



## **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by D. S.  
AICAC File No.: AC-04-40**

**PANEL:** Ms Laura Diamond, Chairperson  
Ms Diane Beresford  
Mr. Paul Johnston

**APPEARANCES:** The Appellant, D. S., appeared on his own behalf;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Mr. Mark O'Neill.

**HEARING DATE:** March 1, 2005 and July 14, 2005

**ISSUE(S):** Was the two-year determination appropriate and completed  
correctly?

**RELEVANT SECTIONS:** Sections 107 and 109 of The Manitoba Public Insurance  
Corporation Act ('MPIC Act')

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

### **Reasons For Decision**

The Appellant, D. S., was injured in a motor vehicle accident on December 16, 2000. As a result of injuries sustained to his left wrist, the Appellant underwent arthroscopic surgery. The medical evidence indicated that he was unable to return to his pre-accident employment as a mechanic/automotive service technician, due to the injury to his left wrist and the work limitations which resulted. He was in receipt of Income Replacement Indemnity benefits.

After the second anniversary of the accident MPIC conducted a "two-year" determination in order to identify alternate employment which the Appellant would be capable of holding.

**Preliminary matters**

At the commencement of the hearing scheduled for March 1, 2005, the Appellant indicated that he still wished to call a number of witnesses who were not available or in attendance at the hearing, and he requested an adjournment in order to contact these witnesses and arrange for them to appear at a later date.

The Appellant stated that he had been in contact with a staff member at the Commission. He had attempted to send a summary of the witnesses' evidence to the Commission by courier, but the document had been lost by the courier company and he did not have a copy. He also indicated that a staff member from the Commission had advised him, by telephone, to appear at the scheduled hearing and to request an adjournment if his witnesses could not appear. The Appellant undertook to provide the Commission with a copy of the courier waybill for the documentation he had attempted to send to the Commission.

Counsel for MPIC opposed the Appellant's request for an adjournment and took the position that the Appellant had had ample time and notice with which to arrange for the witnesses' attendance at the hearing. Counsel for MPIC had spent significant time preparing for the hearing and was ready to proceed at that time. As well, he questioned the credibility of the Appellant in asserting that the Commission staff had led him to believe he would receive an adjournment at the last minute.

The panel adjourned to consider the Appellant's request and concluded that the request should be denied and the hearing proceed as scheduled.

In spite of his undertaking at the hearing to forward the relevant documents to the Commission, the Appellant did not produce a copy of the courier receipt or waybill for the materials he claimed to have sent to the Commission.

When the Appellant failed to provide this information to the Commission following the hearing, an appeals officer for the Commission contacted him and attempted to obtain follow-up information regarding the courier documentation, including the way bill, receipt, and details of the request for delivery.

The Commission was not successful in its attempt to obtain this information. The Appellant then indicated to the appeals officer that the documents in question had not in fact been provided to the courier, and that he had since located the envelope in the trunk of his car where it had accidentally fallen, unbeknownst to him. These documents were never provided to the Commission.

The hearing was reconvened on July 14, 2005, to deal with the clarification of the issues regarding this documentation and the impact of these issues upon the Appellant's credibility.

At the hearing, the Appellant was unable to satisfy the Commission as to the veracity of his previous claims and allegations regarding the missing documentation.

Counsel for MPIC submitted that the events before the Commission served to support the position of MPIC that the Appellant was not credible and that his assertions could not be relied upon by the Commission.

The Appellant appeared and testified before a panel of the Commission. The Commission views testimony before it, under oath, as a serious matter. The panel is of the view that, regarding matters touching upon this appeal, the Appellant has demonstrated that he is not a credible witness. The Commission finds that the Appellant's testimony before the Commission is unreliable, and has given very little weight to this evidence.

### **Internal Review Decision**

The Appellant, because of his injuries, was unable to continue with the employment he had held prior to the accident, as a Heavy Duty Mechanic's Assistant.

Following the "two-year determination" analysis conducted by MPIC, it was determined that the Appellant was capable of holding the position of Parts Clerk. The Appellant sought an Internal Review of this decision. On January 29, 2005, an Internal Review Officer for MPIC concluded that the occupation of Parts Clerk was the correct occupation for the Appellant and that the Corporation had, as required, ensured that all of the factors listed under Section 109 of the Act (in determining the employment) had been taken into account when making the determination. It is from this decision of the Internal Review Officer that the Appellant now appeals.

### **Submission of the Appellant**

The Appellant submitted that he did not meet the physical requirements to perform the job of Parts Clerk. Many of the parts which one would be required to handle could weigh more than the weight set out for his lifting restrictions (35 lbs in a straight lift). Further, due to the bulky nature of many of the parts, handling these items would involve a difficult or awkward angle of lifting which could not be managed by the Appellant with his physical restrictions.

The Appellant also submitted that he did not have the required computer knowledge to perform the position of Parts Clerk. Although he was familiar with some of the parts which one would encounter in performing the duties of a Parts Clerk in the automotive industry, he had trouble with the computer system and generating the paperwork which was necessary for those systems. In his view he would require a great deal of training to be able to operate the computer systems properly. This was borne out by some of the work experiences he had in attempting to prepare himself for re-entry into the workplace, and letters submitted by some of his employers supported this position.

Further, the Appellant lacked experience in the automotive industry and pointed to the evidence on file from several employers in the industry that Parts Clerk was the kind of job that individuals worked their way up to, and that the position required knowledge and experience in the industry.

#### **Submission of MPIC**

Counsel for MPIC submitted that the purpose of the two-year determination was not to guarantee that the Appellant would get a job within a year after the determination. The relevant question was whether the Appellant was capable of performing the determined occupation, in order to set a residual earning capacity.

Counsel for MPIC noted that the appropriate classification in this case was that of “Stock Clerk and related occupations”. He submitted that MPIC had met all the requirements of Section 109 of the Act in determining the Appellant’s occupation, and that he was capable of holding employment in the relevant classification.

Counsel for MPIC stressed that the credibility of the witness was at issue, as over the course of the appeal process, the Appellant had demonstrated that he was prepared to say whatever he thought would convince the Commission to allow an adjournment of his appeal, and that many of these statements had not in fact been true.

In particular, Counsel for MPIC stressed the importance of a claimant's honest and factual cooperation during the physical assessment process and submitted that reliant as these assessments are upon the claimant's self reporting, caution should be exercised in regard to the assessments of the Appellant's physical abilities, given his demonstrated lack of credibility and reliability.

Counsel for MPIC argued that the results of a Functional Capacity Evaluation and a Transferable Skills Analysis performed indicated that the Appellant was capable of holding a position of Parts Clerk. These assessments showed that the Appellant had the education and skills to enable him to perform in this position.

He submitted that the Appellant would not have difficulty lifting the parts required by the automotive industry, which are smaller and lighter than those he had previous. had to lift in the heavy equipment field.

### **Discussion**

Section 107 of the MPIC Act provides for a new determination of employment after the second anniversary of an accident.

#### **New determination after second anniversary of accident**

**107** From the second anniversary date of an accident, the corporation may determine an employment for a victim of the accident who is able to work but who is unable because

of the accident to hold the employment referred to in section 81 (full time or additional employment) or section 82 (more remunerative employment), or determined under section 106.

The considerations to be followed under Section 107 are set out under Sections 109(1) and 109(2) of the Act:

**Considerations under section 107 or 108**

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

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

**Type of employment**

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

- (a) normally available in the region in which the victim resides; and
- (b) employment that the victim is able to hold on a regular and full-time basis or, where that is not possible, on a part-time basis.

Schedule 1 of Regulation 39/94 contains a table of classes of employment, and includes the classification of “Stock Clerks and related occupations”.

The onus is on the Appellant to show that the determined employment is one which he is not capable of holding.

Counsel for MPIC submitted that the Appellant’s evidence lacked credibility, and the Commission has noted its concerns regarding the Appellant’s unreliability. However, the Commission is of the view nonetheless, that the documentary evidence in the file supports the Appellant’s position that he was not capable, under Section 109, of performing the position of Parts Clerk.

The Commission has reviewed the results of the Transferrable Skills Analysis dated June 26, 2003 and prepared by Ms. Mavis Menzies of Continuum Consulting Inc. In addition to the narrative report provided, Ms. Menzies identified, in Table 1, lists of occupations where the Appellant either met the job criteria, may require further training, and did not meet the criteria. “Parts Clerk” was identified as one of the occupations where the Appellant may require further training.

<b>NOC</b>	<b>Occupation</b>	<b>Comments</b>
1472	Parts Clerk	Involves passing entrance exam at the grade 10 level at Academy of Learning – Strength – Light to Medium

Further, Table 3 sets out a list of “potential employment opportunities that would require further training”. Under Parts Clerk, the table notes:

. . . High School Education. May require further training.

Table 4 sets out the training courses that would be required for these occupations, including Service/Parts/Inventory Clerk, and the approximated competition time for each. Service/Parts/Inventory Clerk, it is indicated, would require a thirty-two (32) week course from Patal Vocational Preparation Schools Ltd. Applicants were required to score a Grade 10 level on tests to qualify for the courses, with candidates being evaluated on test score, interview and references.

It is worth noting that a Vocational/Educational Assessment performed in regard to the Appellant, by Roger Groening, Director of Education and Employment Preparation Services, dated May 27, 2003, indicated that the Appellant had achieved a Grade 7.2 level in computation, and Grade 1.8 level in applied mathematics.

The question of whether the Appellant would even have the necessary qualifications to enter such courses at Patal Vocational Preparation School, was addressed by Ms Menzies in a report dated November 4, 2003.

The Employment Specialist addressed the issue of the client's academic standing as reported in Mr. Roger Groening's Vocational/Educational Assessment. It was to be noted that in this assessment the client achieved a grade 7.2 in computation and grade 1.8 in applied mathematics. As recorded in the Transferable Skills Analysis, applicants to Patal Vocational Preparation School must score at a grade 10 level on entrance tests to qualify for courses. The Employment Specialist recommended, once again to the client, that he contact Patal and write the entrance test before he solicited additional letters from employers. . . .

Therefore, the panel finds that additional training was a requirement identified from the early stages of the two-year determination process, in the Transferrable Skills Analysis. This training was not provided to the Appellant, and there is a question as to whether the Appellant was even capable or qualified to take such training.

The documentary evidence included letters from several potential employers in the automotive industry. This evidence from potential employers established the requirement for experience in the automotive parts field and the necessity for candidates to obtain job experience through the process of working the way up through entry level positions. The Appellant did not have this experience.

As well, documentary evidence from employers participating in the Appellant's work experience program indicate that the Appellant's physical limitations and difficulties with his intellectual capabilities prevented him from being effective and productive in Parts and Store Clerk positions.

In summary, the documentary evidence established that:

1. the classification and occupation selected in the two year determination, Parts Clerk or Stores Clerk, required the Appellant to obtain additional training;
2. training for the position of Parts Clerk included a thirty-two (32) week course at Patal Vocational Preparation School. The Appellant did not receive this training, and it is possible that he might not have the academic prerequisites or education level required to qualify for the course;
3. the Appellant did not possess the necessary job experience in the automotive parts field which was necessary for the position of Parts Clerk; and
4. employers participating in the Appellant's work experience programs found that the Appellant's physical limitations and difficulties with intellectual capabilities prevented him from being effective and productive in the position of Parts Clerk.

Accordingly, based on the documentary evidence on the file, it is the view of the panel that the Appellant was not capable of holding a position as a Parts Clerk. When the criteria listed under Section 109(1)(a) of the Act are examined, it is difficult to determine, as a result of the Appellant's unreliable evidence, what his physical capabilities might be. However, on the basis of the documentary evidence on file, it is apparent that the Appellant did not have the education, training, work experience, and intellectual abilities to hold that employment, at the time of the determination.

### **Decision**

For the reasons outlined herein, the Commission finds that the Appellant has established, based upon the documentary evidence, on a balance of probabilities, that MPIC was not correct in determining the two-year employment of the Appellant as a Parts Clerk and failed to consider all

of the relevant factors as set out in Section 107 and 109 of the MPIC Act. The Commission determines that the Appellant has established, on the balance of probabilities, that on a consideration of all of the relevant factors, the Appellant did not have the education, training, work experience, or intellectual ability to hold that employment at the time of the determination.

The Commission directs that:

1. MPIC reinstate the Appellant's Income Replacement Indemnity benefits effective August 29, 2004.
2. the question of the appropriate two-year determination for the Appellant be referred back to the case manager for determination.

The Commission will retain jurisdiction in order to assist the parties should they be unable to arrive at the appropriate compensation set out in paragraph one (1) above.

As a result, the Appellant's appeal is allowed and the Internal Review Officer's decision dated January 29, 2004 is therefore rescinded.

Dated at Winnipeg this 29 day of August, 2005.

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**LAURA DIAMOND**

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**DIANE BERESFORD**

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**PAUL JOHNSTON**