

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by A.S.
AICAC File No.: AC-06-37**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, A. S., was represented by Mr. James R. Smith;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: October 11, 2007

ISSUE(S): Entitlement to Income Replacement Indemnity benefits (was the two-year determination done correctly and in accordance with the applicable statutory provisions)

RELEVANT SECTIONS: Sections 107 and 109(1) 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 August 29, 2003. The Appellant suffered a soft tissue injury to his neck and back, along with a right rotator cuff tear. Although he underwent surgery, the repair of the rotator cuff was not successful.

At the time of the accident the Appellant was [text deleted] years old and was employed with [text deleted] as a yard man. His duties included washing buses, parking buses and cleaning the inside of buses.

MPIC's Health Care Services Team determined that the Appellant was unlikely to regain the capacity to perform the work related duties that he had been performing prior to the accident.

MPIC began a two (2) year determination process a short time later.

A Transferable Skills Analysis and Labour Market Survey classified the Appellant's work related capacity as sedentary to light, with some restrictions requiring him to do left-hand work and to have very minimal use of his dominant right arm. The report identified two (2) "potentially suitable" occupations for the Appellant including telephone solicitor/marketer and parking lot attendant.

However, employment potential as a parking lot attendant was determined to be limited. Accordingly, the Appellant's case manager, on August 29, 2005, rendered a two (2) year determination decision determining the Appellant as a telemarketer. As a result, on August 29, 2006, his Income Replacement Indemnity ('IRI') benefits would be reduced in accordance with Section 115 of the MPIC Act.

This decision of the case manager was upheld by an Internal Review Officer on February 2, 2006. The Internal Review Officer concluded that based upon the medical information on the Appellant's file, and a review completed by Dr. Shrom of the Health Care Services Team, the Appellant was able to hold the determined employment, both physically and mentally. In addition, the Labour Market Survey identified at least three (3) employment opportunities for the Appellant within the identified employment classification.

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

Evidence and Submission for the Appellant

The Appellant testified at the hearing into his appeal. He gave a work history and indicated that he had driven a truck for thirty (30) years. He got along with shippers and receivers, and was accustomed to a culture of roughness, and physical and outdoor work.

His job for [text deleted] was also an outdoor job with a similar environment.

As a result, he testified that he would not be able to work as a telemarketer. He testified that, in his view, these jobs had a certain “revolving door” aspect to them. He stated that he would have to be nice to people working in such a job, and felt that if someone “told him off” or swore at him during a telemarketing call, he would respond in the same way.

The Appellant described his injuries in the motor vehicle accident, indicating that the injury to his right shoulder was very difficult for him. He had been right handed all his life, and was now trying to learn to do things with his left hand as a result of the accident. He also described difficulties with sitting for long periods, and indicated that he could only sit for about an hour and a half at a time and then he would need to get up and start moving around.

The Appellant described how he often felt depressed since the accident. When this happened, he would get dressed and go for a walk outside. After a while he would feel better. He emphasized the importance of him being able to work at an outdoor type of job, and the difficulties that he would face if he was forced to work at an inside office job like telemarketing, where he would not be comfortable in that environment.

The Appellant described difficulties that he had with sleep since the accident. He had tried to take a computer course, but had found it difficult to sit for such long periods of time. He also had difficulties with his vision, and difficulty hearing in one ear.

The Appellant also described the steps in which he participated during the two (2) year determination process. He indicated that he met with the rehabilitation consultant, Ms Ducharme, two (2) or three (3) times. She asked him a lot of questions, and he had nothing to hide. He told her that he had lost his driver's licence, and that he had a grade 8 education. He indicated that he would go to any rehabilitation program that she wanted him to go to, but that all his life he had done physical jobs and could not work at an inside office job like telemarketing.

On behalf of the Appellant, counsel submitted that the cursory assessment which had been undertaken for the Appellant in the two (2) year determination process was inadequate. He described it as an almost "mechanical" process which did not factor in his sensitivities, history, intellectual abilities or personality. The assessment failed to recognize these factors, as well as his severe physical limitations, advanced age, and personality.

Counsel reviewed the factors to be considered under Section 109 of the MPIC 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.

In regard to physical ability, counsel submitted that the Appellant could not sit still for the extended periods of time which would be required of a telemarketer. In regard to the Appellant's intellectual ability, he referred to the Appellant's personality, lack of education and phobia-like fear of working in an office building. He noted that his work experience consisted entirely of working with trucking, or heavy lifting. He had only a grade 8 education, which is very limiting in terms of his job prospects.

As a result, counsel for the Appellant queried who would want to hire a [text deleted] year old, disabled male with poor eyesight, a grade 8 education and an expressed inability to work inside, as a telemarketer, or for any other office job.

He indicated that while the Appellant was quite prepared to go through some type of rehabilitation or retraining, MPIC must make a better effort at placing the Appellant in the position he would have been in before the motor vehicle accident.

He noted the Appellant's evidence that he had worked all his life and was not a malingerer or afraid of work. He would like to be working and this was important to his sense of worth and self-esteem as a contributing member of society. However, the motor vehicle accident had shattered this ability and MPIC should reinstate his benefits and undertake a fresh two (2) year determination of his employment ability.

Counsel for MPIC submitted that when it was discovered that the Appellant was not able to work as a yard man, it was medically determined that the Appellant was able to work at some employment and had some residual earning capacity. Accordingly, the two (2) year determination process was undertaken.

The Appellant agreed that he could do some work and, Ms Ducharme, the vocational rehabilitation counselor, met with the Appellant and provided a report. There is no evidence to suggest that her assessment was cursory. As a result of the Appellant's physical limitations, she looked for a sedentary type of job that the Appellant could do with his left hand. Although it was determined that a parking lot attendant might be an appropriate employment, there were a shortage of available jobs in this area.

Counsel for MPIC reviewed the factors set out in Section 109 of the MPIC Act. He indicated that Ms Ducharme was fully aware of these criteria. He noted that prior work experience of the Appellant was not particularly relevant in this case, since the only other jobs he had undertaken involved physical labour and he could no longer do this.

Counsel for MPIC argued that:

- a consideration of "intellectual" capability did not include personality factors, as this is not specifically listed in the MPIC Act.
- there were no medical reports or evidence that the Appellant could not do a telemarketer's job.
- the two (2) year determination process was not a vocational placement service and it was not relevant whether the Appellant likes the job determined for him or whether he feels

he is not suited to it.

- Ms Ducharme knew that the Appellant had a grade 8 education when she identified the telemarketer's job, and took into account the fact that this job does not require an education or training.

There was no medical evidence on the file to indicate that the Appellant could not sit for long periods of time, particularly since the motor vehicle accident basically involved neck and shoulder injuries.

Therefore, counsel submitted that the case manager and Internal Review Officer had made the correct determination in the two (2) year determination process.

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.

The onus is on the Appellant to show on a balance of probabilities that the employment determined for him under Section 107 is not appropriate and that the Internal Review Officer

erred in upholding this determination of the Appellant's employment as a telemarketer.

The factors which must be considered in such determination are:

- a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination.

The Commission has reviewed the evidence on the Appellant's file, as well as the testimony of the Appellant himself. The Appellant was a credible witness and his testimony was not largely shaken upon cross-examination.

Upon reviewing all of the evidence, the Commission has concluded that, when considering the education, training, work experience and physical and intellectual abilities of the Appellant, the determination of telemarketer is not a suitable or appropriate employment for the Appellant. Although it was submitted that the position of a telemarketer does not require particular education or training, the Appellant has established, on a balance of probabilities, that he had none of the education, training, work experience or intellectual abilities which would make him suitable for or capable of performing the duties of a telemarketer.

As his counsel points out, the Appellant is [text deleted] years old with limited computer experience, a grade 8 education, difficulties with vision and hearing, limited sitting tolerance, profound difficulties using his dominant hand, a work history completely comprised of outdoor and physical labour, and an expressed distaste and discomfort with indoor office work. The combination of all of these factors lead the Commission to conclude, on a balance of probabilities, that the Appellant is not able to hold employment in the determined employment of a telemarketer.

The Commission therefore concludes that the Internal Review Officer, in her decision dated February 2, 2006, failed to give sufficient weight to the factors set out in Section 109(1)(a) of the MPIC Act. The Internal Review Officer therefore erred in finding that the Appellant was capable of performing the duties of a telemarketer and that the two (2) year determination was sufficiently supported by the material on file. The Appellant's IRI benefits were improperly reduced.

As a result, the Commission allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated February 2, 2006. The Commission directs that MPIC reinstate and reimburse the Appellant's IRI benefits effective to August 29, 2006, together with interest thereon. 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 22nd day of November, 2007.

LAURA DIAMOND