Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-67

PANEL:	**Ms Yvonne Tavares, Chairperson** **Mr. Neil Cohen** **Mr. Les Marks**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.**
HEARING DATE:	**April 21, 2009**
ISSUE(S):	**Whether two year determination of employment appropriate**
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 October 28, 2000. The Appellant was the passenger in a vehicle that was involved in a head-on collision on Highway [text deleted] south of [text deleted]. He was taken to hospital by ambulance, where he was found to have multiple fractured ribs on the right side as well as a compound fracture of the scapula. 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 by [text deleted]. in [text deleted]. His main duties included sausage making, killing of animals, deboning/cutting meat and loading. Due to the injuries which the Appellant sustained in the motor vehicle accident, he was unable to return to this full-time employment after the accident and he became entitled to income replacement indemnity ("IRI") benefits.

The Appellant undertook physiotherapy treatment, a rehabilitation-conditioning program and commenced a gradual return to work program at [text deleted] performing light duties. However, by May 2002, the conclusion had been reached that the Appellant would not be able to return to full-time employment as a butcher at his former employer. MPIC then referred the Appellant to a vocational consultant for retraining. A Transferable Skills Analysis was completed on September 27, 2002 for the purpose of identifying appropriate employment opportunities for the Appellant, taking into consideration his functional capacities, education and training, employment experience and transferable skills. Five employment options were identified as possible suitable employments for the Appellant, including photographic and film processor, cook, service station attendant, translator/interpreter and front desk agent.

Subsequently, a Job Demands Analysis was carried out of a cook/server position at [text deleted] Restaurant in [text deleted]. The Job Demands Analysis determined that the Appellant's body measurements and functional abilities met the physical demands and reaching for 90% of the demands and duties of the grill cook position. Reaching above shoulder height could be accomplished using his unaffected arm. It also determined that the Appellant's lifting abilities were not compatible with lifting a <u>full</u> box of fries or the boxes of shortening (lard). However there was the option at the workplace for some assistance with lifting.

MPIC then referred the Appellant to [rehab clinic] for a work hardening program to increase the Appellant's functional ability while attempting to control his subjective complaints of pain allowing him to successfully return to the workplace. The Appellant did complete the work hardening program. [Rehab clinic's] discharge report dated September 15, 2003 determined that the Appellant was physically capable of pursuing a job as a cook at [text deleted] based upon the information in the Job Demands Analysis. However, he was limited to reaching above his head due to the reduced functioning of his shoulder. The lack of range of motion of the right shoulder limited the Appellant with overhead reaching activities with his right arm, but he could use his left arm. Therefore, [rehab clinic] concluded that the Appellant could pursue a position at [text deleted] as a cook if he so desired.

A job placement on a supernumerary basis was then arranged for the Appellant at the [text deleted] restaurant in [text deleted]. The job placement was an opportunity for the Appellant to demonstrate whether he could work as a cook/server. Prior to attending [text deleted], the Appellant was concerned that [text deleted] would not be a good place to work and he did not think that he would like it. At the initial meeting with the manager of [text deleted], the Appellant became visibly upset when asked if he could mop or sweep the floor; he raised his voice, swore and stated he did not want to do these duties. The Appellant continued to demonstrate his unwillingness to participate in the job placement program at [text deleted] and the interview with the manager was terminated. The case manager then determined that he would proceed with the two year determination of employment in lieu of a suspension of benefits based upon the Appellant's conduct at the interview.

In a decision dated October 15, 2003, the case manager determined that the Appellant was capable of holding employment as a cook/food preparer. In accordance with Schedule C of Manitoba Regulation 39/94, the determined employment was classified in the category of Food and Beverage Serving Occupations. The Appellant was determined of being capable of doing this occupation on a full-time basis and thus was determined as being capable of earning a minimum wage salary from that employment. As a result, pursuant to ss. 110(d) of the MPIC Act, one year from the determination of employment, his IRI benefits would be reduced by his actual net earnings or by the wage attributable to the determined employment, whichever was greater.

The Appellant sought an Internal Review of the case manager's decision of October 15, 2003. In a decision dated February 20, 2004, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. The Internal Review Officer found that the two year determination complied with Sections 107 and 109 of the MPIC Act. The Internal Review Officer determined that Section 109 of the MPIC Act did not require that MPIC take into account the "vocational interests and aptitudes" of the claimant. He further found that there was no evidence that the Appellant suffered from psychological conditions which would impact on his ability to do the determined employment, nor was there any evidence to support the argument that the determined employment was beneath the Appellant's dignity to even try. As a result, the Internal Review Officer was satisfied that the case manager considered all of the relevant factors in arriving at a determined employment and that the determination was not based – even in part – on improper or irrelevant factors.

The Appellant has now appealed from 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 Legislative Provisions:

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:

Counsel for the Appellant submits that the case manager was incorrect in the two year determination of the Appellant as a cook/food preparer. He argues that the Appellant did not have the functional capability to perform the lifting/carrying duties of a cook/food preparer. He maintains that the Appellant cannot meet the lifting requirements of the determined position. As such, counsel for the Appellant submits that the Appellant was not able to perform the essential

duties of the occupation without assistance and therefore the two year determination of employment was flawed from the outset.

Additionally, counsel for the Appellant submits that MPIC has an obligation to return the Appellant to a meaningful job. He argues that MPIC has obligation to consider the vocational interests and cultural background of an Appellant when determining an occupation. He contends that MPIC has a positive obligation to find an Appellant meaningful employment in keeping with the Appellant's personal and vocational characteristics. As a result, counsel for the Appellant maintains that the Appellant's appeal should be allowed.

MPIC's Submission:

Counsel for MPIC submits that the two year determination of employment of the Appellant as a cook/food preparer was appropriate. In support of his position, counsel for MPIC argues that:

- [Rehab clinic's] discharge report of September 15, 2003 indicates that the Appellant could do the job of a cook at [text deleted] based on the information contained in the Job Demands Analysis.
- [Text deleted], the Appellant's family physician, indicated that the Appellant could do this job.
- The [text deleted] job was part of the process. It was a work placement for a trial period. It was not the determined employment.
- The food preparer job was not demeaning or degrading.

Counsel for MPIC submits that the case manager did properly address the considerations under Sections 107 and 109 of the MPIC Act in arriving at the determined employment for the

Appellant. He argues that the [text deleted] position is an example of one occupation within the classification that the Appellant could do. He maintains that the work placement at [text deleted] was part of the process, but the Appellant sabotaged the job interview because of his mindset that he was too old to work at [text deleted]. As a result, counsel for MPIC contends that all of the criteria set out in Sections 107 and 109 of the MPIC Act were met when the determination was finalized in October 2003. Accordingly, he submits that the appeal should be dismissed and the Internal Review Decision dated February 20, 2004 should be confirmed.

Decision:

Upon a careful review of all of the medical, paramedical and other reports and documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant and of counsel for MPIC, the Commission finds that the two year determination of employment of the Appellant as a cook/food preparer was inappropriate and we are not satisfied, on a balance of probabilities, that the Appellant could hold this type of employment on a regular and full-time basis.

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. We find that MPIC failed to properly consider the Appellant's physical abilities when determining that he could hold employment as a cook/food preparer. The evidence did not establish that the Appellant had the functional capability to perform the physical demands of the determined position. Rather, the Job Demands Analysis of the [text deleted] position established that the Appellant could not perform the heavy lifting that was required of that position (without assistance).

The [rehab clinic] Discharge Report concluded that the Appellant achieved a functional strength demand of Medium Frequent upon his completion of that program. However, there was no evidence, other than the Job Demands Analysis of the [text deleted] position, before the Commission as to the physical demands of the determined employment. The fact that the Appellant could possibly carry out the job at [text deleted] with one particular employer, who was willing to accommodate his lifting restrictions, did not mean that he was capable of carrying out the determined employment. We find that it is not appropriate in completing a two year determination of employment, to require that a claimant be accommodated within that determined employment. This was clearly the case with the [text deleted] position. The Appellant could not perform the heavy lifting that was required. To expect that the Appellant would receive assistance whenever required in performing that job function was not appropriate for a determined employment. In conducting a two year determination of employment, the Appellant must meet the essential job requirements. We find that heavy lifting was an essential job requirement of the [text deleted] position. Accordingly, since the Appellant could not perform the required heavy lifting, he could not hold the determined employment.

Additionally, the Commission finds that without a labour market analysis to establish that the cook/food preparer jobs were normally available in the region in which the Appellant resided, the Commission had no evidence to establish that the factors under Section 109(2) of the MPIC Act had been met. This is even more important, particularly in this case, given that the Appellant resided in [text deleted] and there was no evidence to establish whether the determined position was normally available in that area.

Accordingly, for the foregoing reasons, the Commission determines that:

a) MPIC incorrectly reduced the Appellant's IRI benefits effective October 17, 2003 pursuant to Section 110(1)(d) of the MPIC Act;

b) the Appellant's IRI benefits shall be reinstated as at October 17, 2003. Interest shall be added to the amount due and owing to the Appellant in accordance with Section 163 of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review Decision dated February 20, 2004 is, therefore, rescinded.

Dated at Winnipeg this 25th day of June, 2009.

YVONNE TAVARES

NEIL COHEN

LES MARKS