objective basis to determine that since the Appellant was capable of pushing down the clutch on a 3800 passenger school bus he was capable of pushing down the clutch of any truck that he operated.
3. as a result, the Internal Review Officer did not have a factual foundation to determine that the Appellant was physically capable of operating a truck for an entire work shift without causing both a great deal of pain to his left knee and fatigue.

The Commission also notes that the Internal Review Officer failed to give sufficient weight to the serious motor vehicle accident injury the Appellant suffered to his left knee which [Appellant's orthopaedic surgeon] reasonably expected would result in the Appellant suffering

from osteoarthritis to that knee in the future. Although the Internal Review Officer referred to the Appellant's osteoarthritis and the strong likelihood he would experience progressive difficulties over time with arthritis, the Internal Review Officer did not address the issue at that time as to whether or not the constant clutching by the Appellant in the operation of a truck caused him a great deal of pain in the course of an entire work shift.

[Appellant's orthopaedic surgeon] had clearly documented in reports to MPIC that the Appellant had suffered a serious motor vehicle accident injury to his left knee and required surgery. [Appellant's orthopaedic surgeon] in his report to MPIC dated June 4, 2001 stated:

> Through a separate incision, his knee joint was exposed. His avulsed tibial tubercle was reduced adequately and stabilize (sic) with the help of a lag screw. His tibial plateau fracture was reduced and secured with cancellous screws. For additional stabilization, his ligamentum patellae was wired to the upper tibia using two tension band wires.

In this report [Appellant's orthopaedic surgeon] further stated:

> 3. His functional deficit is mainly due to ache and stiffness of the left knee joint, in addition to the left ankle and subtalar joint.
>
> . . . .
>
> 5. His permanent impairment is mainly due to intra articular fracture of his left knee associated with multiple ligament injuries. <u>The probability of subsequent post traumatic osteoarthrosis of his left knee is considerable</u>. (underlining added)

The Appellant testified at the appeal hearing in a straightforward and direct manner, without equivocation, and the Commission finds him to be a credible witness and accepts his evidence on all issues in dispute between the Appellant and MPIC. As a result, the Commission accepts the Appellant's testimony that:

1. prior to the motor vehicle accident he had no physical problems relating to his left knee in operating a truck during the course of a work shift.

2. after the motor vehicle accident injury he experienced extreme pain to his left knee while constantly pressing down on a truck clutch while operating a truck during his entire work shift;
3. the motor vehicle accident injury he sustained to his left knee caused and/or materially contributed to the Appellant's complaints of extreme pain to his left knee while operating a truck.
4. after working a full shift as a truck driver the Appellant, as a result of the pain to his knee and resulting fatigue, was unable to carry out his normal daily activities and assist his sick wife.
5. after the motor vehicle accident he did not voluntarily return to work as a truck driver but was forced to do this work and suffer the pain to his left knee because he needed to make a living and because he had no training to obtain employment other than as a truck driver.

The Commission therefore determines that:

1. MPIC failed to conduct a proper investigation to determine whether or not the Appellant had the physical capacity to operate a truck during an entire work shift prior to terminating his IRI.
2. the Appellant suffered a serious injury to his left knee as a result of the motor vehicle accident which required major surgery and caused a permanent impairment to the Appellant's left knee.
3. MPIC failed to give sufficient consideration to the significance of the serious motor vehicle accident injury the Appellant suffered to his left knee and to [Appellant's orthopaedic surgeon's] medical opinions in respect of this injury.
4. the Appellant's complaints of pain to his left knee while operating a truck for an

entire work shift are consistent with the diagnosis of osteoarthritis which [Appellant's orthopaedic surgeon] made in respect to the Appellant's left knee.

5. having regard to the testimony of the Appellant and the medical opinions of [Appellant's orthopaedic surgeon], the Commission is satisfied, on the balance of probabilities, that the motor vehicle accident injury the Appellant sustained to his left knee has caused or materially contributed to the Appellant's complaints of extreme pain while operating a truck for a full work shift.
6. in these circumstances it is unreasonable to require the Appellant to work as a truck driver.

For these reasons the Commission finds that the Appellant has established, on the balance of probabilities, that as a result of the injury he sustained in the motor vehicle accident he is physically incapable of returning to work as a truck driver.

In the alternative, if the Commission is in error that there is no physical basis for the pain which precludes the Appellant from returning to work as a truck driver, the Commission accepts the Appellant's testimony that this pain to his left knee is real and severe and was caused by the motor vehicle accident. It is therefore unreasonable in these circumstances to require the Appellant to work as a truck driver.

Judicial treatment of subjective pain complaints in disability cases was 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.

*McCulloch v. Calgary (City) (*1985), 15 C.C.L.I. 222 (Alta. Q.B.)

The Commission therefore determines, for the reasons outlined herein, that the Appellant has established, on the balance of probabilities, that due to the motor vehicle accident injuries he sustained to his left knee, which resulted in extreme pain to this knee while operating a truck, he is unable to hold the employment he held as a truck driver at the time of the motor vehicle accident in accordance with Section 110(1)(a) of the MPIC Act. As a result, the Appellant's appeal is allowed and the Internal Review Officer's decision dated July 13, 2004 is rescinded. The Appellant shall be entitled to IRI benefits from the date of the termination of his IRI to the date of reinstatement of IRI, together with interest, less any income he earned as a result of any employment during that period of time.

Dated at Winnipeg this 6th day of April, 2005.

MEL MYERS

DEBORAH STEWART

PAUL JOHNSTON