Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-040

PANEL:	**Ms Jacqueline Freedman, Chairperson** **Mr. Tom Freeman** **Ms Sandra Oakley**
APPEARANCES:	**The Appellant, [text deleted], was not present at the appeal hearing;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**October 13, 2015**
ISSUE(S):	**Whether the Appellant's 180 day determination was appropriate and in accordance with the applicable statutory provisions.**
RELEVANT SECTIONS:	**Subsections 70(1), 86(1), 86(2), 106(1) and 106(2) 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

Background:

The Appellant, [text deleted], was employed as a welder for several years. Due to a disc prolapse with radiculopathy (unrelated to any motor vehicle accident), he underwent surgery to his neck on June 9, 2004. As a consequence of the neck surgery, the Appellant was off work for a period of time. During his time off work, the Appellant was laid-off due to a shortage of work. He was scheduled to return to work on September 19, 2004. However, due to a shortage of

work, no work was available to him and he remained laid-off. On November 1, 2004, the Appellant was involved in a motor vehicle accident ("the first MVA"), in which he suffered various injuries. At that time, the Appellant was classified as a "non-earner" pursuant to the provisions of subsection 70(1) of the MPIC Act. The Appellant received various treatments with respect to his injuries from the first MVA and was scheduled to return to work on May 2, 2005, subject to modified duties and a graduated return to full duties. Just prior to his return to work, on April 30, 2005, the Appellant was involved in another motor vehicle accident ("the second MVA"). The Appellant suffered injuries as a result of the second MVA. Because he was not yet back at work, the Appellant was again classified as a "non-earner" at the time of the second MVA pursuant to the provisions of subsection 70(1) of the MPIC Act.

As a non-earner, the Appellant was entitled to an Income Replacement Indemnity ("IRI") under the MPIC Act. By decision letter dated March 3, 2008, the case manager notified the Appellant as follows:

> "As we discussed in our letter of September 19, 2007 you qualify for a 180 day determination according to Section 86 of the Manitoba Public Insurance Corporation Act (attached). The 180 day determined employment must be an employment that you would have been capable of performing had the accident not occurred (Section 106 attached).
>
> The following information is considered in the 180 day determination:
>
> - work experience
> - jobs held in the five years prior to the accident
> - education and training
> - physical and intellectual capabilities
>
> Based on the information available, your 180 day determined employment falls under the occupational description of the National Occupational Classification Guide #6421 "Retail Salesperson" specializing in the sale of welding supplies and/or equipment. Although you have never worked as a Retail Salesperson, this is an occupation you would have been capable of performing based on your transferable skills, physical and intellectual capabilities.

> In particular, the physical demands of this occupation falls within the physical restrictions and limitations imposed by your Health Care Providers and Health Care Services that includes "no work above shoulder height" and/or sustained activities involving repetitive neck flexion and extension."

The Appellant disagreed with the case manager's decision and filed an Application for Review. The Internal Review Officer, by decision letter dated December 17, 2010, upheld the case manager's decision. The Internal Review Officer stated as follows:

> "The 180 day determination was completed in relation to the April 30, 2005 motor vehicle accident and therefore, the question that must be determined is whether your client had the education, training, work experience and physical and intellectual abilities to perform the essential duties of a retail sales person immediately before that accident.
>
> I find that your client did meet the requirements for working as a retail sales person immediately before the accident. Further, I accept [MPIC's doctor's] opinion that your client would not be functionally capable of performing the essential duties as a welder (which is the alternative employment determination that you propose) at the time of his April 30, 2005 motor vehicle accident.
>
> Given the above, I must confirm the case manager's decision."

The Appellant disagreed with that decision and filed this appeal with the Commission.

The issue which requires determination on this appeal is whether the Appellant's 180 day determination was appropriate and in accordance with the applicable statutory provisions.

Decision:

For the reasons set out below, the panel finds that the Appellant's 180 day determination was not appropriate and was not made in accordance with the applicable statutory provisions.

Preliminary and Procedural Matters:

The Appellant's appeal was scheduled for hearing on October 13, 2015, at 9:30 a.m. Notice of the hearing was sent to the Appellant by regular mail and Xpresspost, to the address provided by

the Appellant in his Notice of Appeal. The Notice of Hearing sent by Xpresspost was accepted and signed by [text deleted] on June 23, 2015. The Notice of Hearing sent by regular mail was not returned to the Commission. Section 184.1 of the MPIC Act provides how notices may be given to the Appellant. It provides as follows:

> **How notices and orders may be given to appellant**
>
> 184.1(1) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant
>
> (a) personally; or
>
> (b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.
>
> **When mailed notice received**
>
> 184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

On October 13, 2015, the hearing of the Appellant's appeal was convened at 9:30 a.m. with counsel for MPIC present. As the Appellant did not attend at the Commission, the Chairperson dialed the telephone number for the Appellant which had been provided by the Appellant to the Commission in his Notice of Appeal. A recorded message indicated that the telephone number was out of service. The panel adjourned to allow the Appellant 15 minutes leeway time in case he was running late. At 9:45 a.m. the panel returned to the appeal hearing room. The Appellant did not attend.

The Commission's Notice of Hearing provided that the time and date of the hearing are firm and that postponements will only be granted under extraordinary circumstances. The Notice also

provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and may issue its final decision either granting or dismissing the appeal in whole or in part. Accordingly, the appeal hearing proceeded, in the absence of the Appellant, at 9:45 a.m. and the panel heard the submissions from counsel for MPIC.

Submission for the Appellant:

Although the Appellant did not participate in the hearing of his appeal on October 13, 2015, the Appellant did provide the following reasons for his appeal in his Notice of Appeal, which was filed on March 17, 2011:

> "For reasons set forth in various letters from [Appellant's former counsel] including attached Nov 3/10 and Nov 24/10 letters."

The Appellant was previously represented by counsel, [text deleted] ("former counsel"). As indicated in the Notice of Appeal, the Appellant's former counsel sent several letters to MPIC in support of the Appellant's position. In a letter dated November 3, 2010, the Appellant's former counsel submitted as follows:

> "It was and remains our position that [the Appellant's] determined employment should have been as a welder and had been his long-term work history.
>
> The 180 day determination was for a different employment and this was primarily on the basis that your medical consultant indicated that he would never have been able to return to work as a welder having regard to his pre-accident surgery. Additional medical documentation was since submitted demonstrating that this was not the case and, indeed, [the Appellant] has in fact returned to work as a welder (and this is why the IRI benefits came to an end). It was and remains our position that the only reason [the Appellant] did not return to work as a welder at an earlier date was a consequence of the injuries he sustained in the November 01, 2004 and April 30, 2005 accidents.
>
> The significance of the determination of employment is of course that employment as a welder would have resulted in a higher IRI calculation as compared to the 180 day employment that was determined by the case manager."

In an earlier letter, dated August 1, 2008, the Appellant's former counsel submitted as follows:

> "As set forth in our letter of July 3, 2008, the subject matter of file no. [text deleted] relates to the earlier decision of the case manager with respect to a 180 day determination. In the decision letter of March 3, 2008, the case manager determined that employment as a retail salesperson notwithstanding the fact that, as stated in the decision letter, [the Appellant] had never worked as a retail salesperson in his life.
>
> The work history of [the Appellant] has indeed been that of a welder. The only reason why the 180 day determination did not result in a determined employment as a welder is that MPI had taken the position that, prior to the accident of November 1, 2004, [the Appellant] was incapable of returning to his work as a welder due to neck surgery that he had received earlier that year.
>
> [The Appellant] has always maintained that this is not the case and that prior to the accident of November 1, 2004 (as well as the subsequent accident of April 30, 2005), he was capable of working as a welder.
>
> In support of this position, we have now obtained and provided the file from [text deleted] which did indeed include a report confirming that [the Appellant] was medically cleared to return to work on September 19, 2004. As outlined in our letter of July 3, 2008 the only reason why he did not return to work at that time is that he was waiting for an opening to become available.
>
> In further support of our position is the fact that [the Appellant] did obtain employment as a welder commencing May 3, 2008.
>
> It should be noted that [the Appellant] does have certain ongoing restrictions as a consequence of the injuries that he sustained in the automobile accidents of November 1, 2004 and April 30, 2005 and it was therefore necessary for him to find (on his own) a welding job that was somewhat less physical than the job that he was previously performing. He was successful in doing so and, although he does continue to experience difficulties, he has been continuing to work.
>
> We would submit that this further supports our position that the decision of MPI that [the Appellant] was incapable of working as a welder (for reasons unrelated to the two automobile accidents) was incorrect."

In a subsequent letter to MPIC dated July 21, 2009, the Appellant's former counsel commented on a report from MPIC's Health Care Services, as follows:

> "It was and remains our position that [the Appellant's] condition had improved by the time of the November 01, 2004 accident and that he was capable of returning to work as a welder. We do not disagree with the comments of [MPIC's doctor] that [the Appellant's] may have encountered some difficulties in this regard, but this does not mean that he was incapable of working as a welder. The EI claim file does indeed include some fairly specific medication documentation, including a report from [Appellant's doctor] indicating that [the Appellant] was capable of returning to work as a welder effective September 19, 2004. As a consequence of that medical report, [the

> Appellant's] EI benefits were changed from sick benefits to regular benefits commencing September 19, 2004. Of course, in order to qualify for regular benefits, an individual must be ready, willing and capable of working at their employment.
>
> The report of [MPIC's doctor] does not seem to specifically comment upon the report of [Appellant's doctor], nor the fact that [the Appellant's] benefits were converted to regular EI benefits as of September 19, 2004. We are not aware of any medical evidence which indicates that [the Appellant] would have been incapable of working as a welder between September 19, 2004 and November 01, 2004.
>
> Even if [the Appellant] was still experiencing some residual symptoms by November 01, 2004 which would have caused him to encounter difficulties in working as a welder, we also note that the 180 day determination decision letter is based upon the condition of [the Appellant] as of either April 29, 2005 or October 28, 2005.
>
> Clearly [the Appellant] has a very lengthy history of employment as a welder. He was indeed even able to return to work as a welder in May 2008 notwithstanding the injuries that he sustained in the 2 MVA's. A suggestion had been made at one point that [the Appellant] would never have been able to return to work as a welder as a consequence of the surgery that was performed in June 2004 but clearly that is not accurate. Further, we are not aware of any medical evidence whatsoever indicating that [the Appellant] would have been incapable of working as a welder on either April 29, 2005 or October 28, 2005 other than as a consequence of the injuries that he sustained in the accidents."

The foregoing submissions were made in support of the Appellant's position that the 180 day determination was incorrect and not made in accordance with the provisions of the MPIC Act.

Submission for MPIC:

Counsel for MPIC noted that although the facts of this case are complex, the issue on appeal is simple, specifically whether the 180 day determination was correct or not. MPIC determined the Appellant as a retail sales person of welding parts. In his Notice of Appeal, the Appellant refers to the letters from his former counsel and submits that he should have been determined as a welder rather than as a retail sales person.

Given the provisions of section 106 of the MPIC Act, counsel for MPIC submitted that the panel should consider whether the Appellant was capable of performing the duties of a welder on April

29, 2005, the day before the second MVA, whether because of MVA related symptoms or non-MVA related symptoms. Counsel further submitted that the burden is on the Appellant to show that the determined employment is incorrect on a balance of probabilities. Counsel submitted that the Appellant in this case is unable to meet that burden, particularly since he did not attend at the hearing of his appeal.

Counsel for MPIC noted that after the first MVA, the Appellant was having physical difficulties. He referred the panel to a report from the Appellant's physician, [Appellant's doctor], dated November 19, 2004. In that report, [Appellant's doctor] indicated that the Appellant was suffering from left neck and shoulder pain, with limited left shoulder range of motion. The report indicates, with respect to the Appellant's work status, that the Appellant's clinical condition results in an "inability to perform required tasks". A further report from [Appellant's doctor] dated December 10, 2004 indicates the functional classification "significant functional limitation" and indicates that the Appellant is "unable to work at any job".

Counsel for MPIC noted that on April 28, 2005, [Appellant's doctor] signed an occupational health assessment form which indicated that the Appellant was able to return to modified work duties. This form indicated that the Appellant had certain restrictions in his capabilities, including restrictions on lifting from floor to waist up to 50 pounds, carrying up to 50 pounds and no work above the shoulder. Counsel for MPIC also referred to [Appellant's doctor's] report of January 4, 2006 addressed to MPIC. In that report, [Appellant's doctor] stated as follows:

> "[The Appellant] had been given leave to start light duties at his visit of April 28, 2005 (prior to the accident). He was still unable to do overhead work as well as repetitive neck movements or static flexion/extension of cervical spine.
>
> These restrictions continue, but in addition, he now has lower back and left lower extremity pain which is still under investigation (C.T. scan is booked for January 26, 2006)."

Counsel submitted that the restrictions identified in the first paragraph above related to the modified return to work in April 2005.

MPIC's case manager had a discussion with the Appellant's employer, which he recorded in the file notes dated November 28, 2005. In those notes, the case manager indicated that the employer had described details of the Appellant's job duties, as follows:

> "Discussed the type of work claimant is required to do. [Appellant's employer] advised that the jobs vary as they are a fabricating plant. Structured steel pieces are different. Structured steel pieces are for building fabrication.
>
> [Appellant's employer] indicated that as a welder, required to wear a welding helmet. Welders will either leave face mask down or flip it up & down while working. Movement of head required in job.
>
> Welders are required to lift and carry small parts. Sometimes they are required to hold the pieces in place while welding. Majority of work requires lifting & overhead lifting. Also bending down is required. Their (sic) are hoists for lifting heavier objects. Body positions vary according to the job – sometimes welders will have to stretch/reach & then weld a piece. Claimant uses a welding torch – welding machine is a couple of pounds.
>
> Asked if claimant is provided restrictions for RTW if they would be able to accommodate claimant in his return to work. [Appellant's employer] advised that they would have to know what the restriction is, what claimant is able/unable to do to determine if they can accommodate him in his return to work. Medical note would be required."

Counsel for MPIC submitted that given the above-noted job duties, as well as the Appellant's above-described physical limitations, it is clear that he was unable to do the job of a welder. Counsel also noted that it was unknown how long the Appellant's graduated return to work program was intended to be. He referred the panel to a report from [Appellant's neurosurgeon] dated April 19, 2005, in which [Appellant's neurosurgeon] and his resident stated as follows:

> "We advised him to go back to work on a gradual plan so that the patient will be involved with light work initially and then the work load will be increased gradually as the patient tolerates it."

Counsel for MPIC also referred to a letter from the Appellant's orthopedic surgeon, [Appellant's orthopedic surgeon], dated November 8, 2005, in which [Appellant's orthopedic surgeon] stated as follows:

> "I suggested that he may not be able to do his heavy work because of the left shoulder but he should be able to do some lighter work which is probably good for him anyway."

Counsel for MPIC acknowledged that the Appellant was able to perform some of the required duties of his welding job, but given that he could not perform all of the required duties of his job, he had to be determined into some other form of employment. He referred the panel to a report from MPIC's Health Care Services dated September 30, 2005. In that report, the Health Care Services medical consultant stated as follows:

> "Based on [the Appellant's] past history that included cervical spine surgery, the documentation of an exacerbation of symptoms as a result of a November 2004 motor vehicle incident and the reporting of persistent symptoms through 2005, it is my opinion [the Appellant] does not have the physical ability to perform his normal duties as a welder."

The Health Care Consultant provided a further report dated March 21, 2007. In that report, he commented further upon the physical limitations of the Appellant, as follows:

> "It is not unreasonable to assume that [the Appellant] would be limited to some extent as a result of the lumbar disc abnormality and the pre-existing cervical and left shoulder medical conditions. [The Appellant's] low back condition might prevent him from performing labour-type activities, activities that require repetitive forward flexion and rotation as well as prolonged sitting. It is possible that [the Appellant's] cervical and left shoulder symptomatology limit him from performing work with his hands above shoulder height or activities that require sustained or repetitive neck extension."

Counsel for MPIC referred the panel to one additional report of the Health Care Services medical consultant, dated November 26, 2007, in which the consultant provided the following opinion:

> "It is my opinion work as a fitter/welder would involve use of hands at or above shoulder height that in turn would result in neck extension and that this would likely

> exacerbate any symptoms and possibly accelerate the development of degenerative changes at levels above and below the portion of the spine that was fused. It is also my opinion work as fitter/welder would involve repetitive neck movements and sustained neck positions, which could adversely affect the underlying changes involving the cervical spine and lead to the development of more symptoms."

Counsel for MPIC also noted that with respect to the welding job that the Appellant ultimately obtained in May 2008, the Appellant has provided no details with respect to the duties of that job, other than, through his former counsel, that it is a "light welding job". He has been out of touch with MPIC since then. MPIC and the Commission do not know how it has affected his condition.

Counsel for MPIC also pointed out that although [Appellant's doctor] signed a return to work form dated October 2, 2004 indicating that the Appellant was able to work starting September 19, 2004, he had also signed a medical certificate for the purpose of Employment Insurance dated October 7, 2004 indicating that the Appellant would be off work from May 27, 2004 with an "indefinite" expected recovery date. Counsel for MPIC submitted that these constituted conflicting statements from [Appellant's doctor] as to when the Appellant was able to return to work.

Counsel for MPIC submitted that the Appellant has not shown, on a balance of probabilities, that the 180 day determination made was incorrect. He therefore submitted that the Internal Review decision should stand.

Reasons for Decision:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated December 17, 2010, is incorrect. In particular, the Appellant

needs to show, on a balance of probabilities, that the 180 day determination was not appropriate and was not made in accordance with the applicable statutory provisions. Those provisions are as follows:

70(1) In this Part,

"**non-earner**" means a victim who, at the time of the accident, is not employed but who is able to work, but does not include a minor or student;

Entitlement to I.R.I. after first 180 days

86(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the non-earner in accordance with section 106, and the non-earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the non-earner was receiving during the first 180 days after the accident.

Determination of I.R.I.

86(2) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering

(a) whether the victim could have held the employment on a full-time or part-time basis;

(b) the work experience and earnings of the victim in the five years before the accident; and

(c) the regulations.

Factors for determining an employment

106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

Type of employment

106(2) An employment determined by the corporation must be an employment that the victim could have held on a regular and full-time basis or, where that would not have been possible, on a part-time basis immediately before the accident.

After a careful review of all the reports and documentary evidence filed in connection with this appeal, including the submissions made on behalf of the Appellant, and after hearing and giving careful consideration to the submissions of counsel for MPIC and taking into account the provisions of the relevant legislation, the Commission finds as follows:

Discussion:

At the time of the second MVA, the Appellant was not working but was scheduled to return to work. He had earlier had surgery and suffered some injuries in the first MVA, but he had recovered to such an extent that [Appellant's doctor] had signed an occupational health assessment form dated April 28, 2005, addressed to the Appellant's employer, [text deleted], which indicated that he was to return to work with "modified or alternate duties". This return to work was supported by [Appellant's neurosurgeon] and his resident, who had provided a letter to [Appellant's doctor] dated April 19, 2005 in which they indicated "We advised him to go back to work on a gradual plan so the patient will be involved with light work initially and then the work load will be increased gradually as the patient tolerates it".

Counsel for MPIC, in his submissions, raised the point that [Appellant's doctor] may have made inconsistent statements in October, 2004, regarding whether the Appellant was able to return to work at that time. However, the panel notes that the relevant time for assessing whether the Appellant was scheduled to return to work is immediately prior to the second MVA. Accordingly, those earlier statements are not relevant to the issue being considered here. [Appellant's doctor's] April 28, 2005 return to work plan was corroborated by the neurosurgeon [Appellant's neurosurgeon], and the panel accepts that evidence of the Appellant's ability to return to work in April 2005.

As an individual who was not working at the time of the second MVA but who was scheduled to return to work, the Appellant met the definition of a "non-earner" pursuant to subsection 70(1) of the MPIC Act. Pursuant to the provisions of section 86 of the MPIC Act, as a non-earner the Appellant is entitled to IRI on the basis of a determined employment if he was not able to hold an employment because of the second MVA. Although the Appellant tried to return to work after the second MVA, he found, after the first day, that he was unable to continue due to his injuries. Accordingly, MPIC eventually determined an employment for him. Subsection 86(1) provides that MPIC shall determine an employment in accordance with section 106 of the MPIC Act. The parameters for a determination of employment are set out in subsections 86(2) and 106(1) of the Act. The issue here is whether the determined employment was appropriate. MPIC says the Appellant was properly determined as a retail sales person of welding parts. The Appellant says he ought to have been determined as a welder.

As noted, the MPIC Act sets out the factors which must be considered by MPIC in making a determination of employment. Subsection 86(2) provides that in making a determination, the corporation shall take into account, among other things, the work experience of the Appellant in the five years before the accident. In addition, subsection 106(1) of the MPIC Act provides that "the corporation shall consider the regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident".

MPIC had a Transferable Skills Analysis ("TSA") prepared, dated February 8, 2008, in order to assist in determining a suitable employment for the Appellant. The authors of the TSA, [text deleted], Employment Specialist and [text deleted], Research Analyst, did seem to consider all of the relevant factors in preparing their report:

Education

It is noted at page 3 of the TSA that the Appellant completed grade [text deleted] and part of grade [text deleted] at [text deleted] High School in [text deleted].

Training and Work Experience

On page 2 of the TSA, it is noted that the Appellant was employed as a welder for seven years with [text deleted]. It is noted in the TSA at page 3 that he took a Welder Class II Course with the [text deleted] in 2003, WHMIS training with [text deleted] in 2003 and a COR Safety Course with [text deleted] in 2004.

Physical Abilities

The authors of the TSA noted the following at page 2 of the report:

> "It is noted on file that, at the time of [the Appellant's] November 1, 2004 motor vehicle accident, he was on Employment Insurance. He had been employed at [text deleted] for seven years; however, had not been to work since early 2004. He had undergone neck surgery on June 9, 2004, and was medically cleared to return to light duty work as a fitter/welder on May 2, 2005, performing light duties with the following restrictions:
>
> - Lifting from floor to waist up to 50 lbs. carrying up to 50 lbs.
> - Push pull up to 50 lbs.
> - No work above shoulder height."

Accordingly, the TSA was prepared with those restrictions in mind.

Intellectual Abilities

Looking at the Appellant's vocational interests, work values and abilities, the authors of the TSA noted as follows at page 5:

> "These results, when analyzed by the Harringon-O'Shea Career Decision Making System process, would suggest the following career clusters for further exploration:

> 1. Technical
> 2. Skilled Trades
> 3. Math-Science
>
> In reviewing the results of the Harrington-O'Shea Career Decision Making System survey with [the Appellant], he stated he felt the results were reflective. With regards to his self-reported interests, [the Appellant] stated that ideally he would like to return to work as a welder. If this is not appropriate, he would be interested in a position using his hands."

As noted above, the Appellant did, in fact, find employment as a welder in May 2008.

Conclusions of the TSA

The authors of the TSA concluded that given their analysis, there were several categories of occupations which would be reasonable for the Appellant, "based on his vocation profile, and restrictions and limitations, prior to his April 30, 2005 motor vehicle accident". The authors noted that "the occupations identified should not require further education, however some on the job training may be required. When employment opportunities arise, his actual abilities to perform the duties of the specific position may need to be further assessed." These categories included, among others:

- NOC 7214, Contractors and Supervisors, Metal Forming, Shaping and Erecting Trades e.g. Foreman, ironworkers; supervisor, welders
- NOC 7265, Welders and Related Machine Operators e.g. furnace solderer; metal solderer; soldering machine operator; spot welder; wire welder
- NOC 9483 Electronic Assemblers, Fabricators, Inspectors and Testers e.g. capacitator assembler; circuit board assembler; electronics assembler; surface mount assembler; through-hole assembler; wave soldering machine operator

- NOC 3223 Dental Technologists, Technicians and Laboratory Bench Workers e.g. ceramic denture moulder; dental laboratory bench worker; orthodontic band maker; dental technician; dental technologist
- NOC 6421 Retail Salesperson and Sales Clerks e.g. car rental agent; electronics salesperson – retail; hardware store clerk; retail sales clerk

Determination

It appears, based on email correspondence dated February 20, 2008, from the authors of the TSA to the MPIC case manager, that MPIC selected the occupation of retail sales person to be the determined employment for the Appellant from the categories provided in the TSA. It is not clear why that occupation was chosen over various others on the list provided in the TSA. The case manager does indentify why the occupation of welder was not chosen in a fax dated February 22, 2008, to [rehabilitation clinic's doctor]:

> "The 180 day determined employment had to exclude the occupation of a welder due to related activities that would include work above should height or activities that require sustained or repetitive neck extension."

However, the panel notes that the authors of the TSA, in making their findings that the occupation of a welder would be reasonable for the Appellant, took into account the physical restrictions and limitations on the Appellant. Accordingly, the panel finds that the case manager erred in excluding that occupation from consideration.

Counsel for MPIC submitted that immediately before the second MVA, the Appellant was not capable of returning to work as a welder due to his physical limitations. Counsel relied on reports from MPIC's Health Care Services in support of his submission that the Appellant did not have the physical ability to perform his normal duties as a welder.

MPIC's Health Care Services medical consultant provided a report dated February 4, 2005, after the Appellant's surgery and the first MVA but before the second MVA. It is significant to note that in assessing the determination of employment under subsection 106(1), the relevant time period is "immediately before the accident". The relevant date for assessing the Appellant's capabilities here is April 29, 2005. In the February 4, 2005 report, the consultant stated as follows:

> "It is noted that [the Appellant] was provided work opportunity in January 2005. Based on my review of the medical information on file, it is my opinion that [the Appellant] does not have a physical impairment of function arising from the incident in question that in turn would preclude him from returning to his work duties. This is based on information obtained from [Appellant's neurosurgeon] indicating [the Appellant] would have been returning to work in November 2004 even in the presence of residual pain and limited movement. In other words pain and limited movement do not equate to an occupational disability in this case. It is medically probable [the Appellant] will not regain full spinal range of motion as a result of the fusion he underwent."

Accordingly, prior to the second MVA, even though the Appellant had some residual symptoms from the surgery and the first MVA, the MPIC medical consultant was of the opinion that the Appellant was able to return to work and did not have an occupational disability. Subsequent reports from MPIC's medical consultant, prepared after the date of the second MVA, must be read with caution in the sense that the relevant date for the determination is immediately prior to the second MVA.

For example, in a report from MPIC's Health Care Services dated September 30, 2005, some five months after the second MVA, the Health Care Services medical consultant appears to be commenting on the Appellant's capabilities as at that date. The report notes the following:

> "It is possible that [the Appellant] will be able to perform some type of work duties in a modified or reduced capacity.

> It is my recommendation that [the Appellant's] employer should be contacted to see what job opportunities are available to him. If modified duties are available, then [the Appellant] should return to the modified position on a part-time basis, in my opinion.
>
> It is noted that [the Appellant] is undergoing further assessments by a neurosurgeon and [Appellant's orthopedic surgeon]. It would be helpful to obtain reports from these healthcare professionals outlining their involvement in [the Appellant's] care and their opinion with regard to his level of function.
>
> It should be noted that the information on file leads me to conclude the April 29, 2005 [April 30, 2005] motor vehicle incident resulted in symptoms that in turn prevented [the Appellant] from successfully participating in the graduated return to work program recommended by [the Appellant's doctor]."

Notwithstanding that the report is focussed on the Appellant's then-current condition, the medical consultant also acknowledged, in the final paragraph above, that if not for the second MVA, the Appellant would have participated in the planned graduated return to work program. The panel rejects the argument from counsel for MPIC that the Appellant could not be determined as a welder simply because, immediately prior to the second MVA, he was scheduled to return to modified duties on a graduated return to work basis. The Appellant's employer had indicated that a medical note would be required but that certain accommodations could be made, as recorded by the MPIC case manager in his file notes dated November 28, 2005:

> Asked if claimant is provided restrictions for RTW if they would be able to accommodate claimant in his return to work. [Appellant's employer] advised that they would have to know what the restriction is, what claimant is able/unable to do to determine if they can accommodate him in his return to work. Medical note would be required."

In fact, the Appellant was able to obtain a welding job in May 2008, a few months after beginning a work hardening program at [rehabilitation clinic], and a few months after the completion of the TSA report.

In considering the submissions of counsel for MPIC, and in reviewing the decisions of the case manager and the Internal Review Officer, the Commission finds that the only factor considered by MPIC in determining an employment for the Appellant was the physical capabilities of the Appellant, and in so restricting its consideration, MPIC erred in failing to properly consider all of the relevant factors, as required by section 106 of the MPIC Act. In addition, the panel accepts the finding of MPIC's medical consultant made prior to the second MVA that the Appellant did not have an occupational disability; in other words, he was able to return to work as a welder.

The panel finds that a proper consideration of all of the relevant factors under section 106 of the MPIC Act, including the Appellant's physical capabilities, together with the Appellant's training and lengthy work history as a welder, as well as his stated preference to return to work as a welder, leads to the conclusion that a determination as a welder would be the most appropriate employment.

Disposition:

For the reasons outlined herein, the Commission finds that the Appellant has established, on a balance of probabilities, that on a consideration of all of the relevant factors pursuant to section 106 of the MPIC Act, the 180 day determination of the Appellant should be that of a welder.

The Commission directs that the Appellant's IRI be adjusted accordingly. The Appellant shall be entitled to interest upon the monies due to him by reason of the foregoing decision, in accordance with section 163 of the MPIC Act.

As a result, the Appellant's appeal is allowed and the Internal Review Officer's decision dated December 17, 2010, is therefore rescinded.

The Commission shall retain jurisdiction in this matter and if the parties are unable to agree on the amount of compensation, either party may refer this issue back to the Commission for final determination.

Dated at Winnipeg this 9th day of December, 2015.

JACQUELINE FREEDMAN

TOM FREEMAN

SANDRA OAKLEY