

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-01-25**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms. Yvonne Tavares
Ms. Deborah Stewart

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

HEARING DATE: November 29 and 30, 2001

ISSUE(S): Termination of Income Replacement Indemnity ('I.R.I.')
benefits.

RELEVANT SECTIONS: Sections 81(1)(a) and 110(1)(a) of The Manitoba Public
Insurance Corporation Act (the 'MPIC Act') and Section 8
of Manitoba Regulation 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, [text deleted], carries on a mixed farming operation, consisting of grain, forage and cattle farming, on approximately 5,000 acres of land. He owns the operation in conjunction with his brother and his mother, and devotes his full-time attention to the operation of the farm.

[The Appellant] was involved in a motorcycle accident on May 6, 1995, when he swerved on the highway to avoid hitting a deer. As a result of the accident, he sustained a wrist fracture to his right scaphoid bone and a dislocated lunate.

[The Appellant] underwent considerable rehabilitation, including surgical procedures to his right hand, although the procedures were not successful in uniting the fractured bone in his hand. As a result, [the Appellant] continues to experience difficulties with his right wrist and has experienced a loss of strength, flexion, agility and restriction of movement in his right hand. These impairments to [the Appellant]'s right hand have resulted in functional limitations with regard to his occupational duties as a farmer.

The inability to resume his pre-accident occupation enabled [the Appellant] to qualify for Income Replacement Indemnity ('I.R.I.') benefits pursuant to Section 81(1) of the MPIC Act, which provides as follows:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment.

[The Appellant] commenced receiving I.R.I. benefits in the approximate amount of \$1,488 per month, from the seventh day following his accident.

[The Appellant's] claim has been subject to various claims decisions, Internal Review decisions, and a previous Automobile Injury Compensation Appeal Commission decision. In his decision dated January 10, 2001, the Internal Review Officer succinctly summarized the history of [the Appellant's] claim for I.R.I. as follows:

A summary of previous income replacement indemnity decisions rendered is relevant to the issue I presently have before me. In that regard the following has taken place, namely:

- On May 7, 1997 it was the Corporation's decision to reduce your income replacement indemnity entitlement by 50%. You did not seek an internal review of that decision.
- On August 28, 1997 your income replacement indemnity benefits were terminated. That decision was upheld by the Internal Review Decision of [text deleted] dated January 21, 1998.
- On July 20, 1998 the Senior Injury Specialist, [text deleted] issued a decision that as of April 9, 1998 you were entitled to receive 26% of your income replacement indemnity benefits on the basis that you were capable of performing 74% of your farming duties. You sought an internal review of that decision and on January 19, 1999 I provided an Internal Review Decision allowing you 50% of your income replacement indemnity entitlement. Having appealed that Internal Review Decision to the Automobile Injury Compensation Appeal Commission in Reasons for Decision dated July 22, 1999, they allowed your appeal and directed that you be entitled to receive 75% of your full income replacement indemnity entitlement.
- In the meantime, on February 5, 1999 [Senior Injury Specialist] had proceeded to provide a decision, which reduced your full income replacement indemnity entitlement between January to April by 29% and effective May 1, 1999 by 78%. You sought a review of that decision which resulted in my rendering an Internal Review Decision on October 28, 1999 allowing you 75% of your full income replacement indemnity entitlement which decision reflected the Reasons for Decision of the Commission in July, 1999.

Subsequent to the decision of this Commission on July 22, 1999, a further occupational therapy functional assessment was carried out on August 20, 1999, by [text deleted], an occupational therapist with [text deleted]. The purpose of the assessment was to review [the Appellant's] physical abilities, functional tolerances, and ability to perform job-specific physical activities. His physical and functional capacities were then compared to the physical demands of his job in order to determine his ability to safely and consistently manage job tasks at that time.

In her report dated August 23, 1999, [Appellant's occupational therapist #1] had the following summary and recommendations:

[The Appellant's] physical and functional abilities were compared to the physical demands of his job as outlined in a Physical Demands Analysis Report dated in June

1998. [The Appellant] does not demonstrate the physical and functional abilities to perform the following job duties without a significant increase in his physical symptoms:

- Activities involving end range wrist flexion, extension, and side to side movements
- Activities such as completing repairs, picking up buckets, driving, pushing cattle, hammering, fixing fence, shoveling, shifting gears on tractor, lifting containers of chemicals, or lifting equipment parts up to 50 lbs.

[The Appellant] reports he has modified his work methods during some of the above activities to minimize aggravation of the right wrist. For example, he avoids right-hand use while driving, he states he braces the shovel against his body when shoveling and he carries equipment or buckets on the left side. Therefore it is difficult to specify the percentage of his job tasks that he is able to perform at this time considering that he has developed alternate techniques to manage some job tasks, and job site modifications may assist him to manage other job tasks.

Other physical demands of the job described by [the Appellant] that appear to be beyond his demonstrated physical and functional capacities include the following:

- Assisting during calving
- Carrying buckets of feed in right hand weighing 26 lbs.
- Operating baler

The following recommendations, job modifications, and specialized equipment may increase [the Appellant's] functional capacities and ability to manage job demands:

- Use of a right wrist splint - it appears that some job activities may force the wrist into end range of movement contributing to aggravation of the joint. Use of a splint may protect the joint against unnecessary aggravation and potentially improve grip strength and functional tolerances. Recommend use of an elasticized wrist splint with rigid wrist support.
- Use of ergonomic hand tools that are designed to minimize wrist extension or wrist rotation during use.
- Assess the potential to modify controls on farm equipment if the shifting resistance or wrist position aggravates the wrist joint.

The assessment results were reviewed with [text deleted], Rehabilitation Consultant. The following occupational therapy follow-up plan was discussed:

1. Job site visit to further assess client's ability to manage the specific job activities identified as potentially aggravating to the right wrist. Determine the potential to modify these job activities. Assess the percentage of job duties that client is able to perform.
2. Provide wrist splint and assess impact of use of splint on right wrist strength, work endurance, and ability to manage job demands.

As part of the follow-up to her previous report, a job-site visit appointment was completed by [Appellant's occupational therapist #1] on October 8, 1999. During the job-site visit to [the Appellant's] workplace, the physical demands of his job as a mixed farmer were reviewed and were found to be consistent with those noted in the Physical Demands Analysis Report dated June 29, 1998, previously completed by [text deleted], occupational therapist. In her report dated November 2, 1999, specific job tasks that were beyond [the Appellant's] functional abilities were identified. These specific job tasks included the following:

1. Operating machinery – [the Appellant] reports that operating the right-hand controls on farm machinery is difficult and aggravates right-hand pain.
2. Fencing – [the Appellant] reports that twice per year for a three-week duration at four hours per day he is required to survey the fencing on the farm property and repair any damaged fencing. [The Appellant] reports difficulty with driving staples into the fencing to repair barbed wire or to reattach wire and difficulty with replacing fence-posts, considering the weight and tool use required.
3. Feeding cattle/carrying pails of feed – [the Appellant] reports that he carries one pail of feed at a time in the left hand over an average distance of one hundred feet to a maximum distance of one hundred yards.
4. Welding – [the Appellant] describes difficulty with gripping a welding/cutting torch in his right hand for extended periods of time while welding. His complaints correlate with decreased endurance for sustained grip of the right hand, as noted during the functional assessment.
5. Use of other hand tools – [the Appellant] reported problems with using hand tools against significant resistance in the right hand or both hands. Tools used included wrenches, ratchets, hammer and screwdrivers when completing repairs around the farm or on machinery.

6. Barn work – Sweeping barn, shovelling or other tasks requiring sustained grip of tools was reported to aggravate right hand pain after extended periods of time.
7. Calving – [the Appellant] reports that if complications occur during calving, he is required to turn the calf or pull on the calf during calving, requiring bilateral grip and resistive pulling on the calf.

Throughout the report, [Appellant's occupational therapist #1] made several recommendations for modifications and alternate equipment in order to increase [the Appellant's] independence with tasks and improve his efficiency with performing tasks. However, she noted that specific tasks, such as installing fence-posts and selected circumstances during calving, were likely to remain difficult for him, requiring hired help.

[Appellant's occupational therapist #1] also prepared an estimate of the number of hours worked and the time required to complete specific job duties through interviews with [the Appellant]. Based on her estimates of his work capacity, and analyzing that through the various seasons of the year, she concluded that [the Appellant] was functioning on the job at approximately 74% compared to prior to right hand injury.

In consultation with MPIC's case manager, the occupational therapist, the rehabilitation consultant, and the Appellant, it was determined that the Appellant's rehabilitation goal would be to return to farming doing all of the duties required of such an occupation. In furtherance of this objective, equipment modifications were discussed with and suggested by the Rehab Engineering Department of the [hospital] in [text deleted]. The following equipment modifications were agreed to:

1. Hydraulic joystick modifications to two tractors;

2. The purchase of an automated baler;
3. The purchase of a Mig welder;
4. The purchase of a four-inch electric grinder;
5. Fencing tools and clips;
6. Three additional batteries for [the Appellant's] drill to allow the use of the clips;
7. Six spinner knobs for the tractor's steering wheels;
8. Automatic cattle squeeze for the handling of the cattle.

The goal of implementing these additional equipment modifications was to increase [the Appellant's] ability to function in the majority of his farming duties and thereby terminate his I.R.I. benefits.

On June 5, 2000, an occupational therapy Job Demands Analysis was conducted by [text deleted], an occupational therapist with [text deleted], to determine the percentage of work tasks which [the Appellant] could perform. At this point in time, not all of the equipment modifications and recommendations had yet been put in place. The occupational therapist estimated [the Appellant's] abilities based on the anticipated improvements of the modified equipment and the continuing farming arrangement with his brother.

On August 16, 2000, [Appellant's occupational therapist #3] of Transitions Rehabilitation Consulting Services provided a report identifying a revised percentage of duties based on a monthly basis of [the Appellant's] tasks. The report was based on anticipated increases to [the Appellant's] function related to fencing duties as a result of the provision of the automatic stapler. Her conclusion was that the Appellant was capable of completing in excess of 90% of the duties involved with farming.

MPIC's case manager wrote to the Appellant on August 24, 2000, to advise him that his I.R.I. benefits had concluded on August 20, 2000, since [the Appellant] was capable of performing the essential duties of his self-employment as a farmer. MPIC had based its decision on the

occupational therapy assessment completed June 11, 2000 and August 16, 2000 by [Appellant's occupational therapist #3]. It was their opinion that the implementation of the equipment modifications and the purchase of several items of new equipment had increased the level of function with respect to the farm-related duties to the point that the Appellant was now able to complete in excess of 90% of these duties.

The Appellant sought an Internal Review of the case manager's decision. At the Internal Review hearing, [the Appellant] indicated that for the most part, the status of his injury and the nature of the farming operation had remained the same. The Internal Review Officer noted that the only real change that had taken place was the purchase of certain equipment by MPIC to assist [the Appellant] in his farming operation. Accordingly, the Internal Review Officer requested that [Appellant's occupational therapist #3] provide a further narrative report addressing the impact that the new equipment had had on her assessment.

In her report dated December 3, 2000, [Appellant's occupational therapist #3] provided the following response:

Impact of New Equipment

It is difficult to comment on the impact of equipment provided prior to my assessment. As you have indicated, my analysis was completed in a different manner than the one completed by [Appellant's occupational therapist #2]. As a result, it is difficult to extrapolate the impact the machinery has had on [the Appellant's] functional abilities.

[the Appellant] did indicate, however that he felt he would be able to complete cattle feeding with modifications to the [text deleted] tractors in place. The client's estimation of his ability to perform baling and hauling bales appears to have increased since the modification of the [text deleted] tractor and purchase of a new baler. It was my estimation that [the Appellant's] fencing abilities would increase from 25% to approximately 63% upon provision of an automatic stapler (based on his previously reported limitations and his demonstrated ability to operate this device). It is my opinion that provision of a cattle squeeze gate would have increased his ability to process cattle, but the exact percentage difference cannot be interpreted by comparing the two reports.

The Internal Review Officer, in his decision dated January 10, 2001, commented as follows:

Notwithstanding the fact that your injury has remained static, there are two subsequent developments that warrant revisitation of your IRI entitlement, namely:

1. The purchase and modification of equipment by MPI to assist in the farming operation
2. The reassessment of your responsibilities and capabilities by an Occupational Therapist [Appellant's occupational therapist #3] of [text deleted].

According to [Appellant's occupational therapist #3's] assessment of June 11, 2000 you are capable of performing 90% of your farming duties on an overall basis. In arriving at that determination, [Appellant's occupational therapist #3] broke down all of your duties on a month to month basis. Her methodology and background satisfied the concern previously expressed by the Commission. In that regard, [Appellant's occupational therapist #3] provided an outline of her background in her letter to me of December 3, 2000 as:

“Background

I was raised on a 5500 acre mixed grain and cattle farm in rural Manitoba. This background has provided me with first hand experience of the lifestyle commitments required of farmers and their families. Prior to attending University to obtain my current degree, I was a long distance truck driver, which has provided me with background knowledge of the operation of heavier equipment. I have approximately four years experience in work-related rehabilitation and am currently self-employed as a rehabilitation/occupational therapy consultant and specialize in working with individuals whose rehabilitation involves driving or farming.

The most valuable information this background has provided with respect to my present occupation is the appreciation that the essential duties of a farmer cannot be generalized to any specific individual. Variables such as size of operation, size and age of equipment, type of land, and geographical locations are a few which make every operation unique. It is also difficult to generalize an individual's duties as uncontrollable elements such as weather make an individual's duties unique and varied from year to year”.

I am of the view that the methodology employed by [Appellant's occupational therapist #3] is a reasonable and accurate way to assess your capabilities.

....

Having had the opportunity to review your entire file, including the medical reports, I am of the view that you are capable of substantially performing the essential duties of your employment in accordance with Section 8 of Manitoba Regulation 37/94 which states:

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 render 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.

Having arrived at that conclusion, I am upholding [Senior Injury Specialist's] decision of August 24, 2000 and dismissing your Application for Review.

It is from this decision that [the Appellant] now appeals to this Commission.

The issue before this Commission is whether or not [the Appellant's] I.R.I. benefit was properly terminated by MPIC on August 20, 2000. In order to determine that issue, the Commission must decide whether or not the provisions of Section 110(1)(a) of the MPIC Act were properly applied to terminate [the Appellant's] I.R.I. entitlement on August 20, 2000. Section 110(1)(a) of the MPIC Act provides 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.

Section 8 of Manitoba Regulation 37/94 is also applicable. It provides as follows:

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.

The previous decision of this Commission, dated July 22, 1999, determined that [the Appellant] was capable of performing 25% of his farming duties and, accordingly, reinstated his I.R.I. benefits at 75% of his original Income Replacement Indemnity benefit.

As the Internal Review Officer states in his decision dated January 10, 2001, since the decision of the Commission, there are two subsequent developments that warrant revisitation of [the Appellant's] entitlement, namely:

1. the purchase and modification of equipment by MPIC to assist in the farming operation;
and
2. the reassessment of [the Appellant's] responsibilities and capabilities by an Occupational Therapist, [Appellant's occupational therapist #3], of [text deleted].

The purchase and modification of equipment by MPIC was an initiative meant to improve [the Appellant's] functional abilities with respect to his farming operation. Having put the new equipment and machinery modifications in place, one would expect that [the Appellant's] functional capacity would increase. Measuring that increase in function was the reason behind having the reassessment of [the Appellant's] responsibilities and capabilities by the occupational therapist, [Appellant's occupational therapist #3], of [text deleted].

The evidence presented at the hearing however, clearly established that [the Appellant] had not had the opportunity of using much of the new equipment at the time of the assessment by [Appellant's occupational therapist #3]. At that time, he had not even been able to assess the impact of the new equipment and the modifications on his farming operation himself. Neither [Appellant's occupational therapist #3], nor anyone else, has ever conducted a Functional Capacity Evaluation of [the Appellant's] occupational capabilities with all of the new equipment and machinery modifications in place. When [Appellant's occupational therapist #3] conducted her occupational therapy visit on June 5, 2000, her report concludes that estimated abilities are based on anticipated improvements based on equipment provided but not yet tested and continued farming arrangement with [the Appellant's] brother.

[the Appellant] testified at the hearing that not all of the improvements and machinery that had been provided have worked out. For example, he found that the Mig welder was too small for most of the jobs he required; the new stapler provided by [Appellant's occupational therapist #3] was functional, but the staples were problematic because they rust; operating the four-inch electric grinder caused too much vibration through his right hand; overall he found that it took him 50% longer to do everything even with the new modifications in place and there were certain tasks which he still couldn't complete on his own.

We find that [Appellant's occupational therapist #3's] assessment was premature, and further follow-up should have been done in order to confirm that [the Appellant's] functional abilities had indeed improved as expected.

We also share the concern raised by the Commission in their decision of July 22, 1999, wherein they stated that:

As MPIC Internal Review Officer, [text deleted], puts it,..... “the nature of your mixed farming operation is that your ongoing disability has an effect on the overall operation which is not necessarily measurable by either the amount of monies you have expended for replacement labour or the financial bottom line” – nor, we might add, by ascribing a given percentage to each physical activity, totalling those percentages and concluding that the result allows a man to farm.

[The Appellant] testified that even with all the modifications in place, he still could not attend to the calving without assistance; machinery repairs were an ongoing difficulty, as were fence repairs. Other chores, such as the spraying of crops, he has to hire outside personnel to complete for him.

The nature of a farming occupation is such that it requires a farmer to be capable of a varied assortment of multi-dimensional tasks in order to run a successful operation. Although [Appellant's occupational therapist #3] may have had a relevant background which allowed her to assess the farming operation, she still attributed a particular percentage to each of the tasks which [the Appellant] was required to perform, totalled the percentages and determined that he was capable of farming. Applying such a global approach to [the Appellant's] occupation does not recognize that there are certain duties which are essential to operating his farming operation, which he still cannot do.

At the hearing, [the Appellant] testified that he could not attend to the calving without assistance from his brother. For [the Appellant], the calving is a significant aspect of his mixed farming operation. It is an essential duty of his employment that he performed at the time of the accident. Therefore, we find that [the Appellant] is still unable to hold employment within the meaning of Section 8 of Manitoba Regulation 37/94 and as such s. 110(1)(a) was improperly applied to terminate his entitlement to I.R.I. on August 20, 2000.

We accept the Appellant's evidence that with the new equipment and modifications currently in place, he is capable of performing 50% of his duties. Accordingly, we find that [the Appellant's] I.R.I. should be reinstated, with a 50% reduction from the original I.R.I., from August 20, 2000, to the present time and hereafter, pending such further assessments and recommendations as may be determined appropriate to assist [the Appellant] to return to a fully functional status.

Dated at Winnipeg this 5th day of March, 2002.

MEL MYERS, Q.C.

YVONNE TAVARES

DEBORAH STEWART