Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-177

PANEL:	**Mr. Mel Myers, Chairperson** **Mr. Trevor Anderson** **Mr. Les Marks**
APPEARANCES:	**The Appellant, [text deleted], was represented by [Appellant's legal counsel];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.**
HEARING DATE:	**June 9, 2009**
ISSUE(S):	**Entitlement to Income Replacement Indemnity ("IRI") Benefits during the first 180 days following a motor vehicle accident**
RELEVANT SECTIONS:	**Section 85(1)(a) 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 suffered injuries in a motor vehicle accident which occurred on June 13, 1999. At the time of the motor vehicle accident the Appellant was unemployed and for the purpose of IRI he was classified as a non-earner.

The Appellant had been employed with [text deleted] since 1994 until the termination of his employment on Friday, June 11, 1999 two days prior to the motor vehicle accident. At the time

of the Appellant's termination of employment he held the position of an assistant foreman or assistant lead hand. The Appellant was terminated for making a wrong decision in authorizing movement of dangerous goods on Friday, June 11, 1999.

The Appellant had prepared a resume of his employment with [text deleted] and described the nature of his employment as follows:

> "[text deleted] 1997 – [text deleted] 1999
> **[TEXT DELETED]**
> **LEAD HAND**
>
> - Overseeing the loading and unloading of goods from trucks.
> - Reviewing schedules, running times and distances of trucks to establish schedule parameters within a computerized environment.
> - Planning and responsible for the monitoring of staff with the transportation and movement of goods.
> - Establishing work schedules and procedures for staff.
> - Inspecting trailers and recording information regarding the condition of trucks and the safety and security of freight.
> - Communicating on a daily basis with customers to resolve issues such as late shipments, damaged freight and shortages.
>
> [text deleted] 1993 – [text deleted] 1997
> **[TEXT DELETED]**
> **SHIPPER/RECEIVER**
>
> - Inspecting and verifying goods against invoices or other documents, record shortages and reject shortages and rejected damaged goods.
> - Maintaining internal record-keeping systems.
> - Receiving and relaying information to dispatchers to determine delivery routes for freight.
> - Operating loaders to transport material to and from transportation vehicles.
> - Operating loaders to store and retrieve material in the warehouse.
> - Determining methods of shipment and tracking vehicles to ensure that their destination corresponds with the arrival time."

In a note to file dated December 16, 1999 MPIC's case manager reported a telephone discussion with [text deleted's] terminal manager, [Appellant's supervisor], who stated:

> "…they do not have a job description for the Lead Hand but basically explained that they are the assistant to the foreman. Their duties are about 50% administration, such

> as delegation of jobs, discipline, setting up inbound and outbound shipments, and about 50% heavier labour like loading trucks, training staff. Loads can be anything from food to hazardous materials."

[Appellant's supervisor] also informed the case manager that the regular work week was 40 hours per week but the lead hand averaged an additional 10 hours per pay period.

A document entitled "5 Year reference Period" was filed with the Commission, which described the Appellant's progress during his five year employment with [text deleted] as follows:

5 YEAR REFERENCE PERIOD						
	Job Description	Employer	T4 Earnings	Hourly Rate of Pay	Normal Full Time Hours	Remarks:
Year 1 1998	Asst. Lead Hand	[text deleted]	33,645	$14.50/hr	50	Zero absence
Year 2 1997	Asst. Lead Hand	[text deleted]	23,708	$14.50/hr	40 – 50	"
Year 3 1996	Asst. Lead Hand (Asst. Foreman)	[text deleted]	21,882	$9/hr	40	"
Year 4 1995	Dockworker	[text deleted]	21,720	$9/hr	40 hrs	"
Year 5 1994	Dockworker	[text deleted]	10,061	$9/hr	40 hrs	NB On benefits from Employment Insurance ($4,987.00)

As a result of the injuries the Appellant sustained in the motor vehicle accident MPIC retained a Rehabilitation Consultant, [text deleted], to assist the Appellant in his rehabilitation.

On February 12, 2001 [text deleted] wrote to [Appellant's supervisor], Terminal Manager at [text deleted]. In this letter [text deleted] stated:

> "Thank you for taking the time in discussing [the Appellant's] employment history with [text deleted] with me during our meeting on February 6, 2001. This letter will briefly summarize the highlights of our discussion. I will assume this letter is an accurate representation of our discussion unless you specify otherwise. If you have any changes or an addendum, please feel free to contact me by phone to discuss or make the changes directly on this letter and forward a copy to me…

> As an employee you found [the Appellant] to be dependable, punctual, and reliable and an employee that got along with his peers.
>
> In regards to customer contact, you indicated that most customer contact was via the telephone. You indicated that [the Appellant] had "fantastic" customer service skills. You described [the Appellant] as a good worker who did heavy work with a good attitude. While [the Appellant] presented at times as moody, you indicated that this was not out of line with any typical worker on any given day. It was certainly not the norm for [the Appellant].
>
> In regards to the incident surrounding his termination from [text deleted], you indicated that this was an unfortunate incident where [the Appellant] made a wrong decision in authorizing the movement of dangerous goods. [The Appellant] was terminated based on this incident alone.
>
> In regards to the type of equipment used, you indicated that this included the following but not limited to that of the operation of a propane forklift, hand jack, electric hand jack, two wheeled dollies, as well as computer software. You indicated that the computer software was used to keep track of shipments. [The Appellant] was also responsible for assigning freight to various trailers. As well, he was responsible for the printing of way-bills."

On November 12, 2001 [text deleted], Legal Counsel for the Appellant, wrote to the case manager and stated:

> "Another aspect to take into account as to [the Appellant's] entitlement to IRI during the first 180 days is the attached decision of the Appeal Commission in the [text deleted] case. As indicated in that case, even in a situation where an individual is a "non-earner" and does not have a promised job, they are entitled to IRI if they can establish upon a reasonably strong balance of probabilities that, but for the accident, he or she would have been employed in an occupation for which, at the time when the employment would have become available, he or she was qualified.
>
> [The Appellant] had been regularly employed at [text deleted] and it is our understanding that he was regularly employed prior to [text deleted]. He had just lost his job on Friday (2 days before the accident on Sunday) and of course did not have any opportunity to search for alternate employment. In the case of an individual who has been regularly employed through out their work life and who is just terminated from their employment the same weekend as their accident, it would seem that there is reasonably strong balance of probabilities that such individual would have obtained alternate employment within the 6 months following the accident. We accordingly believe that it is appropriate to address the issue of [the Appellant's] entitlement to IRI during the first 180 days and would ask that you advise as to your position therein."

Case Manager's Decision:

On December 21, 2001 the case manager wrote to [Appellant's legal counsel] and rejected any further entitlement to the Appellant's IRI benefit during the first 180 day period on the following grounds:

> "On December 11, 1999, [the Appellant] was still unable to work due to his motor vehicle accident injuries. A 180 day determination was completed, and [the Appellant] was determined as a shipper/receiver. [The Appellant's] IRI benefits were increased to $873.43 bi-weekly effective December 11, 1999.
>
> Therefore, we did pay [the Appellant] IRI entitlements in the first 180 days based on his loss of regular EI benefits. We were not made aware of any job opportunities or job interviews that were available to [the Appellant] during this time.
>
> Also, [the Appellant's] circumstances at the time of the motor vehicle accident were somewhat different from the specific appeal decision that you have quoted. In the [text deleted] decision, the appeal decision sided with him based on the following:
>
> - [Text deleted] won based on establishing the likelihood of earnings on a reasonably strong balance of probabilities.
> - He also had job interviews lined up and prospective jobs.
>
> As outlined above, none of these would apply to your client's situation.
>
> Based on the above, we are unable to consider any further entitlement to Income Replacement Indemnity benefits for this period of time."

In response to the case manager's letter of December 21, 2001 [Appellant's legal counsel] wrote to the case manager and stated:

> "Further to your letter of December 21, 2001, [the Appellant] received notice of his job termination on Friday June 11, 1999. He was however not concerned as, with his 6 years experience at [text deleted], he and his wife felt that he would have no difficulty in finding work in the same field. The next Saturday June 12th, 1999 he found 12 possible jobs in the [newspaper] (attached are copies of those ads). [The Appellant] was intending to deliver resumes on Monday June 14, 1999. The accident occurred on Sunday June 13, 1999. [The Appellant] and his wife were virtually certain that he would be able to obtain employment with one of those companies. It is also our understanding that there has been and remains a high demand for truck drivers in [text deleted]. He of course did not have any job interviews lined up as there was not even one working day between his termination and the accident. It is however our position

> that there was more than a reasonably strong balance of probabilities that he would have obtained alternate employment."

On February 15, 2002 the Appellant made Application for Review of the case manager's decision.

On March 1, 2002 the case manager wrote to [Appellant's legal counsel] and stated:

> "**Income Replacement Indemnity:**
>
> We have reviewed the copies of the job placement advertisements that you have submitted. These advertisements do not tell us nor does it establish upon a reasonably strong balance of probability that [the Appellant] would have qualified for these specific jobs or that he was actually seeking employment.
>
> The fact that your client was fired from his previous occupation could adversely affect [the Appellant's] ability to secure a reference from his former employer.
>
> Therefore, our position remains the same. We are unable to consider any further entitlement to Income Replacement Indemnity benefits for this period of time."

[Appellant's legal counsel] wrote to the case manager on March 18, 2002 and stated:

> "Further to our letter of March 11, 2002, please find attached a copy of the February 12, 2001 letter from [text deleted] to [Appellant's supervisor], [the Appellant's] supervisor at [text deleted]. When we met with [text deleted], he indicated that, in speaking to [Appellant's supervisor], [Appellant's supervisor] had indicated that he would have no problem in providing [the Appellant] with a reference letter upon his request for same because [the Appellant] had been a good and valuable employee and that, unfortunately, [text deleted] had no alternative but to terminate [the Appellant] because of that one incident. This letter from [text deleted] to [Appellant's supervisor] would indeed confirm that fact.
>
> [The Appellant] advises as well that he been informed by [text deleted] that they were quite prepared to provide a good reference to any prospective employer and to explain that they had no choice to terminate him because of their dangerous goods policy and that, otherwise [the Appellant] was an excellent employee. In your letter of March 1, 2002, you indicated that the fact that [the Appellant] had been fired from his previous occupation could adversely affect his ability to secure a reference from his former employer. However, this would not appear to be the case having regard to the above and the enclosed.
>
> In your letter of March 1, 2002 you also questioned as to whether [the Appellant] would have been qualified for the various jobs referred to in our prior correspondence.

> We are accordingly also enclosing for your reference a copy of [the Appellant's] resume setting forth his experience as a shipper/receiver and a lead hand."

Internal Review Officer's Decision:

On September 21, 2006 the Internal Review Officer wrote to [Appellant's legal counsel] confirming the case manager's decisions of December 21, 2001 and March 1, 2002 to reject the Appellant's entitlement to further IRI benefits following the motor vehicle accident.

The Internal Review Officer reviewed the documentation which was on the Appellant's file, including the submissions of [Appellant's legal counsel] and the decisions of the case manager. In upholding the case manager's decision and in dismissing the Application for Review, the Internal Review Officer stated:

> "During the Internal Review process it was indicated that positive references would have been available from other individuals at [text deleted]. It was your position that based upon [the Appellant's] work history and qualifications he would have been able to obtain a job within one week from the date of the commencement of his job search.
>
> In my view the evidence presented falls short of establishing, on a balance of probabilities, that [the Appellant] would have held employment as a Shipper/Receiver within the first 180 days following the accident. In arriving at this decision I have taken into account the fact that [the Appellant] has been fired just prior to the accident and that his former employer would not take him back. I have also noted that he was entitled to be in receipt of EI benefits upon which was used as a basis for the receipt of his IRI benefits. The mere fact that there may have been jobs available for which he was qualified does not establish [the Appellant's] entitlement to receipt of IRI benefits based upon his holding employment as a Shipper/Receiver during this period. In my view the evidence of there being jobs generally available falls short of what is required to entitlement to receipt of Income Replacement Indemnity benefits as a Shipper/Receiver during this period."

The Appellant field a Notice of Appeal dated November 6, 2006.

Appeal:

Provisions of the MPIC Act:

> **Entitlement to I.R.I. for first 180 days**
>
> 85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:
>
> (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;

At the commencement of the hearing the Commission indicated that it intended to deal with the issue of the Appellant's request for entitlement to IRI benefits during the first 180 days following the motor vehicle accident. The Commission further stated that if the Commission determined the Appellant was entitled to IRI benefits during that period of time the matter would be referred back to MPIC to determine the amount of the IRI. Neither Counsel had objections to proceeding in this fashion.

The Appellant testified at the hearing. He stated that since leaving public school he was always employed in a variety of jobs and had never had any difficulty obtaining employment. He confirmed his employment with [text deleted] as set out in the Five Year Reference document filed in the proceedings. He testified that he started as a dockworker loading and unloading a variety of materials from trucks, either physically or with the use of a two-wheel dolly or by a forklift. He further testified that he proved himself as a dockworker and after two years was promoted to assistant lead hand in 1997 when his salary increased from $9.00 per hour to $14.50 per hour and that he continued in this position until the termination of his employment in 1999.

The Appellant also confirmed his job description as lead hand as set out in his resume which was filed in the proceedings. The job description included, not only, operating loaders to transport material to and from the transportation vehicles and the warehouse, but also supervising the loading and unloading of goods by other dockworkers and doing a variety of administrative functions, such as reviewing schedules, running times and distances of trucks, planning movement of goods, establishing work schedules and procedures for staff and communicating on a daily basis with customers to resolve issues relating to shipments, shortages and damaged freight.

The Appellant also testified that there was no written job description that the company had issued. In respect of the termination of his employment, the Appellant was very candid in testifying that he mistakenly authorized the transportation of certain goods which consisted of a broken open bag of material that could be dangerous. He acknowledged that he had made a serious error and provided no excuses for making this error.

The Appellant was directly supervised during the last six months of his employment by [Appellant's supervisor], the terminal manager. In his testimony, the Appellant confirmed the details relating to his experience at [text deleted] as reported by [text deleted] in his letter dated February 12, 2001 to [Appellant's supervisor].

The Appellant further testified that:

1. After being terminated on Friday, June 11th, he and his wife reviewed the want ads in the [newspaper] on Saturday, June 12, 1999 and found 12 possible jobs that he intended to apply for on Monday, June 14, 1999.

2. He pointed out to the Commission the positions in the [newspaper] want ads that he was qualified to perform as a warehouseman, transportation dispatcher, warehouse manager, and as a customer service representative.
3. In respect of all of these jobs he had performed them over his five year employment with [text deleted]
4. Not only did he perform the tasks of a warehouseman, but he also carried out the duties of a working foreman.
5. In addition to being employed as a working foreman, at the time of his termination, he also carried out a variety of administrative duties such as establishing work schedules, procedures for staff, inspecting trailers and communicating on a daily basis with customers in dealing with their problems.
6. Outside of the single error he made, he demonstrated to [text deleted] that he had been a good and valuable employee during his five years of employment with that firm.

In his testimony he challenged the decision of the Internal Review Officer who found that the (sic) he likely could not have been employed for any of these jobs set out in the [newspaper] advertisement because he had been fired and this would have adversely affected his ability to provide a reference from his former employer. He testified that [Appellant's supervisor] had indicated he would provide positive references to him. However, he further testified that he had obtained a reference letter from a foreman at [text deleted] which confirmed he was a good and valuable employee. As a result he did not request a reference letter from [Appellant's supervisor].

He further testified that:

1. He thoroughly enjoyed working in the transportation field.
2. He had developed a thorough knowledge of the area in which he had worked, loved dealing with people and had full confidence that he would be able to obtain employment if not as a customer service representative than certainly as a warehouse labourer or supervisor.

MPIC did not call any witnesses.

Submissions:

In the submissions from Legal Counsel for both parties they referred to a previous decision by the Commission which dealt with the meaning and application of Section 85(1)(a) of the Act, [text deleted] AICAC File No. 96-10.

In that case:

1. MPIC had refused the Appellant's initial claim for IRI based on the fact that the non-earner did not have a firm bonafide offer for employment in hand, which he was prevented from accepting by reason of the injuries sustained in the accident. The Commission, in respect of Section 85(1)(a) of the Act interpreted this provision to mean:

> "…in order to qualify for Income Replacement Indemnity during the first 180 days following injury in an automobile accident, a 'non-earner', as defined in the Act, must establish upon a reasonably strong balance of probabilities that, but for the accident, he or she would have been employed in an occupation for which, at the time when the employment would have become available, he or she was qualified."

2. the Commission rejected MPIC's position that in order for an IRI claim to be successful the Appellant must be able to produce a firm offer of employment which would have been accepted had the accident not occurred for the IRI claim to be successful. The Commission

disagreed with this submission on the grounds that it placed onus upon the Appellant, similar to the onus placed upon the Crown in a criminal case of proof beyond a reasonable doubt, or that has sometimes been described "an abiding conviction to a moral certainty".

3. The Commission further stated:

> "It is our view that the object of this section of the statute is to require the insurer to replace at least a portion (specifically, 90%) of the net, post-tax income that a claimant would have been able to earn but for the accident, and that the claimant needs only to establish the likelihood of those earnings on a reasonably strong balance of probabilities. By that, we mean something stronger than a mere, slender balance that could have been inferred had the legislature used the word *might* rather than *would*, but nevertheless falling short of the heavier onus that must be met by the prosecution in a criminal case. None of the quoted sources suggests that the legislative use of the word *would*, even when used in the present context, necessarily implies certainty."

As well, in that case, the Commission noted the Appellant, in attempting to re-enter the workforce had started sending out resumes and job applications in respect of specific advertisements he had found in the [text deleted] newspapers. Of the first 12 such applications the Appellant had sent out, he had three responses and was called in for three interviews. Unfortunately, before any of his inquiries could bear fruit, the Appellant was injured in a motor vehicle accident. The resultant injuries appeared to have rendered him unable to hold employment of any consequence.

The evidence in that case clearly indicated that the Appellant was highly qualified to perform the jobs that he had applied for. The Appellant testified:

1. as to the few responses that he received;
2. the interviews he had held with an employer;
3. the advice he received from that employer that he was on the short list; and

4. the potential employer had indicated he wished to recall the Appellant for a second interview.

In that case, the Commission found that the Appellant met the onus that there was a reasonably strong balance of probabilities, that but for the accident, he would have been employed and he was qualified when an employment became available. Having regard to the evidence before it, the Commission concluded the Appellant would have found employment, within two months after commencing a search for suitable employment.

In this appeal, Counsel for MPIC pointed out the distinction between the facts in the Commission's decision and the present appeal. In the present appeal the Appellant had not sent out any resumes, had not received any responses, had not been interviewed by any potential employers and was not on anyone's short list for employment. However, MPIC's Legal Counsel did not challenge that the Appellant did have qualifications for doing the work of a shipper/receiver or working foreman as set out in the [text deleted] advertisements.

Counsel for the Appellant responded by asserting that:

1. The Appellant could not have had the opportunity of sending out resumes, receiving a response for these resumes and in fact being interviewed because the accident happened on a Sunday.
2. He and his wife reviewed the [text deleted] ads on Saturday and outlined which jobs he would seek on Monday.
3. Unfortunately, the Appellant was involved in the motor vehicle accident on the next day which prevented him from pursuing any job opportunities.

Counsel for the Appellant stressed the qualifications for employment for warehouse labourer, dockworker, and lead hand. He also reviewed the job advertisements and indicated that the jobs of a warehouse person were very basic and he certainly had the skill and ability to do this job. Although prospective employers would take into account the reason for the Appellant's termination of employment, his work ethic and his work experience at [text deleted] overrode any such concerns. He further pointed out that [Appellant's supervisor] was given an opportunity of responding to [text deleted's] letter which had detailed the high regard that he had for the Appellant in the workplace and that [Appellant's supervisor] had not written to Mr[text deleted] challenging any of [text deleted's] assertions in respect of the Appellant.

Decision:

The Commission found the Appellant to be an impressive witness who was candid and forthright in response to questions, both by his Counsel, MPIC's Counsel and the Commission. The Appellant did not make any excuses in regard to the termination of his employment. When testifying before the Commission, the Appellant appeared to be a confident individual; was intelligent, hard working and appeared to have very good people skills. The Commission finds that the Appellant was a credible witness and accepts the Appellant's testimony in respect of all issues in dispute between the Appellant and MPIC.

The Commission finds that, applying the test laid down in the Commission's decision in [text deleted] AICAC File No. 96-10, for the Appellant to qualify for IRI during the first 180 days, the Commission must make its determinations on a case by case basis. The Commission finds:

1. Several jobs for a warehouseman, as advertised in the [text deleted], could easily be performed by a person having the experience of the Appellant and he would be a desirable person for any employer to hire him for that job.

2. The Appellant's experience as lead hand and the skill level he demonstrated in his rapid promotion from dockworker to lead hand at [text deleted] within a five year period would make him a very desirable person to an employer seeking to fill such a position.
3. The high regard his supervisor had for the Appellant during his employment at [text deleted] would override the single error the Appellant made during a five year period at [text deleted] which lead to his termination.

For these reasons, the Commission finds the Appellant has met the onus placed upon him to establish that upon a reasonably strong balance of probabilities, that but for the accident, he would have been employed in any of the jobs which were printed in the [text deleted] advertisements. The Commission is satisfied the Appellant was qualified to be employed as a warehouseman, had the experience and skills to act as a supervisor in a warehouse and could perform the duties of a customer representative. Notwithstanding the termination of his employment for an error in judgement, the Commission accepts the Appellant's testimony that there were a number of jobs advertised which would not have required a person to handle dangerous goods. As a result, the Commission concludes that the Appellant would have been hired in one of the positions advertised in the [text deleted].

The Commission therefore rescinds the decision of the Internal Review Officer dated November 21, 2006 and allows the Appellant's appeal and therefore refers the matter back to MPIC for the purpose of determining the amount of IRI the Appellant would be entitled to. If the parties are unable to agree as to the amount of compensation within 60 days of receipt of this decision, then either party may on reasonable notice request the Commission to reconvene for the purpose of determining the amount of compensation.

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

MEL MYERS

TREVOR ANDERSON

LES MARKS