

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by J. M.
AICAC File No.: AC-05-219**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, J. M., was represented by Mr. Alan Goddard; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: July 11, 2007

ISSUE(S): Whether the determined employment as a Level 2 Roofing Supervisor is appropriate

RELEVANT SECTIONS: Sections 107, 109 and 110(1)(d) 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 was injured in a motor vehicle accident on November 12, 2000. A previous decision of the Commission, in file number AC-03-68, found that, due to injuries sustained in the motor vehicle accident, the Appellant was 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 ordered a continuation of the Appellant's Income Replacement Indemnity (IRI) benefits as a result.

Following this decision of the Commission, MPIC began an analysis, pursuant to Section 107 of the MPIC Act, regarding a determination of alternate employment for the Appellant. The Appellant's case manager concluded that the appropriate employment for the Appellant, based upon his work experience, physical capacity and ability to perform tasks, was as a roofing supervisor. In accordance with Schedule C of Manitoba Regulation 39/94 the determined employment was classified in the category of "*Residential Commercial Installer Services*", based upon code number 7219 of the National Occupation Classification (NOC). The case manager determined that the Appellant should be classified as a Level 3 Roofing Supervisor.

The Appellant sought an Internal Review of this determination. On December 21, 2005 an Internal Review Officer for MPIC agreed with the prior Internal Review Decision of September 29, 2005 which determined that the Appellant had the physical and mental capabilities to perform the determined employment of a roofing supervisor, however, at a Level 2 Experience Level. His IRI benefits were terminated as a result on July 8, 2006.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submissions for the Appellant

The Commission heard evidence from the Appellant and from his wife, who was also involved in the operation of the roofing business, [text deleted].

The Appellant testified that he had a limited (grade three) education with limited abilities to read, write and communicate. He was questioned regarding reports provided by Occupational Rehabilitation Group, which attempted to provide an analysis of the Appellant's previous

occupation as a self-employed roofer and his ability to perform the duties of that job, as well as a Transferable Skill Analysis and a Transferable Skill Analysis Addendum.

The Appellant testified that he had no computer skills and that for thirty (30) years he had done the mostly physical labour of shingling roofs, which included stripping roofs and shingling them, as well as clearing debris. This involved both estimating jobs, writing estimates for customers, ordering and sometimes transporting supplies, as well as climbing up on the roof to do the physical work with other employees working beside him. The Appellant's wife was responsible for doing the books, billing, and paying workers and sub-contractors.

It was the Appellant's evidence that he was no longer capable of climbing up on roofs, as he had problems with both his back, his endurance and his balance. He was not capable of going up on the roofs to do estimates. Nor could he work alongside employees to assess their capability and supervise them.

Now, the Appellant is only able to do some estimates which can be performed from the ground, do some transporting of materials (although he can not carry anything heavy), and travel to some of the work sites to check on employees. He testified that he is only able to work for a few hours at a time (less than three) and not every day.

The Appellant's wife testified that she has been involved with running [text deleted] since 1970. She testified that prior to the motor vehicle accident, her husband did everything, including going up on roofs to do estimates, picking up materials, getting supplies, delivering shingles, measuring roofs and roofing. The number of employees associated with the business has varied from two (2) to ten (10) according to the jobs which had to be done.

She testified that while some jobs could be estimated from the ground, for other buildings, it was necessary to go up on to the roof, depending upon how high the roof is and how steep its peak etc.

The Appellant's wife testified that she had always typed up contracts for customers and sub-contractors. Her husband would distribute jobs to employees and sub-contractors and order the materials. He worked up on the roof with other sub-contractors and employees and she would then make out the checks for the employees and sub-contractors. She explained that her husband had a grade three (3) education with limited abilities in reading and writing, although he has improved recently because she has been helping him with it.

She testified that she would not describe her husband as a roofing supervisor and that he did not have the ability to climb up on roofs and so could not supervise employees who were working on roofs. She also explained that his hearing was not very good and this sometimes made communication difficult.

Counsel for the Appellant submitted that it was clear the Appellant was not able to perform eighty-five (85%) percent of the duties of a roofer. This had been established in the previous Automobile Injury Compensation Appeal Commission decision in July of 2004, as well as a medical report from Dr. Craton, Medical Director of MPIC's Health Care Services Team, submitted on March 7, 2005. As well, a report provided by occupational therapist Tuyet Huynh reviewed the occupation of self-employed roofer and concluded that the work could be broken down as follows:

- Eavestroughing (10% to total job duties)

- Roofing (75% of total job duties)
- Estimates (5 % of total job duties)
- Purchasing and transporting supplies (10 % of total job duties)

Therefore, it is this writer's opinion that [J.M.] is unable to perform the eavestroughing and roofing job duties (see chart above) and thus unable to perform 85% of his total job duties.

Counsel noted that MPIC requested a Transferable Skills Analysis which was performed by Deane Thibodeau-Land and Michael Wittmeier, of the Occupational Rehabilitation Group, who provided a report dated February 28, 2005. In that report the Appellant's transferable skills were set out as well as a notation that the Appellant had completed a grade three (3) education "*with no specialized training*". Five occupations were identified as being appropriate alternate occupations for the Appellant. These included:

- Small Appliance Servicers and Repairers
- Plastic Products Assemblers
- Electronics Assemblers
- Assemblers, Fabricators, Industrial Electrical Motors and Transformers
- Security Guard and Related Occupations

Roofing Supervisor was not on this list. Counsel noted that these were menial jobs involving light task to be performed with the hands.

Although, as noted above, roofing contractor and roofing supervisor were not on this list, a further "*Transferable Skills Analysis Addendum*" was prepared by Mr. Wittmeier on March 22, 2005. He stated:

... It is this writers understand that you have requested that we complete a Transferable Skills Analysis (TSA) Addendum and Labour Market Survey within the Winnipeg area on the occupation of Roofing Contractor – NOC 7219.

Mr. Wittmeier reviewed the main duties of a roofing contractor, recognizing that:

The majority of employers contacted stated that they required applicants to be able speak, read and write English, some indicated that they would prefer applicants to have completed high school. Some employers prefer applicants to have supervisory experience in construction; one employer requires multiple years of experience in this role. The majority of employers reported that applicants with [J.M.'s] experience and evidence of aptitude would be eligible and considered for employment within this role. Some employers require applicants to have basic computer skills or the ability to learn computers in an on-the-job training period.

Mr. Wittmeier concluded that the Appellant possessed the knowledge and skills to be considered to be a viable candidate for employment opportunity within this role and was marketable as a roofing contractor.

Counsel for the Appellant queried what had been the impetus for this Addendum, and Counsel for MPIC could not explain the existence of this second document, as there was no supporting material on the file to indicate why or when the report of March 22, 2005 had been requested.

Counsel for the Appellant submitted that he had never worked as a roofing supervisor even before the motor vehicle accident; he had been a roofer. He did not have a great deal of supervisory experience, which had been limited to working alongside his employees doing roofing, something he could no longer do. He submitted that in applying the criteria under Section 109(1) of the MPIC Act (the education, training, work experience, and physical and intellectual abilities of the victim at the time of the determination), MPIC had failed to consider the Appellant's lack of education, lack of training as a supervisor, and lack of physical and intellectual abilities. They had picked the category of roofing supervisor "*out of the air*" and tried to make it fit the Appellant, rather than making an honest determination of what work he was capable of doing. It was clear that he could not perform the essential duties of this occupation with his limited education, reading and communication abilities, as well as limited

physical abilities, which prevented him from even climbing up on a roof, let alone doing estimates and supervising employees who were working on roofs. It was submitted that the Appellant was not capable of working full-time and was not capable of performing the essential duties of a roofing supervisor. Accordingly, the decision of the Internal Review Officer should be overturned.

Submission for MPIC

Counsel for MPIC submitted that the essential goal of a two (2) year determination was to put a dollar figure on the residual earning capacity of an individual who was able to work, but unable to perform the essential duties of pre-accident employment. He submitted that the medical evidence established that the Appellant is, and has been able to work, in some capacity, for at least the past six (6) years.

When taking into account “the education, training, work experience and physical and intellectual abilities of the victim”, MPIC had clearly, in the two (2) year determination process, recognized and considered the Appellant’s education and intellectual abilities. Although he has limited formal education, completion of high school would only be a “bonus” to prospective employers and there are no formal educational prerequisites for the position of a roofing supervisor.

In regard to training and work experience, counsel submitted that the Appellant’s thirty (30) plus years of hands on experience gave the Appellant all the necessary skills and experience to competently perform the duties of a roofing supervisor.

Counsel submitted that it may be the case that the Appellant is only able to hold the employment of roofing supervisor on a part-time basis, according to the medical evidence, and that the

Commission should at least find that the Appellant is able to hold the determined employment on a part-time basis.

Discussion

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.

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.

The onus is on the Appellant to show, on a balance of probabilities, that MPIC incorrectly determined his employment as a roofing contractor and incorrectly terminated his IRI benefits.

The Commission has carefully reviewed the provisions of Section 109 of the MPIC Act, and considered whether the Appellant has the education, training, work experience and physical and intellectual abilities to work as a roofing supervisor.

The Commission has considered the evidence before it of the Appellant's limited English, reading and writing, and computer skills, as well as his difficulties with his hearing. I have also considered the evidence regarding the physical limitations which the Appellant has encountered since the accident, including a lack of strength and endurance, and the difficulties with his balance which have resulted in his being unable to carry heavy loads or climb up and work on rooftops.

The Commission has also reviewed the report submitted by the occupational therapist, Tuyeth Uynh, who concluded that the Appellant was unable to perform eighty-five (85%) percent of the eavestroughing and roofing job duties of his previous occupation of self-employed roofer, including eavestroughing, roofing, estimates, and purchasing and transporting supplies.

These duties are also an important part of the job of a roofing supervisor.

In addition, the initial Transferable Skills Analysis provided to MPIC, on February 28, 2005, did not identify roofing supervisor as an occupation appropriate for the Appellant. It is not clear why MPIC received a second "Transferrable Skills Analysis Addendum", which went on to recommend that the Appellant would be a viable candidate for employment opportunity and was marketable as a roofing contractor.

The Commission agrees with counsel for the Appellant. The Appellant had never worked as a roofing supervisor even before the motor vehicle accident; he had been a roofer. The Commission agrees that the Appellant did not have a great deal of supervisory experience and

that he lacked the English, reading and writing and computer skills and physical abilities to perform the essential duties of a roofing supervisor or roofing contractor.

The Commission is satisfied in regard to the evidence, that, on a balance of probabilities, the Appellant did not have the necessary requirements pursuant to Section 109 of the MPIC Act to perform the essential duties of a roofing contractor.

The Commission finds that the Appellant has established, on a balance of probabilities, that MPIC did not make a correct two (2) year determination as to the nature and employment of the Appellant pursuant to Sections 107 and 109 of the MPIC Act.

The Commission therefore determines that:

- A. MPIC incorrectly terminated the IRI benefits of the Appellant pursuant to Section 110(1)(d) of the MPIC Act;
- B. The Appellant's IRI benefits be reinstated as of July 8, 2006. Interest will be added to the amount due and owing to the Appellant in accordance with Section 163 of the MPIC Act.
- C. The Commission shall retain jurisdiction in this matter and, if the parties are unable to agree on the amount of compensation, either party may refer this issue back to this Commission for final determination.

Dated at Winnipeg this 15th day of August, 2007.

LAURA DIAMOND