

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-021**

PANEL: Ms Yvonne Tavares, Chairperson
Ms Diane Beresford
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATES: December 12 and 13, 2011

ISSUE(S): 1. Whether the Appellant has a reasonable excuse for the late filing of his Application for Review;
2. Whether the two-year determination of employment was appropriate.

RELEVANT SECTIONS: Sections 107, 109 and 172(1) and (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant, [text deleted], is appealing the Internal Review Decision dated January 30, 2009, with respect to the following issues:

1. whether the Appellant has a reasonable excuse for the late filing of his Application for Review; and
2. whether the two-year determination of employment was appropriate.

At the hearing of the appeal, the Appellant withdrew his appeal with respect to entitlement to further psychological treatment funding.

Facts and Background:

The facts of the appeal can be briefly summarized as follows:

1. On October 29, 2002, the Appellant was a passenger in the backseat of a vehicle involved in a rollover. The Appellant was not wearing his seatbelt at the time and was ejected through the hatchback window of the vehicle.
2. As a result of the accident, the Appellant sustained significant injuries, including a closed head injury, right occipital condyle fracture, facet fractures of C5 and C6 without deformity, transverse process fracture of C7 without displacement, laceration of spleen and left kidney, brachial plexus injury to the left shoulder, fracture of the distal left thumb, and multiple contusions and lacerations.
3. At the time of the accident, the Appellant was employed as a journeyman electrician. However, 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.
4. By early 2005, the conclusion had been reached that it was unlikely that the Appellant would be able to resume his pre-accident occupation as a licensed electrician which was classified as heavy work demands. As a result, MPIC undertook a two-year determination of the Appellant's residual earning capacity.
5. A Transferable Skills Analysis ("TSA") and labour market analysis was completed on May 16, 2005 in order to assess the Appellant's skills and abilities with respect to alternate employment. Based on this assessment, the occupation of a College and Other Vocational Instructor NOC 4131 and the occupation of a Construction Inspector NOC

2264 were identified as best suiting the Appellant's experience, education and physical requirements.

6. A Functional Capacity Evaluation was also completed and confirmed that the Appellant was capable of medium physical work demands.
7. Based upon the results of the Functional Capacity Evaluation and the TSA and Labour Market Research, MPIC completed a two-year determination of the Appellant's residual earning capacity.
8. In a decision dated June 22, 2006, MPIC's case manager advised the Appellant that the position of "Construction Inspector" was selected as the most suitable position for his determined employment. The determination took effect July 2, 2006. The Appellant continued to receive his current income replacement indemnity ("IRI") for one year following July 2, 2006. Starting July 2, 2007 (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.
9. The Appellant sought an Internal Review of that decision and filed an Application for Review of Injury Claim Decision on November 25, 2008 with MPIC.
10. In a decision dated January 30, 2009, the Internal Review Officer rejected the Appellant's Application for Review for failure to comply with Section 172 of the MPIC Act. The Internal Review Officer found that the Appellant did not have a reasonable excuse for failing to apply for a review of the case manager's decision within the time period stipulated by the MPIC Act. The Internal Review Officer also considered the merits of the Appellant's appeal and found that the determined employment as a "Construction Inspector" was done correctly and in accordance with the applicable statutory provisions. 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. As previously noted, the issues which require determination on this appeal are:

1. whether the Appellant has a reasonable excuse for the late filing of his Application for Review; and
2. whether the two-year determination of employment was appropriate.

Relevant Legislation:

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.

Application for review of claim by corporation

[172\(1\)](#) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

Corporation may extend time

[172\(2\)](#) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

ISSUE #1 – WHETHER THE APPELLANT PROVIDED A REASONABLE EXCUSE FOR THE LATE FILING OF HIS APPLICATION FOR REVIEW:

Appellant's Submission:

At the appeal hearing, the Claimant Adviser argued that the Appellant was highly motivated to return to work following the two-year determination process. The Claimant Adviser contends that the Appellant tried to find work as a construction inspector, but it was only after he tried to find that employment and was unsuccessful that he realized that the determination was inappropriate. The Claimant Adviser submits that Section 172 is fundamentally unfair to claimants since, pursuant to Section 110(1)(d) of the MPIC Act, an Appellant is given a year to try and find alternate employment, but only 60 days to seek a review of the case manager's decision respecting the determination of employment. As a result, claimants often find themselves at the end of the one year job search having been unable to secure positions within the determined employment, and being in the position of not being able to challenge the case manager's decision.

The Claimant Adviser maintains that it was only when the Appellant realized that he had a brain injury and cognitive difficulties, that he also realized that he would be unable to find a job as a construction inspector. As a result, the Claimant Adviser argues that the Commission should accept the Appellant's explanation for the delay and extend the time for filing the Application for Review.

MPIC's Submission:

Counsel for MPIC submits that the Appellant has not provided a reasonable excuse for the delay in filing the Application for Review. Counsel for MPIC maintains that the Appellant knew that the time period for filing an Application for Review was 60 days. He had previously filed an Application for Review from another case manager's decision. Further, she contends that there was a significant delay in the actual filing which would cause considerable prejudice to MPIC should the Appellant's appeal be allowed. Additionally, counsel for MPIC contends that the Appellant was not actively looking for work throughout the majority of the one year job search and he was not motivated to return to work on a full-time basis. Counsel for MPIC maintains that the Appellant simply has not provided a reasonable excuse for the failure to file his Application for Review of the case manager's decision within 60 days of the decision. As a result, counsel for MPIC submits that an extension of the time should not be granted to the Appellant to file the Application for Review.

Decision:

Upon hearing the testimony of the Appellant, and after 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 the Claimant Adviser on behalf of the Appellant and of counsel for MPIC, the Commission finds that the Appellant has not provided a reasonable excuse for his failure to file the Application for Review within the time period set out in Section 172(1) of the MPIC Act.

Reasons for Decision:

The Commission, having considered the totality of the evidence before it, finds that the Appellant has not provided a reasonable excuse for his failure to file the Application for Review within the time period set out in Section 172(1) of the MPIC Act. We find that the Appellant was well aware of the time limits for filing for an Application for Review. Further, the evidence before the Commission established that the Appellant simply was not interested in pursuing employment until on or about June 6, 2007, less than one month before his one year job search ended. Yet his Application for Review was not filed until November 25, 2008. Further, there was a paucity of evidence before the Commission with respect to any effort on the Appellant's behalf to secure employment within the determined classification. Rather, we find that the Appellant was not interested in pursuing alternate employment and he did not establish an inability to find employment within the determined classification. As a result, the Commission finds that the Appellant's failure to find employment within the determined classification did not constitute a reasonable excuse for his failure to apply for an Application for Review within the time limits provided within Section 172(1) of the MPIC Act.

The Appellant also testified that he realized that the determined employment was not suitable when he found out that he had a brain injury. He testified that he saw a program on television describing symptoms of brain injury and he feels that he has a brain injury. It was at this point that the Appellant contends that he realized that he would be unable to carry out the job duties as a Construction Inspector. The Commission finds that there was no evidence before it that the Appellant had an ongoing problem with memory. Rather, the findings from [Appellant's Doctor #1] and [Appellant's Doctor #2] suggest that the Appellant is capable of employment within the determined classification. The panel also finds that the delay in the filing of the Application for Review would create significant prejudice to MPIC in this case.

Lastly, the Commission did consider the merits of the appeal in order to assess whether or not the time limit should be extended for the filing of the Application for Review. However, upon a careful review of all of the documentary evidence filed in connection with this appeal, the Commission finds that the two-year determination of the Appellant as a Construction Inspector was appropriate. We find 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. As a result, we are unable to find that an error on the merits of the Appellant's appeal would justify extending the time limit for filing the Application for Review.

As a result, in the circumstances, the Commission finds that the Appellant has not provided a reasonable excuse for failing to file the Application for Review within the time period set out in Section 172(1) of the MPIC Act. Accordingly, the Appellant's appeal is dismissed and the decision of MPIC's Internal Review Officer dated January 30, 2009 is confirmed.

Dated at Winnipeg this 23rd day of February, 2012.

YVONNE TAVARES

DIANE BERESFORD

SANDRA OAKLEY