

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-05-211**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Diane Beresford
Mr. Paul Johnston

APPEARANCES: The Appellant, [text deleted], was represented by Ms Marcelle Marion of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: July 23, 2008

ISSUE(S): Two-year determination of employment

RELEVANT SECTIONS: Sections 107 and 109 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

Reasons For Decision

The Appellant, [text deleted], was involved in a motor vehicle accident on February 2, 1999. As a result of the motor vehicle accident, the Appellant sustained a very badly comminuted intra-articular fracture of his right wrist. He also experienced significant psychological sequelae, which included bouts of depression and substance abuse. Due to the bodily injuries which the Appellant sustained in this accident, he became entitled to Personal Injury Protection Plan benefits pursuant to Part 2 of the MPIC Act.

At the time of the motor vehicle accident, the Appellant was employed as a flat roofer, which was classified as a very heavy level of work. 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. The Appellant then undertook various programs to assist him with returning to the workforce. However, by early 2003, the conclusion had been reached that, even after undergoing extensive physical and psychological rehabilitation, it was unlikely that the Appellant would be able to resume his pre-accident occupation. MPIC subsequently undertook a two-year determination of the Appellant's residual earning capacity. Initially, MPIC's case manager determined the Appellant as capable of meeting the job requirements of a security guard. This decision was however later rescinded as it was determined that the Appellant lacked the required English language skills necessary for the determined position of a security guard.

In the spring of 2005, a Physical Demands Analysis and a Functional Capacity Evaluation were undertaken to assess the Appellant's suitability for the position of mechanical assembly. In a decision dated June 6, 2005, the case manager determined that based upon the Functional Capacity Evaluation of April 22, 2005, and the Appellant's level of skills and abilities, the Appellant was capable of holding the position of "Assembler". In accordance with Schedule C of Manitoba Regulation 39/94, the determined employment was classified in the category of electrical and related equipment, fabricating and assembling occupations.

The Appellant sought an Internal Review of the case manager's decision of June 6, 2005. In a decision dated September 15, 2005, the Internal Review Officer confirmed the case manager's decision and dismissed the Appellant's Application for Review. In his decision dated September 15, 2005, the Internal Review Officer noted the following:

In her FCE Report of April 29, 2005 [text deleted] concluded that you demonstrated that ability to perform the physical duties of a Mechanical Assembler. In arriving at that conclusion, [text deleted] indicated:

“[The Appellant] scored below average on right and left fine motor speed/coordination and as a result a concern would be his ability to perform at a competitive level. However, he fell just slightly below average, and therefore, may do well in mechanical work given time to hone his skills within a supportive environment.”

For the most part, your concerns about your ability to hold the job of an Assembler were directed toward your difficulties with non-physical issues such as concentration and depression etc. I have concluded that the evidence confirms your ability to carry out the physical requirements of an Assembler.

You have indicated that concentration testing should be undertaken. As indicated above, [Appellant’s psychologist #1] and his assistant have seen you extensively over the years and there is no indication from his office that this type of testing is required. This is despite the fact that your reported difficulties with concentration were noted in their reports. In fact, it is indicated in [Appellant’s psychologist #1’s] report of December 7, 2004:

“In terms of this man’s mental status, he has good attention and concentration”.

Your concentration was previously tested by [Appellant’s psychologist #2] who indicated in his report of August 24, 2000 under Cognitive Testing:

Cognitive Testing

“In light of his concerns on his concentration and memory, I had tested his verbal memory, non-verbal memory, and higher level concentration. All 4 memory variables were within normal limits. Higher level concentration was also functional, although his auditory attention span appeared be decreased. Thus I reassured [the Appellant] that his memory was appropriate for entering a training program, although he is likely to see variations in his attention due to his fatigue and associated sleep disorder and mood changes.”

In his report to [text deleted] of March 25, 2000, [Appellant’s psychologist #2] further confirmed with respect to your Attention/Concentration:

Attention/Concentration

[The Appellant] was generally functional in his attention. This includes the following:

- a) his auditory attention span: was within an average range.
- b) visual scanning on pen-and-paper tests: was normal in a complex task, and reflected a single error on a less complex format. Thus this is not regarded as functionally significant.
- c) Informal testing of “frontal lobe” inhibition and self-regulation revealed that his concentration was within normal limits.

- d) Visual attention to detail, on intellectual assessment: was slightly above average, exceeding 75% of other individuals.

During the course of the Internal Review Hearing I asked you to provide me with examples of difficulties with concentration you had experienced. You provided me with one example relating to being inattentive while driving. Your example did not appear unique to the average population. To the extent that your use of Paxil could be contributing to any concentration issues, you should discuss this further with your physician.

I attach a little weight to the fact that you did not succeed with your work experience at [text deleted]. It was not my impression that you were motivated to return to work at that time.

Therefore, based upon the information in your file, which I have reviewed, I am satisfied that your two-year determination was completed correctly in accordance with the legislation and the evidence. Accordingly, I am dismissing your Application for Review and upholding [text deleted] decision of June 6, 2005.

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.

Appellant's Submission

The Claimant Adviser, on behalf of the Appellant, submits that the case manager was incorrect in the two-year determination of the Appellant as an assembler, for the following reasons:

1. the Appellant could not perform the physical requirements of an assembly job due to the hand injury which he sustained in the motor vehicle accident; and
2. the Appellant's ongoing depression and poor concentration made him ill-suited to an assembly job requiring a significant amount of attention to detail.

In support of her position, the Claimant Adviser relies on the report dated May 17, 2008 of [Appellant's occupational therapist], occupational therapist, wherein [Appellant's occupational therapist] concluded as follows:

Based on objective testing completed on three different occasions, it is my opinion that [the Appellant] is not suitable for the position of assembler. Based on test results, it would appear that [the Appellant] does not possess the hand function necessary to complete assembly work on a full time basis in a competitive work environment.

As a result, the Claimant Adviser maintains that the two-year determination was incorrect. She argues that the Appellant did not have the ability to carry out the essential duties of an assembler as at June 6, 2005 and continues to be unable to work at that occupation. Therefore, the Claimant Adviser submits that MPIC's determination should be rescinded and the Appellant's IRI benefits be reinstated.

MPIC's Submission

Counsel for MPIC argues that the case manager's decision was based upon several assessments and investigations of the Appellant's functional capabilities and was a suitable two-year determination. Counsel for MPIC submits that:

1. In June, 2005, [the Appellant] was able to work, but was unable – because of the accident – to hold the full-time employment he held immediately before the accident.

It is clear from the material that the wrist injury permanently precluded him from working in the relatively heavy types of work he had been doing prior to the accident.

2. In June, 2005, [the Appellant] had the physical and intellectual abilities to hold employment as an "Assembler". The physical aspect was confirmed by the Functional Capacity Evaluation dated April 29, 2005, while the intellectual aspect was confirmed in several of the reports submitted by [Appellant's psychologist #1].

Although Section 107 also mentions “education” and “training” as criteria, the reality is that “Assembler” positions do not require much in either of these areas because job-specific, on-the-job training is generally provided by the employer.

Similarly, although [the Appellant] did not have specific work experience as an “Assembler”, the duties of the occupation have been described as a “scaled-down version” of the “more physical, hands-on types of work” that [the Appellant] was used to doing.

3. In June, 2005, the occupation of “Assembler” was “normally available” in the City of [Text deleted], where [the Appellant] then resided (and still does reside).

The material indicates that there were “Assemblers” employed with [text deleted] at the time of the determination. There were no doubt other similar operations in [Text deleted] at the time.

4. In June, 2005, [the Appellant] was able to hold employment as an “Assembler” on a regular and full-time basis.

On a balance of probabilities, the totality of the evidence supports the conclusion that this criterion was met.

Counsel for MPIC argues that MPIC worked extremely hard to rehabilitate [the Appellant] to the point where it was appropriate for him to re-enter the workforce. He notes that considerable effort was expended to determine the Appellant into an appropriate category of employment. As a result, counsel for MPIC maintains that all of the criteria set out in Sections 107 to 109 of the MPIC Act were met when the determination was finalized in June, 2005. He contends that there has been no compelling evidence to the contrary put before the Commission and therefore the appeal should be dismissed.

Discussion

Upon a careful review of all of the medical, paramedical and other reports and documentary and oral evidence filed in connection with this appeal, and after hearing the submissions of the Claimant Adviser on behalf of the Appellant, and of counsel for MPIC, the Commission finds that the two-year determination of the Appellant as an assembler was inappropriate.

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 did not properly consider the Appellant's physical abilities when determining that he could hold employment as an assembler. In arriving at this conclusion, we note the following reports from the occupational therapists who assessed the Appellant's functional abilities:

- The Functional Capacity Evaluation conducted on April 21, 2005 by Ms Tuyet Huynh, occupational therapist, concluded that:

[The Appellant] should be able to perform the physical duties of a Mechanical Assembler. Mechanical Assemblers are responsible for the following:

- Light to medium level work (lifting no more than 35-50 pounds at waist level)
- Occasional to frequent fine motor movements. Particularly requiring tripod, chuck and pincer grasps of no more than one pound of force required.
- Light to moderate grip force required to operate torque gun, scissors and mallet.

Based on his performance, [the Appellant] should not have difficulty with the above tasks.

[The Appellant] scored below average on right and left fine motor speed/coordination and as a result a concern would be his ability to perform at a competitive level. However, he fell just slightly below average, and therefore, may do well in mechanical work given time to hone his skills within a supportive environment.

- The report dated May 17, 2008 of [text deleted], Occupational Therapist, which concluded that:

Based on objective testing completed on three different occasions, it is my opinion that [the Appellant] is not suitable for the position of assembler. Based on test results, it would appear that [the Appellant] does not possess the hand function necessary to complete assembly work on a full time basis in a competitive work environment.

We find that the position of assembler required occasional to frequent fine motor movements. Based upon the Appellant's limitations with right and left fine motor speed, sensation and touch discrimination, we find that he would likely not be competitive or suitable for work requiring a large component of fine motor activity, especially where there was a speed requirement such as with small assembly. We find that the two-year determination was overly optimistic in trying to determine an individual who had sustained a significant hand injury into a position requiring a large component of fine motor activity. The Appellant's functional abilities at the time of the two-year determination simply did not meet the requirements of an assembler position. As such, 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.

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

- a) MPIC incorrectly reduced the Appellant's IRI benefits effective June 6, 2006 pursuant to Section 110(1)(d) of the MPIC Act; and
- b) [The Appellant's] IRI benefits shall be reinstated as at June 6, 2006. 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 15, 2005 is, therefore, rescinded.

Dated at Winnipeg this 30th day of October, 2008.

YVONNE TAVARES

DIANE BERESFORD

PAUL JOHNSTON