

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by H.D.
AICAC File No.: AC-07-25**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnston
Ms Linda Newton

APPEARANCES: The Appellant, H.D., was represented by Mr. Alain Hogue;
Interpreter Ms Styczynska
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Danielle Robinson.

HEARING DATE: March 24, 2009

ISSUE(S): Whether the Appellant was properly determined as a forklift
operator.

RELEVANT SECTIONS: Sections 107 and 109(1)(2) 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 September 29, 2003. He sustained an injury to his neck and back. As a result of his motor vehicle accident injuries, the Appellant was unable to continue working at his job as a repair technician at [text deleted]. He was in receipt of Income Replacement Indemnity Benefits from MPIC.

In February and June 2005, MPIC completed a Functional Capacity Evaluation and a Transferable Skills Analysis.

The Appellant also obtained a forklift operator's licence.

On September 29, 2005, the Appellant's case manager issued a decision which stated that, pursuant to the two year determination provisions in Section 107 and 109 of the MPIC Act, MPIC had conducted a residual earning determination for the Appellant and concluded that he should be determined as a "Material Handler" which is classified under Schedule "C" of Regulation 39/94 under the MPIC Act (in the category of "material handling equipment operators").

The Appellant did not agree that he had the ability to perform this work and sought an Internal Review of the case manager's decision.

On November 24, 2006, an Internal Review Officer for MPIC found that the medical evidence did not support the Appellant's contention that he could not work as a forklift operator and that there was no psychological reason that he could not work. Accordingly, the case manager's decision was confirmed.

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

Preliminary Matter

At the outset of the hearing, the parties indicated that, despite comments in reports from Dr. MacKay, a member of MPIC's Health Care Services team, the question of whether the Appellant's injuries and symptoms were caused by the motor vehicle accident, was not in issue

between the parties. Rather, the issue to be addressed at the hearing was whether the Appellant was properly determined as a forklift operator.

Evidence and Submission for the Appellant

The Appellant testified at the hearing into his appeal, with the assistance of a [text deleted] interpreter. He described his history in [text deleted] and in Canada. He had worked as a mechanic in [text deleted] and once he came to Canada started to work as an office cleaner and an assembler of car pumps. He worked very hard, and at some periods worked at both of these jobs, for a total of approximately 12 hours per day.

Since 1995, he had also worked repairing collision damage on large trucks and mechanical repairs, which included welding. He continued to work in this capacity at [text deleted] to the date of the motor vehicle accident. He described himself as healthy with no major problems. He was active and enjoyed both sports and social activities, as well as playing with his children. His injuries from the motor vehicle accident, however, prevented him from continuing with these activities. The Appellant described the motor vehicle accident, and described the pain which he felt in his lower back, shoulders and neck. He described the treatment which he had undergone, including physiotherapy.

The Appellant gave evidence that he tried to go back to work at his original job on January 19, 2004, on a part-time basis. He worked there, in some pain, for approximately nine days, before going to the doctor. With his doctor, it was concluded that his back hurt terribly and that he could not continue with that work.

Following this attempt, he also attended for massage therapy and met with an occupational rehabilitation counsellor. Alternatives for employment were reviewed and considered. The

Appellant cooperated with the vocational counsellor and did everything that he was asked to do in order to try and find a job.

He indicated that he would be interested in operating a forklift and he set out to obtain his forklift operator's licence. Then he worked, on a trial basis, at [text deleted] operating a forklift. He described the work (getting in and out of the forklift, lifting pallets, and changing plates on pallets) as involving a lot of movement. After 6 hours he was in pain and went home. He phoned his vocational counsellor to discuss the possibility of finding another job that he would be able to perform.

When asked why he could not do the work of a forklift operator, the Appellant noted that he had a lot of difficulty moving things and that the job required him to lift things and move them up and down the forklift all the time. He also said that the job involved a lot of head movement, to look around and in back of him etc., while operating the forklift and he was not able to move his head like this. After trying to do the job at [text deleted], he felt pain everywhere, starting in his back and continuing through his legs.

He stated that the job of a forklift operator did not just involve sitting down with little movement. It involved quite a bit of movement, as well as lifting, pushing and pulling and he was not able to do this.

The Appellant described attempts at finding other employment, to no avail.

When asked by Counsel for MPIC to describe the pain he felt after working on the forklift at [text deleted], the Appellant noted that it was heavy pain, not just soreness. This, he agreed was

the main restriction from working as a forklift operator. Although he had done very well on his forklift exam and he had shown a willingness to try working as a forklift operator when it was suggested by his vocational counsellor, it was the position of the Appellant that he could not perform this work.

Counsel for the Appellant submitted that at the time of the motor vehicle accident the Appellant had been healthy with no prior problems. He was a hard worker who worked over 10 hours a day at jobs in both [text deleted] and Canada. He was honest in his evidence throughout his testimony, describing his attempts at recovery with his doctor and through physiotherapy and even his attempts, for nine days, to try and go back to his old job.

Although it was understandable that MPIC had supported the Appellant's attempt to find work as a forklift operator, as he was a mechanical person, and this job would have been a good fit, MPIC failed to consider the reality of a forklift operator's job. The problem is, counsel submitted, that operators do not just sit in the forklift and drive around. There are no such jobs. The work requires a person who is very pliable. The person has to turn, go up and down, pick up the things on the lift and move things around. They do not have assistants or labourers to help them. In the real job, an employee who cannot perform these functions, which involve physical, manual labour, is not productive and will not be able to keep that job.

Although Dr. Sommer, in a report dated June 5, 2005, suggested that the Appellant may have some elements of a chronic pain disorder, he could not make a definitive prognosis. Counsel noted that the Appellant still had pain and that it was chronic and resulting from the motor vehicle accident, regardless of whether Dr. Sommer was able to provide a clear diagnosis and prognosis. Reports from the Appellant's own physician, Dr. Biala, who had been seeing him

both before and since the motor vehicle accident, documented his pain, difficulties and restrictions.

Counsel took issue with the report submitted by Dr. MacKay of MPIC's Health Care Services team, dated October 7, 2008. He noted that not only had Dr. MacKay not seen or examined the Appellant, but also that Dr. MacKay's assessment failed to consider the essential duties of a forklift operator. As a forklift operator, the Appellant would be required to work at a reasonable pace and to do his job properly. He would have to be alert, shoulder check, get on and off the machine, twist his head around and do some lifting, pushing and pulling. The safety of the Appellant and of other people requires that the forklift operator not be limited by restrictions of movements, as the Appellant is. Dr. MacKay's finding that the Appellant could perform this job was, Counsel submitted, "based on a jello foundation" and there was no real basis for that finding.

Counsel submitted that the two year determination for employment of the Appellant as a Materials Handler was a case of trying to fit a "square peg into a round hole", with no real recognition of what the job demanded and what the Appellant could actually do. He submitted that the decision of the Internal Review Officer should be overturned.

Submission for MPIC

Counsel for MPIC reviewed Sections 107 and 109 of the MPIC Act, noting that the Act requires that MPIC look at the interests, intellectual and physical abilities of the Appellant as well as his education and experience. She noted that the Appellant had expressed interest in working as a forklift operator. He possessed the necessary education, as he had pursued and obtained his forklift operator's licence. He had some previous experience in the workplace with forklifts and

had done some work on a forklift at [text deleted]. As well, there was no question as to his intellectual abilities.

Therefore, the question of whether the Internal Review Officer's decision was correct comes down to his physical abilities.

The Appellant's physician, Dr. Biala, was alone in the medical information on the file in saying that the Appellant was not functionally capable of doing this job. The Functional Capacity Evaluation completed on February 21, 2005 (to determine what an injured claimant is capable of doing) identified the Appellant's capabilities at the medium level, with some restrictions on overhead movements and requiring positional changes and a gradual return to work.

The Transferable Skills Analysis, completed on June 13, 2005, looked at the Functional Capacity Evaluation and at the Appellant's interests, training and experience. It looked at available work in the area.

As a result of the determinations of these experts, the level of work in the appropriate job for the Appellant was determined.

Counsel also noted that Dr. Sommer, in his report, had noted that pain was the limiting factor for the Appellant rather than loss of function. There is no record on the file of diminished range of motion or current complaints regarding his cervical area, so there was no evidence to establish that the Appellant would have difficulty shoulder checking on a forklift. Counsel also referred to Dr. MacKay's report which looked at the objective medical evidence on the file and reports of the experts and concluded that the Appellant does have the physical ability to perform the

essential duties of this job. He may have some symptoms, but Counsel noted that there is no guarantee or expectation that an individual will be completely pain free when they return to work. Experiencing some symptoms of pain does not mean that an individual is functionally incapable of performing the duties of the determined employment.

Dr. Biala, she noted, relied on the Appellant's subjective evidence of his pain and did not show that she had an awareness of what a forklift operator does. She had not done any research in this area, as had the experts who performed the Functional Capacity Evaluation and the Transferable Skills Analysis.

Counsel submitted that Dr. Biala's evidence should be weighed against all of the other medical evidence on the file which indicated that the Appellant does have the functional capacity to do this job. Accordingly, the Commission should find that the proper determination was made and that the decision of the Internal Review Officer should be upheld.

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 the determination made by MPIC was not correct.

As both parties noted, the issue in this case is not whether the Appellant had the interest, experience or education to perform the job. Rather, the issue in dispute is his physical ability.

The panel has reviewed the documentary evidence on the indexed file as well as the testimony of the Appellant and the submissions of both Counsel.

The panel finds that the position of Materials Handler (or forklift operator) does involve some physical/manual type labour. The Transferable Skills Analysis of June 13, 2005 notes the physical demands of the job as:

“Physical Demands:

The physical demands rating for this NOC code is stated as Medium or work activities involve handling loads between 10kg and 20 kg. The employers contacted reported varying physical demands. The majority of contacts confirmed that this rating is within their work environment.”

The job description included in the Transferable Skills Analysis lists one of the duties as “may perform other activities such as opening containers and crates, filling warehouse orders, assisting in taking inventory and weighing and checking materials.”

The evidence of the Appellant, through his job search and his job trial at [text deleted], as well as his attempt to work at his old job at [text deleted], was that he could not do this kind of physical labour.

The evidence at the hearing established that a forklift operator’s job is not simply a job which involves sitting on a forklift and driving the machine. That job also entails lifting, moving and placing pallets, moving things up and down and to the floor throughout the day.

The evidence from the Occupational Therapist and from Dr. MacKay does not agree with Dr. Biala’s evidence that the Appellant could not do this job. While Counsel for MPIC is correct in pointing out that Occupational Therapists do have expertise in assessing functionality and job descriptions, they observed the Appellant for only a short period of time in one or a few assessments. Dr. Biala, on the other hand, knew the patient well. She cared for him before the motor vehicle accident and examined and assessed him several times after the accident. She had the opportunity not only to assess his physical condition, but also to obtain a history and information regarding his efforts to perform the forklift operator’s job and to assess this as well.

Dr. MacKay, on the other hand, reviewed the documents on the file and spent some time focusing on causation, which was not even an issue at the hearing.

Accordingly, based upon the evidence of the Appellant regarding the requirements of the job and his difficulties in performing it, as well as the reports of his caregiver, Dr. Biala, the Commission concludes that the Appellant did not have the physical ability to perform the job of forklift operator or Materials Handler. Accordingly, the decision of the Internal Review Officer dated November 24, 2006 is overturned and the Income Replacement Indemnity Benefits of the Appellant will be reinstated from September 29, 2006.

Dated at Winnipeg this 13th day of May, 2009.

LAURA DIAMOND

PAUL JOHNSTON

LINDA NEWTON