

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-55

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Les Marks
Ms Wendy Sol

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.

HEARING DATE: August 20, 2009

ISSUE(S): Two year determination of employment

RELEVANT SECTIONS: Sections 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, [text deleted], was involved in a motor vehicle accident on May 7, 2003. As a result of the motor vehicle accident, the Appellant developed ongoing neck and right shoulder pain combined with limited range of motion and variable low back pain, along with tingling and numbness in his right hand and fingers. Due to the bodily injuries which the Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan ("PIPP") benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a road construction worker with [text deleted]. Due to the injuries which the Appellant sustained in the motor vehicle accident, he developed ongoing chronic pain which resulted in physical limitations which rendered him unable to return to his pre-accident full-time employment.

MPIC arranged for a Transferable Skills Analysis and a Functional Capacity Evaluation to determine a suitable alternate employment for the Appellant. In a decision dated December 21, 2007, MPIC's case manager determined that the Appellant was capable of holding employment within the classification "Other Elemental Service Occupations NOC 6683". This classification included occupations such as ticket taker, door attendant and laundromat attendant. The case manager found that the Appellant had the physical capacity to perform the determined employment of "Other Elemental Service Occupations" on a full-time basis as those positions are "sedentary" in nature. As a result, the case manager applied Section 110(1)(d) of the MPIC Act to reduce the Appellant's income replacement indemnity ("IRI") benefits on December 21, 2008 by his actual net earnings, or the net earnings from Schedule C corresponding to the determined employment.

The Appellant sought an internal review of the case manager's decision of December 21, 2007. In a decision dated May 14, 2008, the Internal Review Officer amended the case manager's decision by determining that the Appellant could hold the determined employment on a 50% part-time basis, rather than full-time. In her decision, the Internal Review Officer noted the following:

“I find that you are able to hold the employment physically as determined for you. However, I do recognize that you do have pain symptoms that are limiting. I will therefore alter the determination to be at a part-time level of 50%, recognizing that you may not be able to work either every day, or for full 8 hour shifts. I also recognize that some of these jobs may not be necessarily full time “9 to 5 type jobs”, but might involve some shortened shifts as is quite often the case in many elemental service occupations. I find this satisfies the statutory requirements as set out in Section 109 of the MPIC Act in that you are able to hold employment on at least a part-time basis.”

The Appellant has now appealed that Internal Review Decision to this Commission. The issue which arises on this appeal is whether the Appellant’s two year determination of employment was appropriate.

Relevant Legislation:

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.

Appellant's Submission:

The Appellant's representative submits that the case manager was incorrect in the two year determination of the Appellant within the classification "Other Elemental Service Occupations", for the following reasons:

1. The Appellant is unable to work due to the following work-related restrictions/limitations, as endorsed by his family physician:

- Above shoulder work
- Balancing
- Climbing ladders
- Climbing stairs
- Cognitive ability
- Crawling
- Kneeling
- Lifting – up to 15 lbs.
- Lifting – up to 20 lbs.
- Lifting – up to 50 lbs.
- Lifting – over 50 lbs.
- Manual dexterity
- Pulling
- Pushing
- Reaching either or both arms
- Sitting
- Squatting, bending
- Standing
- Violent confrontation – avoid
- Walking/distance or time
- Walking/uneven ground
- Working alone
- Working in confined space

The Appellant's representative relies on the opinion of the Appellant's family physician that the Appellant is not fit to return to regular duties or any modified duties.

2. The Appellant has little ability to do much of anything due to his chronic pain and physical limitations, and certainly would not be capable of holding any employment.

3. MPIC did not offer any job retraining or upgrading to assist the Appellant in his return to the workforce. The Appellant was willing to try a position with MPIC, but that was not possible.
4. The Appellant does not have the educational or academic qualifications to hold the determined employment.
5. With respect to the laundromat attendant position, the Appellant's representative submits that heavy lifting is required in that occupation and the Appellant would be unable to meet that requirement.
6. With respect to the position of door attendant within the determined classification, the Appellant's representative submits that that position also requires heavy lifting, which would be beyond the Appellant's physical capabilities.
7. With respect to the position of ticket taker, the Appellant's representative submits that that position requires having to clean the theatre between showings which would be beyond the Appellant's abilities. The Appellant's representative further maintains that the Appellant could not work enough hours as a ticket taker to accumulate 20 hours per week. She submits that this position is a very casual position which is more appropriate for students who are looking for 4 to 8 hours of employment per week.
8. The Appellant's representative claims that the surveillance reports are exaggerated. She argues that the majority of the surveillance of the Appellant was undertaken during a time when the Appellant was having pain injections and nerve blocks and accordingly his function was actually somewhat better than it is today. The Appellant's representative submits that, in any event, the surveillance tapes demonstrate minimal activity on the Appellant's part and do not establish that the Appellant would be capable of holding employment.

As a result, the Appellant's representative maintains that the two year determination of employment was incorrect. She argues that the Appellant does not have the ability to carry out

the essential duties of any of the employments within the classification of “Other Elemental Service Occupations” and continues to be unable to work at those occupations. Therefore, the Appellant’s representative submits that MPIC’s determination should be rescinded and the Appellant’s IRI benefits be reinstated.

MPIC’s Submission:

Counsel for MPIC argues that the case manager’s decision was based upon several assessments and investigations of the Appellant’s functional abilities and was a suitable two year determination. Counsel for MPIC submits that:

1. The Appellant’s self-perception and self-limitation totally limit his activities. The Appellant’s symptomatology is subjective and his non-clinical activities contrast with his presentation to caregivers.
2. The Appellant is mentally and physically able to do the determined employment. The Appellant is able to communicate and correspond with the public. His education and intellectual abilities are not as limited as the Appellant has presented.
3. The Appellant is able to work effectively with others. His performance evaluations from [text deleted] establish that he had effective inter-personal relations with co-workers.
4. The Appellant’s family physician, [text deleted], does not provide any background in his reports or any discussion or assessment of the Appellant’s abilities. As such, [Appellant’s doctor’s] opinion that the Appellant is not fit to return to work is of limited value.
5. The surveillance reports demonstrate that the Appellant is active outside of the home. The Appellant is not totally disabled and is not bedridden and therefore is capable of employment.
6. The video surveillance shows that the Appellant is able to sit for extended periods of time playing VLT machines and extending his right arm. During this activity, the Appellant

demonstrated no outward appearance of discomfort nor cognitive problems or inability to look to the right.

7. The video surveillance on April 30, 2004 demonstrated that the Appellant was capable of prolonged squatting while inserting air into the tires of his vehicle which contrasted with the Appellant's reported level of function that squatting was very limited and very difficult due to pain.
8. The video surveillance of the Appellant on October 20, 2003 showed the Appellant at [text deleted] bending over and squatting down to the ground, which contrasts with his reported level of function.
9. The Functional Capacity Evaluation which was conducted on March 13, 2006 reports that the Appellant was in pain even before the testing began. The Appellant perceives himself in the crippled disability level.
10. The Labour Market surveys conducted on behalf of MPIC demonstrate that the positions within the classification of "Other Elemental Service Occupations" are available in [text deleted]. The jobs do exist, although there may not be openings immediately.
11. The Appellant has no intention of returning to work. The Appellant has purposely underperformed in the Functional Capacity Evaluation and in the testing to determine his abilities. No weight should be given to the Appellant's evidence. Positions are available and there is nothing that restricts the Appellant from working. There are all types of elemental service positions available where the Appellant could work.

Counsel for MPIC argues that all of the criteria set out in Sections 107 and 109 of the MPIC Act had been met when the Appellant was determined into the classification of "Other Elemental Service Occupations". He contends that there has been no compelling evidence to the contrary put before the Commission and therefore the appeal should be dismissed.

Decision:

Upon a careful review of all of the medical, paramedical, and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of the Appellant's representative and of counsel for MPIC, the Commission finds that the two year determination of the Appellant within the classification "Other Elemental Service Occupations" on a part-time basis was appropriate.

Reasons for Decision:

Pursuant to Section 107 of the MPIC Act, in determining an employment under Section 107, MPIC is required to consider the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination. The employment determined by MPIC must also be:

1. available in the area in which the victim resides; and
2. employment that the victim is able to hold on a regular full-time, or part-time basis.

The Commission finds that the Internal Review Officer, in her decision dated May 14, 2008, gave careful and appropriate consideration to each of these factors when determining the Appellant's ability to hold the determined employment. In reaching its decision that the Appellant could hold the determined employment on a part-time basis, the Commission has taken into consideration the following:

1. Education and Intellectual Abilities

The classification "Other Elemental Service Occupations" includes elemental occupations, not elsewhere classified, primarily concerned with the provision of services. Employees within this classification are employed by a wide range of retail service and other establishments and may be self-employed. Example titles of occupations within this

classification include: beauty salon attendant, car jockey, cloak room attendant, door attendant, funeral home attendant, fur storage attendant, hotel valet, laundromat attendant, parking lot attendant, shoe shiner, tanning salon attendant, ticket taker, toll booth attendant, usher.

The Labour Market Survey dated December 17, 2007 indicated that there were no specific educational requirements for the positions of ticket taker, usher, door attendant and laundromat attendant, other than the ability to read and speak English. On the job training was provided for each of the positions listed.

We find that the Appellant's intellectual abilities meet the very minimal educational requirement of the classification "Other Elemental Service Occupations". The Appellant's demonstrated ability to function in other workplace settings and in every day situations convinces us that he is capable of meeting the very limited educational requirements of these positions. The focus of this classification is the service sector and we recognize that no particular skills are required for the majority of the occupations within this group and that on the job training would suitably prepare an individual for employment within this classification. Accordingly, we find that the Appellant has the educational and intellectual abilities to perform within the classification "Other Elemental Service Occupations".

2. Physical Abilities

The Internal Review Officer found that the Appellant could hold the determined occupation on a part-time basis at 50%. She took into account the Appellant's pain symptoms which limit his activity, recognizing that he might not be able to work either every day or for full

eight hour shifts. She also took into account the fact that many of the occupations within the determined classification involved part-time hours or shortened shifts.

The Commission finds that the Appellant's representative did not establish otherwise. The evidence submitted to the Commission does not establish that the Appellant could not hold the determined employment on at least a part-time basis. The onus to establish that he did not meet the physical requirements rested with the Appellant. We find that he did not meet that onus. Based upon the Functional Capacity Evaluation, the physical assessments and the video-tape surveillance, we find that the Appellant had the physical ability to hold the determined employment on a part-time basis. Additionally, the Appellant's own admission that he would have worked at MPIC if there was a suitable position led us to the conclusion that the Appellant is capable of employment and is not completely unemployable.

3. Availability of Employment

The Internal Review Officer reviewed the two labour market surveys conducted on July 23, 2007 and December 17, 2007. Various employers were contacted and the vocational rehabilitation consultant concluded:

“It appears that the employment prospects for this occupational group are good. Employers in all three employment options are hiring or have hired in the past few months and continue to see a demand in their field. In addition, these options match [the Appellant's] skills and abilities. All three employment options under this occupational group provide on the job training which will be of great assistance to [the Appellant] and make an easier transition into alternate employment.”

At the hearing of the appeal the Appellant's representative indicated that she had contacted a number of employers and companies and provided detailed summaries of her various findings. She found some laundromats were family-run, while others were not. However, the labour market survey demonstrates that there are positions available for ticket taker and

ushers and/or attendants within [text deleted]. While not every employer contacted was actively looking for employees at that particular time, the evidence shows that these positions do in fact exist in [text deleted].

Upon a consideration of all the information provided, the Commission finds that jobs within the classification of “Other Elemental Service Occupations” do exist within [text deleted].

As a result, the Commission finds that the criteria set out in Section 109 of the MPIC Act have been met and accordingly the two year determination of the Appellant within the classification “Other Elemental Service Occupations” on a part-time basis was appropriate. As a result, the Appellant’s appeal is dismissed and the Internal Review Decision dated May 14, 2008 is therefore confirmed.

Dated at Winnipeg this 29th day of September, 2009.

YVONNE TAVARES

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