

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-178**

PANEL: Ms. Laura Diamond, Chairperson
Dr. Patrick Doyle
Ms. Mary Lynn Brooks

APPEARANCES: The Appellant, [text deleted], was represented by Ms. Darlene Hnatyshyn from the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms. Dianne Pemkowski.

HEARING DATE: February 11, 2009

ISSUE(S): Whether MPIC properly determined the Appellant as a Lab Technician given her current level of education

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

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 was injured in a motor vehicle accident on June 27, 2003. As a result of the accident she suffered injuries to her neck, left arm, left rib, left shoulder, right elbow and bruises to her ankle.

At the time of the accident, the Appellant was working as a nurse's aide. She had a grade twelve education and nurse's diploma from [text deleted] with experience as an emergency nurse in [text deleted]. She had also obtained Health Care Aide and Home Care Aide Certificates in Canada.

As a result of the accident, the Appellant was physically unable to return to her previous occupation.

Following a Transferable Skills Analysis provided by an employment and rehabilitation specialist, [text deleted], and follow-up reports from [Appellant's employment and rehab specialist], MPIC concluded that the Appellant would be able to perform the duties of a lab technician, taking into consideration her physical limitations, vocational history and her educational level.

On June 29, 2005, the Appellant's case manager wrote to her indicating that a two-year determination of her Income Replacement Indemnity benefits had been completed based on her residual capacity to hold alternate employment and the employment determined for her was that of a Medical Laboratory Technician.

The Appellant sought an Internal Review of this decision. On September 1, 2005, an Internal Review Officer for MPIC rejected the Appellant's contention that a formal certificate or diploma was required before one can be employed as a lab technician and upheld the case manager's decision.

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

Evidence and Submission for the Appellant

The Appellant testified at the hearing into her appeal. She described her training and employment history as an emergency nurse in [text deleted], following a four-year high school medical program. She worked as an emergency nurse in [text deleted] before coming to Canada. She worked at the [text deleted] while going to school to learn English, and pursued health care aide, home care and palliative care courses. She also did CPR and first aid training and worked at [text deleted].

After the accident, she met with [Appellant's employment and rehab specialist] to complete and review the Transferrable Skills Analysis and Labour Market survey. She was eager to get back to work and had hoped that MPIC would pay for further training for her. However, she was left with the impression that this was not an option. She discussed formal training as a lab technician with [Appellant's employment and rehab specialist] and with her case manager, since she felt it was not possible for her financially, to pay for that course on her own.

Having identified work as a lab technician as a good option that was close to her education and within her functional capacities after her injury, the Appellant began to investigate possible positions with medical laboratories at the [hospital #1], [hospital #2], [lab #1] and [hospital #3]. She also researched what would be required to obtain a diploma from [text deleted] in the field of medical laboratory technician.

Following this research, the Appellant was left with the understanding that without a certificate or diploma in the area or many years experience on the job, she would not be qualified for such a position.

Although she indicated to her case manager that she would require further education, her case manager disagreed and felt that she was educated enough to get a job. The Appellant did not agree. In her view, the position would involve running many new electronic or computerized machines with which she was not familiar.

The Appellant continued to consult with [Appellant's employment and rehab specialist] regarding possible positions for lab technicians and went to several job interviews. However, this did not result in any job offers as a laboratory technician.

In December of 2007, the Appellant obtained a position as a health care aide with [text deleted], working on the surgery unit. However, she testified that given her injuries she would not be able to work full time as a health care aide and is currently working .4 of a position.

She testified that she was still interested in training as a laboratory technician. She felt that this training would help her a lot. Before the motor vehicle accident, she had been a happy, independent, hard working person. The motor vehicle accident changed her life and took away her independence, since she could no longer do certain tasks such as grocery shopping and was afraid of driving. She noted that with this difficulty driving, it would be helpful for her to take the diploma course at [text deleted]. Then she could look for work anywhere and might be able to avoid driving in busy traffic by finding a job in [text deleted] or at [text deleted].

Counsel for the Appellant noted that before the motor vehicle accident the Appellant had been flexible and hard working. She obtained designation as a health care aide and received positive performance appraisals for her work.

However, due to her motor vehicle accident injuries, she was no longer able to continue working full time, as she had previously, as a health care aide. Although she had been determined as a lab technician, through many investigations and attempts to find work in this field, she discovered that she did not possess the requisite experience or academic skills necessary to obtain such a position without educational upgrading to the diploma level.

The Appellant's evidence regarding her research at [lab #1], [text deleted] College and the [hospital #1] and [hospital #3], found that without a diploma or a lot of experience, her chances of finding employment as a laboratory technician were next to impossible. She continued to apply for positions at labs but was not successful in finding employment.

Both [text deleted], (who performed a psychological assessment of the Appellant) and [text deleted], the Appellant's doctor, supported her returning to work as a lab technician. Counsel noted a new system in Manitoba, whereby [text deleted] was responsible for public sector staffing of imaging centres and diagnostic services. [text deleted] became responsible for all the hiring and setting of qualifications. She reviewed an excerpt from their website which dealt with the position of laboratory technician. It stated:

Laboratory Technician

Job Description

Performs support functions to assist Technologists in their daily procedures: Duties include preparing and dispensing all media and solutions used in the department, accessioning, receiving, processing of specimens and phlebotomy (blood collection).

Educational Requirements

Laboratory Technician training program

Education Institutions

[text deleted] College

Counsel also noted that the [text deleted] Regional Health Authority, in a casual job posting for a Laboratory Assistant, stated that the successful applicant “must be a graduate of a School for Medical Laboratory Assistant.”

Counsel submitted that [Appellant’s employment and rehab specialist] failed to consider the qualifications required by the [text deleted] and other institutions in her reports. As a result, her reports were flawed and should not have been relied upon by the case manager and the Internal Review Officer when they decided that it was not necessary for the Appellant to obtain further education in order to be successful in finding a position as a laboratory technician.

Counsel pointed to other documents on the indexed file received from [lab #2] and [lab #3].

[Lab #2] indicated that medical courses would be preferred for employment as a lab technician, and that while they had on rare occasions hired individuals with only high school education and trained them in-house, relevant medical courses are preferred.

[Lab #3] indicated that its lab requires new technician hires to have a diploma from training as a lab technician, although if there were no qualified applicants, [lab #3] would consider hiring someone with only a high school education.

Counsel reviewed two previous decisions of the Commission.

In [text deleted] (AC-03-81) the Commission reviewed and accepted a liberal approach to statutory interpretation where it applies to policies under the PIPP Guide, in order to maximize employment opportunities consistent with Section 150 of the MPIC Act.

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

Counsel submitted that the object of the legislation was to assist a claimant in successfully returning to the workplace, in a meaningful job, with a salary comparable to that which he or she had earned prior to the motor vehicle accident. She submitted that MPIC failed to consider the intent of the MPIC Act in this case, when deciding not to provide training that would allow the Appellant to be successful in her determined employment.

Counsel also reviewed the Commission's decision in [text deleted] (AC-05-54). In that case the Commission found that at the time of the two-year determination the Appellant did not have the education, training or work experience which was necessary for him to find employment in that field. Although MPIC had provided some training, unfortunately, the two-year determination had been made on a premature basis before he had fully achieved the necessary qualifications. The Commission ordered that the Appellant's benefits be reinstated as a result.

In the current appeal, counsel for the Appellant indicated that the Appellant was seeking a retroactive reinstatement, to date, of her IRI benefits with interest, as well as a fair and proper determination to allow her to return to the workplace, preferably by providing the training needed to work as a lab technician.

Evidence and Submission for MPIC

Counsel for MPIC noted that the issue before the panel is whether the determination of the Appellant as a Medical Laboratory Technician was correct. In this regard, Section 109(1) and (2) set out the factors to be considered by the Corporation, including the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination.

MPIC retained a rehabilitation consultant to assist with this determination for the Appellant. As a result of these investigations and reports, the job of Medical Laboratory Technician under the National Occupation Code was identified.

That position required either experience in the area or the completion of a course. It was determined that the Appellant had the necessary qualifications for the position described in the National Occupation Code. Counsel pointed out that while some of the documents provided from laboratories responded to the question of whether they would hire individuals who had only completed high school as laboratory technicians, the Appellant had more than a high school education, including her training and employment as a nurse in [text deleted] and the health care courses which she had taken in Canada.

For example, the letter from [lab #3] indicated that while [lab #3] requires a diploma, it would also consider degrees from other countries.

The Transferrable Skills Analysis conducted identified Medical Laboratory Technician as a possible employment for the Appellant. The relevant job description indicated that no experience was required.

Counsel submitted that the panel should not give a great deal of weight to the Appellant's testimony regarding what she learned in her investigations with various institutions. She submitted that the Commission should give more weight to the reports of the vocational expert than to the Appellant's testimony about what she had been told.

She noted that [Appellant's employment and rehab specialist] report dated August 7, 2008 reviewed the requirements for the position and concluded that the Appellant possessed the necessary qualifications for the job.

Counsel for MPIC noted that [Appellant's employment and rehab specialist] had done current research which showed that there was not much difference in the criteria required and researched in 2005 and that currently required in 2008.

Although she noted that the Appellant might not meet the qualifications for a particular position advertised by the [text deleted] Regional Health Authority, that does not mean that the Appellant cannot meet the qualifications for other positions. The real issue is whether the Appellant, at the time of the two-year determination, had the skills to perform in that generic category. A position must be generally available in the area where the Appellant lives, but that does not mean a specific job must be available. There are many reasons why an employer might have chosen other applicants over the Appellant, but this is not part of the consideration of whether the statutory requirements have been satisfied.

Counsel submitted that the Commission's decision in *AC-05-54* turned on its particular facts and the requirements for the courses considered in that case.

Counsel for MPIC also submitted that should the Commission decide that the Appellant did not have the necessary educational or experience requirements to perform the position of Laboratory Technician, the matter should be referred back to the Appellant's case manager for determination, although the Commission could retain jurisdiction.

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 she did not have the education, training, work experience and physical and intellectual abilities at the time of the two-year determination of employment to enable her to perform the duties of a Medical Laboratory Technician.

The panel has reviewed the documentary evidence on file, the evidence of the Appellant, and the submissions of counsel.

Counsel for MPIC is correct in her submission that, as noted by [Appellant's employment and rehab specialist], the National Occupational Classification #3212 for Medical Laboratory Technicians lists a diploma or certificate as a preferred, and not a required qualification.

However, qualifications for medical laboratory technician positions in Manitoba are also influenced by [text deleted].

The position description for Laboratory Technician provided by [text deleted], (dated November 2007) also lists "Completion of a Medical Laboratory Assistant program" as preferred, but not required.

The panel has also had regard to evidence on the indexed file provided from other laboratories and hospitals in the province, as well as the [text deleted] website and information from [text deleted] College.

As noted by counsel for the Appellant, the job posting from the [text deleted] Regional Health Authority for a position at [hospital #4] listed graduation from a recognized school for medical laboratory assistant as required.

A lab supervisor for [lab #2] indicated, on September 13, 2007 that while the minimum education background required for employment as a laboratory technician would be high school, relevant medical courses/experience would be preferred. She indicated that:

5. [Lab #2] has on rare occasions hired individuals with only high school education and trained them in-house, but people with some relevant medical courses are preferred – Lab Assistant course, Medical Office Assistant course, etc. (After a reasonable work experience, these Technicians have usually continued on to obtain their CSMLS certification as Medical Laboratory Assistants.)

A lab manager with [lab #3] indicated, on September 12, 2007, that its lab requires new technician hires to have a diploma indicating training as a lab technician eg: from [text deleted] College or [text deleted], but would also consider degrees or diplomas from other countries. She indicated:

5. In a worst case scenario, if there were no qualified applicants (ie. With a diploma) [lab #3] would consider hiring someone with only a high school education. Fortunately, in recent years, we have been able to attract more qualified applicants.

An excerpt from the website of Diagnostic Services of Manitoba Inc. indicated that a laboratory technician training program was an educational requirement for a position of laboratory technician and referred to Herzing College as an educational institution providing this training.

The evidence has shown that there are some inconsistencies in job requirements for this position within the field. Certainly, some postings and job descriptions reviewed do list a certificate as a preferred, but not a required, qualification. Some of these employers, however (such as Unicity

and [lab #3]) recognize that it is only in a rare, or worst case scenario, that these positions would be filled with a candidate who does not have a diploma or certificate in the area.

Other job descriptions clearly list a certificate or diploma as a requirement for the job.

The panel is of the view that MPIC's position that a certificate or diploma is not a requirement based upon the National Occupation Code or the [text deleted] job description, does not reflect the reality of the actual determinants involved in the job market in Manitoba for laboratory technician positions. Nor does it accurately reflect the job requirements listed on the [text deleted] website, which is a source of information for people in the province who are not currently employed in that system, but are considering employment as a laboratory technician.

In the panel's view, references in the letters from [lab #3] and [lab #2] to "rare cases" or "worst case scenarios" might apply to allow employment as a medical laboratory technician for someone who has significant experience working in that field. This panel finds however, that the Appellant did not have the significant experience that would be required to find employment as a lab technician. Without that, and without a diploma or certificate from a recognized institution, we find that the Appellant did not have the education, training, work experience, knowledge or skills necessary to meet the requirements of the position.

MPIC, through the two-year determination process, selected an occupation that, based upon her expression of interest and functional capabilities, the Appellant agreed could be appropriate for her. Unfortunately, this determination was made before the Appellant was qualified, pursuant to Section 109 of the MPIC Act, to meet the requirements to fill that occupation. MPIC erred in failing to provide the necessary education and training to allow her to realistically compete for

positions as a laboratory technician in the Province of Manitoba. The evidence before the panel established that, without completion of a certificate or diploma such as that offered by [text deleted] College (or other educational institutions), significantly more work experience in the field would be required in order for the Appellant to be employed as a laboratory technician.

The evidence submitted by the parties to the Commission in this appeal satisfies the Commission that the Appellant has established, on a balance of probabilities, that pursuant to Section 109 of the MPIC Act, she did not have the education, training and work experience or knowledge and skill to meet the requirements for the position of Medical Laboratory Technician. As a result, we find that MPIC did not make a correct two-year determination as to the nature of employment of the Appellant, pursuant to Sections 107 and 109 of the MPIC Act.

The Appellant's appeal is allowed and the Internal Review Officer's decision dated September 1, 2005 is, therefore, rescinded.

The Commission further 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 June 28, 2006;
- c) the calculation of IRI benefits owing to the Appellant as a result of this decision shall be referred back to the Appellant's case manager for calculation;
- d) interest shall be added to the amount owing to the Appellant in accordance with Section 163 of the MPIC Act; and

e) 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 the Commission for final determination.

Dated at Winnipeg this 27th day of February, 2009

LAURA DIAMOND

DR. PATRICK DOYLE

MARY LYNN BROOKS