

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [The Appellant]  
AICAC File No.: AC-10-024**

**PANEL:** Ms Laura Diamond, Chairperson  
Dr. Sharon Macdonald  
Mr. Neil Margolis

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf by teleconference;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.

**HEARING DATE:** May 7, 2013

**ISSUE(S):** Whether the two-year determination was proper.

**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 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 22, 2003. As a result of his injuries, he was unable to return to work as a farmer, the occupation he held prior to the motor vehicle accident.

On June 21, 2007, the Appellant's case manager provided him with a written decision confirming that the medical information on file indicated that he was not able to work full-time as a farmer, which was the job determined for him following the motor vehicle accident. As a result, MPIC had completed a "Two-year Determination" to establish an employment category that reflected his post-accident physical and intellectual abilities. The case manager referred to a

Transferable Skills Analysis Report and a Labour Market Research Report and determined that the position of Sales Clerk matched the Appellant's skills, experience and physical capabilities.

The Appellant sought an Internal Review of this decision. On October 21, 2009, an Internal Review Officer for MPIC reviewed the Appellant's file. He considered medical reports on the Appellant's file as well as a Functional Capacity Evaluation ("FCE") done on January 30, 2007 which opined that the Appellant had the ability to do light strength employment. After reviewing the medical information, the FCE and a Transferable Skills Analysis report dated April 27, 2007, the Internal Review Officer concluded that the Appellant was capable of working the determined employment of Sales Clerk and the case manager's decision was confirmed.

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

**Evidence and Submission for the Appellant:**

The Appellant did not submit any written evidence to support his appeal. He submitted that during his time in Alberta and Saskatchewan, he had received poor health care at the [Hospital] in [Alberta] and that although his doctor in [Saskatchewan] had worked on his spine at the C5-C6 level it was not going to get any better.

The Appellant submitted that he could not perform a sales clerk job as that would probably involve lifting and, because he had suffered high humerus fractures and torn rotator cuffs in the accident, his arms would wear out easily. The Appellant also stated that he had stitches in his head which are still bleeding, with tenderness, pain and itchiness at that site in his scalp. He explained that he was having difficulty finding a doctor in [text deleted] or [text deleted] who is

available to help with the stitches, and that although, he could see them in the mirror, when he consulted a doctor, the doctor had difficulty seeing them.

The Appellant submitted that he had been working around his house and trying to save money to survive but that he had not been able to find any paid work.

**Evidence and Submission for MPIC:**

Counsel for MPIC submitted that the two-year determination assessed by the case manager was correct and had been correctly upheld by the Internal Review Officer. He reviewed the evidence on the Appellant's indexed file to explain how MPIC had arrived at that decision.

Counsel explained that the motor vehicle accident occurred on September 22, 2003. The Application for Compensation completed by the Appellant described the motor vehicle accident as a single vehicle rollover in which the Appellant fractured his C5-C6 cervical spine, suffered bi-lateral humeral fractures, rotator cuff tears and loss of consciousness.

However, he emphasized that the real issue in this appeal is the determination of the Appellant as a retail sales clerk. The case manager's decision set out a description of the two-year determination process as:

“The Two-year Determination process takes place any time after two-years post-accident. It establishes an employment category for you that reflect your post-accident physical and intellectual abilities. It also takes into consideration your education, training and work experience. The determined employment must normally be available in the geographical region where you reside or have worked in the past, and can be held on a full time basis or where that is not possible, on a part time basis.”

Following this process, the case manager came to the conclusion that the Appellant would best be determined into employment as a retail sales clerk. He was not able to continue working as a farmer, but the sales clerk job matched the skills, experience and physical capabilities of the Appellant.

This decision was upheld by the Internal Review Officer for MPIC who found that the evidence supported the two-year determination made by the case manager. He indicated that based on the reports of [Independent Therapy Consultant], of [text deleted], the evidence was overwhelming in supporting this determination.

Counsel explained that after 180 days, the Appellant, who had been classified as a non-earner based upon employment conditions and other factors in the five years prior to the motor vehicle accident, had been classified as a farmer. A Physicals Demands Analysis then looked at the type of work that the Appellant was doing on his farm and classified the physical demand level as medium/heavy to heavy. The Appellant was not capable of doing the medium-heavy to heavy demand farming duties.

[Independent Doctor] examined the Appellant and provided a report dated July 13, 2006. [Independent Doctor] concluded that the Appellant was able to do sedentary work/occasional light duty work.

“[The Appellant] at best, is considered fit to do sedentary work/occasional light duty work that is self-paced in nature and does not involve prolonged fixed neck flexion or extension postures. Any seated work should be ergonomically ‘neck correct’ and limited to periods of one half-hour at a time. Changing positions frequently throughout the work shift would be recommended. Overhead reaching tasks and working at heights should be avoided.

The examinee should avoid prolonged immobilization in any one position. It is generally useful to take 2 to 3 minute breaks at half-hour intervals for gentle movement and

stretching... The examinee should avoid prolonged repetitive use of the arms in abducted or forward flexed positions, with no more than occasional excursion of the arms outside 30 degrees of shoulder abduction or flexion. Lifting should be occasional only, utilizing the appropriate body mechanics limited to 5 kg. from floor to mid-chest height, with no overhead lifting..."

Counsel noted that [Independent Doctor] did not say that the Appellant was unfit for any work. Rather he stated the parameters within which the Appellant should work, falling within the light strength sedentary capacity.

The Appellant was first provided with a Work Hardening Program which would also assess his current level of function.

Following the Work Hardening Program at [Rehabilitation Facility], a Functional Abilities Evaluation ("FCE") was performed. The FCE was authorized by [Appellant's Orthopaedic Surgeon] in [Saskatchewan], who indicated that there was no contra-indication for a FCE at that point. Nor had [Appellant's Doctor] been opposed to a FCE.

The FCE indicated that the Appellant had demonstrated an ability to work at a light frequent strength level. He could perform at a level requiring frequent standing and constant sitting.

Counsel for MPIC then reviewed a Modified Duty Report provided by [Independent Therapy Consultant] on January 7, 2008. [Independent Therapy Consultant] reviewed the medical information on the Appellant's file, the FCE, a Transferable Skills Analysis dated April 27, 2007 and the Independent Medical Examination completed by [Independent Doctor] on July 13, 2006. These had noted that the Appellant was better suited to lighter work activities and set out the following physical abilities which [Independent Therapy Consultant] reviewed:

<b>“Physical Task</b>	<b>Demonstrated Ability</b>
1. Standing	Occasional – Frequent Ability Demonstrated
2. Sitting	Frequent Ability Demonstrated
3. Walking	Occasional Ability Demonstrated
4. Stooping	DNA
5. Lifting	Light (< 10 kg) Weights on an Occasional Basis
6. Carrying	Light weights (< 10 kg) on an Occasional Basis
7. Push/Pulling	Light weights on an Occasional Basis
8. Reaching	Occasional Ability Demonstrated
9. Handling	Frequent Ability Demonstrated
10. Fingering	Frequent Ability Demonstrated
11. Crouching	Occasional Ability Demonstrated
12. Kneeling	Frequent Ability Demonstrated

**Seldom** 0 – 10% of the time

**Frequent**, 34 – 66% of the time

**Occasional**, 11 – 33% of the time

**Constant**, > 67% of the time”

[Independent Therapy Consultant] concluded:

“Based on review of the available medical information and his objective testing results it is believed that [the Appellant] is capable of working within NOC #6421, Retail Salespersons and Sales Clerks. The key physical abilities required to complete this work as per the NOC are; standing and/or walking, upper limb co-ordination and a light strength demand. [The Appellant] is capable of meeting these key physical abilities based on his demonstrated ability during testing. As previously reported it would be important to limit the requirement of neck flexed or extended postures in either a static or dynamic fashion to avoid aggravating his ongoing neck complaints. Also, repetitive reaching and reaching above chest height should be avoided as [the Appellant] will have difficulty completing these tasks with any regularity. Regular rest breaks, position changes and pacing of his physical ability will be important in maintaining his physical function throughout a normal workday.”

After considering the Transferable Skills Analysis, FCE and Modified Duty Report, MPIC concluded that the Appellant was qualified to obtain a position as a Retail Sales Clerk. Also considered was whether there would be such a position available in the area where the Appellant lives and vacancies in that area for positions as an agri-clerk and at a ski resort were reviewed.

Counsel for MPIC submitted that all of this evidence indicated that at the time of the two-year determination, the Appellant was classified as having a light strength ability and this would have

categorized him as being able to do light sedentary work, under the requirements of the Retail Sales category in the National Occupational Classification.

There is a lack of evidence or information that the Appellant could not do light duties, and accordingly, counsel submitted that the Internal Review decision should be upheld and the Appellant's appeal dismissed.

### **Discussion:**

The MPIC Act provides:

#### **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 Internal Review Officer erred in finding that the two-year determination of the Appellant into the classification of Sales Clerk was not correct.

The panel has reviewed the evidence on the Appellant's indexed file, as well as the submissions of the Appellant and counsel for MPIC.

The panel notes that the Appellant has, since filing his appeal, provided no evidence to support his contention that he was not able to perform the work of a sales clerk. He did not present any new information at the hearing, beyond what was in the documents already provided to MPIC and referred to in the Internal Review decision. Further, he provided very little relevant argument or submission at the hearing to support his position.

As a result, the panel finds that the Appellant has failed to meet the onus upon him of showing that the Internal Review decision dated October 21, 2009 was incorrect. We agree with the submissions of counsel for MPIC that the determination of the Appellant into the Retail Sales Clerk position was correct and supported by the evidence. We find that the Appellant was able to work within the light strength capacity and within NOC #6421 Retail Sales Persons and Sales Clerks. The evidence showed that the Appellant was capable of meeting the key physical abilities of standing and/or walking, upper limb coordination and the light strength demand, with the modifications described by [Independent Therapy Consultant] such as the avoidance of repetitive reaching above chest height, regular rest breaks, position changing and pacing.



Accordingly, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated October 21, 2009 upheld.

Dated at Winnipeg this 25<sup>th</sup> day of June, 2013.

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**LAURA DIAMOND**

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**DR. SHARON MACDONALD**

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**NEIL MARGOLIS**