

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-199**

PANEL: Ms Yvonne Tavares, Chairperson
Dr. Sheldon Claman
Ms Linda Newton

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

HEARING DATE: December 12 and 13, 2012

ISSUE(S): Whether the Two- Year Determination of Employment was 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

On May 20, 2000, the Appellant, [text deleted], was involved in a single vehicle accident. He fell asleep at the wheel and rolled his vehicle into the ditch. He woke up upside down in his vehicle in the ditch. He was wearing his seat belt and when he undid the belt, he fell on his head. As a result of the accident, the Appellant experienced pain in the neck, shoulder and left arm, with reduced sensation and numbness in the left arm and hand. He has undergone three surgical procedures due to the injuries he sustained in the accident, including:

- a C6-C7 discectomy infusion in 2001;
- a left C5, C6 and C7 foraminotomy in 2001; and
- arthroscopic surgery of his left shoulder in 2003.

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 with the [appellant’s employer] as a truck driver, [text deleted]. 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.

As part of the Appellant’s attempt to return to work at the [appellant’s employer] required a functional capacity evaluation to determine his functional abilities, limitations and restrictions. On January 10, 2003, a functional capacity assessment was arranged for the Appellant at [rehab clinic]. The Functional Capacity Assessment Report dated January 16, 2003 recommended that the Appellant could work at a “sedentary” or “light” level of activity. It was noted that the Appellant was having headaches following the physical workout portion of the evaluation. As a result of the Functional Capacity Assessment, the [appellant’s employer] indicated that the Appellant would be unable to return to work in his previous employment and no alternate accommodations would be made for the Appellant.

The Appellant underwent an independent physiotherapy examination on February 15, 2005 with [independent physiotherapist] (it is noted that when the Appellant attended on February 15, 2005, he was unable to complete the examination due to complaints of headaches and low back

pain. He then attended on February 24, 2005 to complete the examination). In her report dated March 15, 2005, [independent physiotherapist] opined that the Appellant's present physical findings did not preclude him from returning to the driving portion of his pre-accident employment. She found that the Appellant's current level of function was in the light range of lifting. He would be able to sustain sedentary to light duty job demands at that time for approximately two hours duration. However, she also noted that the Appellant's activity tolerance was limited and his ability to load [text deleted] into a vehicle would be limited by his neck, left shoulder and low back conditions.

Subsequent to receipt of [independent physiotherapist's] report, the conclusion was reached that it was unlikely that the Appellant would be able to resume his pre-accident occupation. As a result, MPIC undertook a two-year determination of the Appellant's residual earning capacity. In a decision dated May 30, 2005, MPIC's case manager advised the Appellant that the position of "truck dispatcher and radio operator" was selected as the most suitable position for his determined employment. The determination took effect May 30, 2005. The Appellant continued to receive his current IRI benefits for one year following May 30, 2005. Starting May 30, 2006 (the end of the one year job search), the Appellant's IRI payments were reduced by either the net income of his determined employment or his actual earnings, whichever was greater.

The Appellant sought an Internal Review of that decision and filed an Application for Review of the injury claim decision on June 20, 2005 with MPIC. In a decision dated September 20, 2005, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer concluded that the Appellant was able to hold the determined employment physically and mentally; that these jobs existed within his geographic area; and, that the Appellant had the skills, both educationally and intellectually to

work as a truck dispatcher and radio operator. As a result, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant's two-year determination of employment as a "truck dispatcher and radio operator" was appropriate.

Relevant Legislation:

Sections 107 and 109 of the MPIC Act provide 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.

Appellant's Submission:

Counsel for the Appellant submits that the case manager was incorrect in the two-year determination of the Appellant as a “truck dispatcher and radio operator”. He argues that the Appellant does not have the functional ability to perform the occupational duties required of a truck dispatcher and radio operator. Counsel for the Appellant contends that the Appellant’s symptomatology precludes him from doing anything on a regular basis. He claims that the Appellant’s significant headaches, neck pain, left arm issues and low back pain leave him unable to do even the basic activities of daily living on a consistent basis. His symptoms are aggravated by any exertion and leave him virtually useless afterwards. Furthermore, the Appellant’s headaches render him unemployable. He argues that the Appellant was a credible and reliable witness at the appeal hearing. The Commission should accept the Appellant’s testimony particularly, that the injuries which he sustained in the motor vehicle accident, and predominantly his headaches, render him unable to hold employment.

Counsel for the Appellant submits that the evidence given by [appellant’s doctor], the Appellant’s family physician, supported the Appellant’s testimony. [Appellant’s doctor] has repeatedly advised that the Appellant is not able to work at any employment. Despite the surgical procedures which the Appellant underwent, [appellant’s doctor] confirmed that the Appellant continues to have significant problems with headaches, neck and back pain, left shoulder, arm and hand pain. The Appellant’s family physician was very familiar with the Appellant’s case, he had known the Appellant for a number of years, and he was convinced that the Appellant was unsuitable for any form of employment.

In conclusion, counsel for the Appellant argues that the Appellant’s testimony was valid and he is unable to return to work. Counsel for the Appellant maintains that the Appellant is completely

disabled, he is not capable of holding any type of employment, including the determined employment of a “truck dispatcher and radio operator”. He contends that the two-year determination should be rescinded and the Appellant’s full IRI benefits should be reinstated. As a result, counsel for the Appellant argues 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 “truck dispatcher and radio operator” was appropriate. Counsel for MPIC submits that MPIC has met the requirements set out in Section 109 of the MPIC Act when performing a two-year determination. The Appellant had the requisite skills required for the determined employment. He had experience doing sedentary administrative duties in his previous employment with the [appellant’s employer]. Counsel for MPIC also refers to the transferable skills analysis completed on February 19, 2003, where various occupations, including truck dispatcher and radio operator, were identified as suitable occupations for [the appellant].

Counsel for MPIC also suggested that the Appellant does not want to return to any form of employment. Counsel for MPIC claims that the Appellant is not motivated to return to work since he is now on permanent disability benefits with the [appellant’s employer]. Counsel for MPIC argues that by returning to work, the Appellant could potentially lose his disability benefits with the [appellant’s employer]. Further, counsel for MPIC argues that [text deleted], the Appellant’s family physician, based his opinion largely on the Appellant’s subjective complaints. Further, due to the long-standing relationship between [appellant’s doctor] and the Appellant, counsel for MPIC claims that [appellant’s doctor] is not neutral and has become an advocate for the Appellant.

Counsel for MPIC submits that the Appellant has not met the onus required to establish that the two-year determination was inappropriate. He maintains that [appellant's doctor] deferred to the Functional Capacity Evaluation which determined that the Appellant could perform light to sedentary employment. Counsel for MPIC also submits that the Appellant's headaches were taken into account by the evaluators when they completed their Functional Capacity Evaluation, yet the Functional Capacity Evaluation still determined that the Appellant could return to work. Counsel for MPIC argues that the Appellant currently undertakes activities of daily living which are equal to the demands of sedentary to light work.

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. 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 May 2005. Accordingly, he submits that the appeal should be dismissed and the Internal Review decision dated September 20, 2005 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 counsel for MPIC, the Commission finds that the two-year determination of employment of the Appellant as a [text deleted] 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 109 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 full-time employment as a truck dispatcher and radio operator. We accept the Appellant's testimony at the appeal hearing and the evidence of [appellant's doctor], that the Appellant's persistent symptoms make him unsuitable for employment. These problems include chronic pain, insomnia, and particularly his headaches, which the Appellant described as his most significant barrier for return to work. Although the Appellant admitted that he could do a number of activities, we accept his evidence that he is unable to do any of these activities for any significant duration or on a consistent basis due to his disabling headaches. The Commission further accepts that the Appellant cannot reliably get to work every day due to his chronic pain symptoms and that his life is not predictable. The Commission accepts the Appellant's testimony that his headaches are incapacitating and render him unable to hold employment.

The Commission was not satisfied with the results of the Functional Capacity Evaluations, and, particularly, the Functional Capacity Evaluation which was carried out with [independent physiotherapist]. While it did note that the Appellant was unable to tolerate the complete examination due to complaints of headaches and low back pain on a single day and had to attend to complete the examination on a separate day, this does not appear to have been taken into account in determining the Appellant's functional ability. The Commission finds that the Appellant's tolerance and endurance for activity was not sufficiently considered when determining his capability for full-time employment. Although [independent physiotherapist] opined that the Appellant would be able to sustain sedentary to light duty job demands for

approximately two hour durations with a short break thereafter, we find that this factor was not sufficiently take into account when assessing the Appellant's endurance for activities for a full day. As a result, we are unable to rely upon the Functional Capacity Evaluations and we have determined that they did not appropriately consider the Appellant's lack of endurance for sustained activity.

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

- a) MPIC incorrectly reduced the Appellant's IRI benefits effective May 30, 2005 pursuant to Section 110(1)(d) of the MPIC Act;
- b) the Appellant's IRI benefits shall be reinstated as of May 30, 2005. 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 September 20, 2005 is, therefore, rescinded.

Dated at Winnipeg this 11th day of March, 2013.

YVONNE TAVARES

DR. SHELDON CLAMAN

LINDA NEWTON