

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-128**

PANEL: Ms. Nikki Kagan, Chairperson
Mr. Trevor Anderson
Dr. Chandulal Shah

APPEARANCES: The Appellant, [text deleted], was represented
by Mr. Ken Kaltornyk;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Trevor Brown.

HEARING DATE: December 14, 2018

ISSUE(S): Whether the Appellant was correctly determined into the
employment of "Administrative Clerk".

RELEVANT SECTIONS: Sections 107, 109(1) and 109(2) of The Manitoba Public
Insurance Corporation Act ('MPIC Act').

Reasons For Decision

Background:

The Appellant was injured in a motor vehicle accident (MVA) on October 11, 2012 while riding his bicycle. He suffered a fractured right tibia below the knee and minor scrapes to his upper back, right shoulder, left knuckle and index finger. As a result of these injuries, he was unable to continue in the employment he held at the date of the accident as a catering assistant. As a full time earner, the Appellant was entitled to receive an Income Replacement Indemnity (IRI) in accordance with the provisions of section 81(1)(a) of the MPIC Act.

On August 23, 2013, the Appellant underwent a multi-disciplinary assessment by a team of health care providers at [rehabilitation centre]. The assessment recommended the Appellant participate in a four week modified work hardening program.

The Appellant completed the work hardening program and [rehabilitation center] provided a discharge report on September 27, 2013. The discharge report concluded that the Appellant demonstrated the physical ability to return to employment within a medium strength weight lifting requirement and a work environment with occasional requirements for walking and standing.

A Physical Demands Analysis (PDA) was completed by an occupational therapist to determine if the Appellant's pre-accident employment as a catering assistant was in fact a position that required medium strength weight lifting and provided for occasional walking and standing. The PDA assessed the nature of the job demands associated with the Appellant's pre-accident employment and determined that the Appellant's injuries precluded him from performing the essential duties of his pre-accident employment.

After the second anniversary of the MVA, MPIC conducted a two-year determination to identify alternate employment which the Appellant would be capable of holding.

This is in accordance to with sections 107 and 109(1) and 109(2) of the MPIC Act which provides as follows:

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.

To determine alternate employment, MPIC retained the services of [text deleted]. to complete a Transferable Skills Analysis (TSA).

The Appellant received notice in writing on October 23, 2014 from his case manager advising as follows:

...

Based upon TSA and given your level of function, skills and abilities, the alternate employment that was identified for you from the National Occupational Classification (NOC) is Administrative Clerk, (NOC 1441). This is your determined employment effective October 31, 2014.

In the Labour Market Survey of March 11, 2014, it was confirmed that there are three positions available in Administrative Clerk positions under NOC #1441.

According to Schedule C of Manitoba Regulations 39/94, your determined employment as an Administrative Clerk is classed in the category of Administration

Support Clerks. This category of employment, has a potential annual income of \$37,735.00, (2014 Schedule C Salary Level 1).

Schedule C (Table B) is a table of classes of employment where gross employment income by occupation is listed based on average earning levels supplied by Human Resources Development Canada.

According to Section 110(1)(d) and Section 115 of the *Act*, your entitlement to IRI will end or be reduced on October 31, 2015, which is one year following the date of your RCD. During the one year job search period, job search assistance may be provided to you to assist in securing alternate employment.

Should you hold employment during the one year job search period, your IRI will be reduced by 75% of the net income earned according to Section 116(1) of the *Act*.

Following this one year period, your IRI will be reduced by 100% of either your actual net earnings or the net earnings from Schedule C of \$37,735.00, whichever is greater. This applies even if you do not hold the determined employment as an Administrative clerk.

The Appellant disagreed with his classification of employment and sought an internal review of the case manager's decision.

The Internal Review Officer in his decision by letter to the Appellant dated April 7, 2015 determined that the Appellant's employment was properly classified and dismissed the Application for Review.

The Appellant has now appealed from the Internal Review Decision to this Commission.

The issue that requires determination of this Appeal is whether the Appellant's determined employment as "Administrative Clerk" was properly classified.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing. He stated that he did not meet the requirements for the job of administrative clerk. He submitted that he did not have either formal training or job experience in clerical work and he would be unable to perform such work without further training. The Appellant submitted that the majority of his job experiences between 1998 and 2012 were in the restaurant industry and other than the job that he held immediately preceding the MVA, all of his previous work experience was at a minimum wage salary.

The Appellant submitted that he was a “hunt-and-peck” typist and he does not touch type. He stated that he has never used a spreadsheet or database and has never performed electronic filing. He stated that he has no formal training in clerical work and his experience with record keeping was limited to compiling a few records of work hours and forwarding them to a bookkeeper.

The Appellant submitted that [text deleted] and its consultant [text deleted] acted in error in the manner they conducted the TSA and as such, the TSA report was inaccurate and unreliable.

The Appellant set out the following errors:

1. In the course of the assessment, [MPIC consultant] recommended that the Appellant retrain as a library technician by enrolling in the two-year course offered at [text deleted] College. Further, in preparation for the course, she recommended that the Appellant complete an English upgrading course. The Appellant was enthusiastic about this plan and he enrolled in the English upgrading course and achieved excellent grades. [MPIC consultant] also arranged for two library technician job shadow opportunities which the Appellant completed and reported to enjoy.

Thereafter, MPIC determined that a library technician position would pay the same salary as an administrative clerk position. Further, for the Appellant to be employed as a library technician he would require two years of retraining, whereas employment as an administrative clerk would not require any retraining.

MPIC took the position that it was not fiscally prudent to incur the cost of the Appellant's retraining as a library technician if the end result is that the Appellant's salary would be the same as that of an administrative clerk. This information was conveyed to the Appellant and the offer for the retraining as a library technician was revoked.

The Appellant submits that MPIC was in error for renegeing on the offer of retraining solely because there would be no financial benefit to MPIC.

2. To satisfy the requirement of section 109(1), the report included National Occupational Classification (NOC) Administrative Clerk postings. The Appellant submits that the job postings in the report indicated that effective writing skills are an essential requirement for the position. The Appellant submitted that he does not have effective writing skills. In fact, [MPIC consultant] recommended that the Appellant complete an English upgrading course prior to commencement of the library technician retraining course.
3. The Appellant further argued that the NOC Administrative Clerk postings found in the Labor Market Survey, completed by [MPIC consultant], require completion of college or other courses in business administration. In spite of the postings, the [text deleted] report stated that based on information that [MPIC consultant] collected directly from employers, post-secondary education was not required.

The Appellant argued that this evidence is unreliable because the TSA report did not include the names of the companies in Manitoba that were contacted nor did they refer to actual job bulletins.

The Appellant questioned his case manager regarding this issue.

The case manager attempted to get further information from [text deleted] about their contact with the employers but by this time, [MPIC consultant] was no longer employed at [text deleted].

Another employee of [text deleted] advised MPIC that they “assume” [MPIC consultant] had actually contacted the employers.

The Appellant argues that he is unable to challenge the conclusions of the TSA report without being provided with names of the employers that were contacted. His position is that the [text deleted] report is unreliable because it is based upon unsubstantiated assumptions.

4. The Appellant submits that [text deleted] should have taken further steps to assess his computer and word processing skills and not relied solely on the vocational summary that he prepared. The Appellant testified that in completing the summary, he embellished his job skills because he thought he was in the process of drafting a resume and he should “beef up” his experience and abilities.
5. The Appellant submits that [text deleted] should have given more weight to the Appellant’s low math and English scores from his assessment.

The Appellant submits that because the salary rate for library technician is the same as that of administrative clerk, one would expect the training requirements would also be the same and as such, the Appellant would require retraining for either position.

The Appellant's position is that given his employment history, level of education and training he could not possibly compete for the proposed positions as an administrative clerk without considerable further training.

Submission for MPIC:

Counsel for MPIC submitted that the policy behind sections 107 and 109 of the MPIC Act is to be considered. These sections set out the factors to determine if a person is capable of some type of employment although not the employment they had prior to the MVA. Two years following the MVA, MPIC makes a determination of the employment that a person is capable of performing following the accident. The person may decide not to work in that employment but the test is that the person is capable of working in that employment.

Counsel did acknowledge that MPIC was in error in recommending that the Appellant enroll in a library technician training course and complete the high school upgrading necessary for the course. Counsel took the position that regardless of this error, employment as a library technician would be inappropriate for the Appellant due to the physical demands of having to be on his feet for long periods of time.

Counsel submitted that [text deleted] completed a vocational skills assessment based on the information in the vocational summary provided to them by the Appellant, and [MPIC consultant] was entitled to rely on the information that was provided to her.

Counsel submitted that the determination of an individual's deemed vocation is an art not a science; [text deleted] reviewed the Appellant's transferable skills, conducted a labor market test and reached the conclusion that the Appellant was capable of working in an entry-level position as an administrative clerk and further retraining was not necessary.

Counsel submitted that a meeting took place between the Appellant and MPIC and they discussed that it would not be fiscally prudent for MPIC to pay for two years of the Appellant's education when the end results would be that he would earn the same salary as an administrative clerk. Counsel argued that MPIC is allowed to do what is fiscally prudent.

Counsel argued [text deleted] considered numerous factors in determining the Appellant's skill set including his physical limitations. Counsel submits that the Appellant has basic word processing skills and is familiar with the Internet and Word. The Appellant has past work experience in a supervisory role.

Counsel submitted that the evidence in the TSA report is to be accepted as there is no evidence to the contrary. If the Appellant wished to challenge the report, they should have called [MPIC consultant] or an alternative representative of [text deleted] as a witness and they did not do so. Without evidence to the contrary, the [text deleted] report is conclusive.

Counsel argued that the fact that the Appellant is not motivated to work as an administrative clerk is not one of the criteria to be considered under section 109.

In determining whether or not the Appellant had the education training, work experience and physical and intellectual abilities, counsel submitted that the words “and” and “or” can be used interchangeably, although counsel provided no authority for this interpretation.

Counsel submitted that the classification was correct and the appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he was not correctly determined into the employment of “Administrative Clerk”.

Upon a careful review of all the medical and other reports, the documentary evidence filed in connection with this appeal, and the evidence of the Appellant, and after hearing the submissions of the Claimant Advisor and of counsel for MPIC, the Commission finds that the Appellant was correctly determined into the employment of administrative clerk.

In determining this case, the Commission gave weight to the TSA report completed by [text deleted] and their consultant, [MPI consultant]. MPIC retained the services of [text deleted] to complete the TSA report. In completing their report, [text deleted] reviewed almost fifty reports relating to the Appellant including medical reports, therapy reports, the Appellant’s vocational summary and several reports completed by [rehabilitation centre] in their assessment of the Appellant. [Text deleted] is a specialized consultant that has expertise in the area of vocational rehabilitation. The Appellant chose not to call the rehabilitation consultant to rebut any of its conclusions.

The Commission considered the Appellant's argument that the TSA report was flawed for reasons stated. To the extent that the conclusions in the report were based upon inaccurate information provided by the Appellant, the Commission finds that the Appellant was the "author of his own misfortune" and cannot now argue that he provided false information. To the extent that the TSA report was based upon "assumptions", the Commission finds that there was no persuasive evidence of same. Based upon the evidence presented, the Commission does not conclude that the TSA report was flawed and the Commission accepts the findings in the TSA report.

The Appellant, in his evidence, attempted to down play his job skills and abilities and appeared to be uncertain about his future. The Commission finds the Appellant has transferable job skills, he was a "jack of all trades" in his previous employment, he acted in a supervisory role, and appeared to have basic computer knowledge. He presented his evidence in an articulate manner. He stated that he drafted and typed the submission attached to his Application for Review. It is noted that the submission is coherently drafted and well formatted.

During the few weeks that the Appellant was enrolled in the English upgrading course, he scored 100% on all assignments. Prior to the MVA, the Appellant was enrolled at [text deleted] University in the Faculty of [text deleted] for three years, although he did not complete a degree. The Appellant has some post-secondary education.

The Commission recognizes that the Appellant was wrongfully offered retraining as a library technician, however it is acceptable for MPIC to be fiscally responsible.

After the Appellant was advised that MPIC would not pay for retraining as a library technician, the Appellant was offered the opportunity to consider other options including the option of

completing a business administration course. The Appellant declined further retraining as well as the job search and counselling services that were offered to him. It is reasonable to expect that the Appellant would take steps to find a new path for himself.

The Appellant's evidence is that he is not sure what he wants to do with his life. The Appellant's lack of motivation to be employed as an administrative clerk is not a consideration in determining whether the classification was correct.

The Commission notes that the Appellant's evidence is that he has been unemployed since the date of the MVA and he was not seeking employment.

After some consideration, the Appellant decided that he was not interested in any further retraining and he would accept the classification of administrative clerk. MPIC then determined the Appellant's residual capacity income and advised the Appellant of same. It was only when the Appellant determined that the income replacement indemnity (IRI) that he would receive would be in net dollars not in gross dollars that he was unhappy with the classification. It appears that the Appellant was not dissatisfied with the classification, but rather with the IRI amount that he was to receive. He stated that he just wanted enough money to be able to travel.

The Commission is satisfied that in determining the employment of the Appellant, MPIC did properly consider the criteria set out in Section 109 and the employment classification is correct.

Disposition:

Based on the foregoing, the Appellant's appeal is dismissed and the decision of the Internal Review Decision dated April 7, 2015, is upheld.

Dated at Winnipeg this day of , 2019.

NIKKI KAGAN

TREVOR ANDERSON

CHANDULAL SHAH