Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-098

PANEL:	**Ms Laura Diamond, Chairperson** **Ms Jacqueline Freedman** **Ms Linda Newton**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted] of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.**
HEARING DATE:	**September 19, 2012**
ISSUE(S):	**1. Whether the Appellant had a promised employment during the first 180 days following the accident, which would entitle him to IRI benefits for the first 180 days;** **2. Whether the Appellant was capable of performing the employment of a heavy equipment operator as of the 181st day following the accident**
RELEVANT SECTIONS:	**Sections 70(1), 85 (1) and (3) 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 was injured in a motor vehicle accident on November 23, 2009. As a result of the accident he sustained soft tissue injuries to his neck and back. At the time of the accident, he was not employed.

On February 10, 2010, the Appellant contacted his case manager and advised that he had recently been called to work, having previously completed a Heavy Equipment Operator [text deleted] and placed on a waiting list for the [text deleted]. However, following investigation, his case manager concluded that the Appellant had not been offered employment, and on April 8, 2010, provided a decision stating that the Appellant did not have any entitlement to Income Replacement Indemnity ("IRI") benefits as employment had not been offered to him. The Appellant was considered a non-earner under the MPIC Act and was not entitled to IRI benefits as he had not established that he "would have held employment".

The case manager had arranged for the Appellant to attend a multi-disciplinary assessment with [rehab clinic]. Her decision noted that this report had indicated the Appellant was capable of holding employment, so any potential entitlement to IRI would end on March 29, 2010.

The case manager issued another decision on April 20, 2010 stating that the Appellant did not hold employment at the time of the accident, had not been offered employment, and had been deemed capable of holding employment as a Heavy Equipment Operator. He would not be entitled to any potential IRI benefits.

The Appellant sought an Internal Review of these decisions. In an Internal Review Decision dated July 5, 2010, the Internal Review Officer reviewed the medical evidence on the Appellant's file and found only subjective complaints of pain with no objective medical evidence of injury. He concluded that the medical evidence did not support his inability to hold employment beyond March 29, 2010 and the case manager's decision of April 20, 2010 was upheld.

The Internal Review Officer also noted the discrepancy between what the Appellant and MPI had been advised concerning an offer of employment. He reviewed the documentation in this regard and also contacted an individual representing the contractor for the project who indicated that his only contact with the Appellant was to confirm his qualifications to operate heavy equipment and that no job was available or offered to him. Accordingly, the Internal Review Officer also confirmed the case manager's decision of April 20, 2010.

It is from this decision that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He described the motor vehicle accident and injuries which he sustained. He indicated that both his legs were injured and that he suffered pain in his back and neck.

The Appellant explained that at the time of the motor vehicle accident he was not working. He had just finished taking a Heavy Equipment Course (which he completed in March) and was looking forward to working on bigger equipment. The course had been financed in part by [text deleted] and in part by [text deleted].

The Appellant described the course and training he received. He described the work as heavy, indicating that operating the large machinery on rough terrain was no easy task.

After completion of the course he registered with [Appellant's education counsellor], at [text deleted], as well as with [text deleted], as he was looking for work up north on heavy equipment.

The Appellant indicated that he then received a call from [project contractor] who worked with the [text deleted]. He says that they spoke numerous times (at least 10 times) and that he told [project contractor] that although he was injured, he would be available for work shortly. According to the Appellant, [project contractor] told him to phone him when he was 100 % available. The Appellant indicated that there were a few times when he and [project contractor] left messages for each other, but that most of the time they actually spoke on the phone. During the first call [project contractor] asked him what kind of certification he had and if he would be available for heavy equipment. The Appellant's understanding of these conversations was that he had been offered a job at [text deleted] by [project contractor] in approximately late January or early February. Although he did not receive anything in writing and most of the contact was by telephone, he understood that there was a shortage of operators and he would be needed at [text deleted] as soon as possible. However, he could not accept this offer of employment because of the injuries he had suffered in the motor vehicle accident.

The Appellant described a visit he made to [Appellant's education counsellor] at [text deleted] on April 13, 2010. He indicated that he had received a call that morning from [project contractor] offering employment, but had told him that he was still not available for work. He then went to see [Appellant's education counsellor] to see if she could help him out and so together they made a call on the speaker phone in her office to discuss the employment offer.

The Appellant also described his attendance at [rehab clinic]. [Rehab clinic] issued a report indicating that he was capable of working at least at a light to medium level, and perhaps at even a more strenuous level. But the Appellant indicated that at the end of March 2010, he was not fit for medium strength work.

The Appellant indicated that he has worked hard all of his life and was used to physical labour. His goal had been to go up north and work on bigger equipment, but this had been prevented by his injuries in the motor vehicle accident.

The Commission also heard evidence from [Appellant's education counsellor], the Project Officer and Education Counsellor for [text deleted]. She described her job in assisting clients with labour market and educational training, as well as counselling. She organized the Heavy Equipment Operator's course which the Appellant took and followed up with him. He would come in to find out if any employers had contacted her. It was she who referred the Appellant to the [text deleted] Project.

[Appellant's education counsellor] provided a letter dated September 20, 2011 which stated:

> "On April 13, 2012, [the Appellant] was in my office and we made a phone call to [project contractor]. During this phone call [project contractor] stated that [the Appellant] had been called into work for the [text deleted] Project but because he was not cleared to work by his Physician he was moved to the bottom of the list.
>
> I have talked with [text deleted], the Employment Assistant Facilitator from [text deleted] who has informed me that she has also talked to [project contractor] and that he is putting in requests for employees and [the Appellant]'s name will come up again soon."

In her evidence, [Appellant's education counsellor] described the meeting in her office with the Appellant and the phone call to [project contractor]. She indicated that [project contractor] sounded very friendly, as if he had spoken to the Appellant before. [Project contractor] asked him if he could come into work and the Appellant said he wasn't cleared yet. [Project contractor] said he would put him back on the list and call him if his name came up again. [Appellant's education counsellor] took notes regarding this call.

On cross examination, [Appellant's education counsellor] confirmed that she did not hear [project contractor] specifically say he had a job for the Appellant. She was not aware that [project contractor] was not doing hiring, but rather passing on the names of possible hires after a pre-screening to another individual who did the hiring.

Counsel for the Appellant addressed the conflict in evidence regarding the offer of employment to the Appellant. The Appellant's indexed file contained an email which [project contractor] had sent to the Internal Review Officer, stating that he spoke with the Appellant only to confirm his qualifications, and not to offer him a job.

However, the Appellant had consistently advised his case manager, as seen in notes of telephone conversations between the two of them on March 29, 2010, April 12, 2010, and April 13, 2010 that [project contractor] had called several times asking when he would be available for work.

Counsel for the Appellant reviewed a copy of an email exchange with [text deleted], [project contractor]'s superior, regarding hiring processes at [text deleted]. She submitted that this document showed that one call was sufficient to obtain qualifications from an applicant. A telephone interview would be conducted during this first call and further calls to the employee

would discuss start time and give more information on such issues as the length of position, or whether it was a day or night shift. Calls to applicants could also touch base regarding possible delays in coming to the site due to scheduling or weather conditions. If there were applicants who could not come to the site for their own reasons, they were always advised to keep in touch and get in contact with the employer when they were available for work.

Counsel submitted that this was the same understanding that both the Appellant and [Appellant's education counsellor] had regarding their telephone conversation with [project contractor] on April 13, 2010. The Appellant testified he spoke to [project contractor] on several occasions and that [project contractor] made him an offer of employment sometime in late January or early February 2010, which he could not accept because of his motor vehicle accident related injuries. The Appellant also testified that on April 13, 2010, he and [Appellant's education counsellor], called [project contractor] from her office at [text deleted] and confirmed that a job offer had been made to him.

Counsel submitted that in her testimony, [Appellant's education counsellor] had also confirmed that she and the Appellant called [project contractor] on the speaker phone in her office and during that conversation there was a job offer made to the Appellant. [Appellant's education counsellor] made detailed notes of this call on a database, unlike [project contractor], who relied only on his own memory of the conversation.

Counsel for the Appellant also submitted that the Appellant was not able to perform the duties of a Heavy Equipment Operator, as a result of his motor vehicle accident injuries. She submitted that x-ray reports and other medical information and documents on the Appellant's file supported the position that the Appellant suffered from medical and, in particular, spinal issues after the

motor vehicle accident. She reviewed reports from [Appellant's doctor] (one undated and one dated March 21, 2010) and [Appellant's doctor]'s chart notes. [Appellant's doctor] was exploring concerns regarding the Appellant's symptoms of numbness in his arms and legs, in addition to his pain. Spinal stenosis was questioned.

Counsel also questioned [rehab clinic]'s assessment, upon which MPIC relied. She indicated that this assessment was flawed with inconsistencies, pointing to severe pain level scores which [rehab clinic] referred to as a mild in nature. [Rehab clinic] then concluded that the Appellant was capable of returning to at least medium and even more strenuous duties. This would have placed him in a category of lifting 60 pounds, and the Appellant was not capable of doing this.

Counsel concluded that the Appellant had in fact received offers of employment which he had been unable to accept as a result of his injuries in the motor vehicle accident. MPIC's decision was seriously flawed. The decision of the Internal Review Officer should be overturned and the Appellants appeal upheld.

Evidence and Submission for MPIC:

MPIC provided several case manager notes detailing the case manager's investigations and conversations with [project contractor] at [text deleted]. In an email dated May 21, 2010 the Internal Review Officer reviewed a conversation he had with [project contractor], who indicated he had spoken with the Appellant but only to confirm his qualifications to operate heavy equipment. There was no job available or offered to him at the time. [Project contractor]'s return email of May 21, 2010 confirmed that this was an accurate statement.

The indexed file also contained a photocopy of notes from [project contractor]'s telephone diary in 2010, including entries from when he began calling job applicants on January 14, 2010 and from July 6, 2010. The only entry which mentions the Appellant was charted on July 6, 2010 and noted a call which the Appellant made to [project contractor], asking why he did not write him a letter offering him a job. [Project contractor] noted there that he told the Appellant he had called to get his qualifications, and did not offer him a job. The Appellant was pretty vocal and [project contractor] ended by asking what his point was to call him.

Counsel for MPIC submitted that the Appellant had not been able to demonstrate, on a balance of probabilities that he had been offered employment at [text deleted]. The documents in the indexed file disclosed serious issues in regard to the Appellant's credibility as a witness. Throughout his interactions with his case managers, [project contractor] and the Commission, the Appellant had told many changed and inconsistent stories. It was submitted that his evidence should be treated skeptically and not be given much weight.

The Appellant's indexed file contained case manager's notes where the Appellant indicated that he had not received any offers or declined any jobs prior to January 12, 2010. However, in a letter dated February 25, 2010 [text deleted] (Employment Assistant Coordinator) wrote to [Appellant's education counsellor] that:

> "...On January 7, 2010, [the Appellant] called me to inform me that he had received a call to go to work in [text deleted]. The call was on January 5, 2010, from [project contractor] a contractor for the project. Due to his injuries, he was unable to start work."

Then, before the Commission, the Appellant maintained that the only job offer he received was in early February. This pattern continued throughout the Appellant's cross examination. Overall, in any case where there were discrepancies between what was written in the

documentation and what the Appellant claimed at the hearing, the Appellant always maintained that the case manager must have been wrong. This was not credible, counsel submitted.

The Appellant's evidence regarding his job offer from [project contractor] was also in direct contrast with the written information that [project contractor] had provided to the Internal Review Officer. [Project contractor] was clear that he had not made any offer of employment to the Appellant and that he did not have the authority to do so.

Counsel submitted that the Appellant's evidence throughout was not consistent or reliable and the Commission should not give it weight.

Although [Appellant's education counsellor] supported the Appellant's evidence, counsel submitted that she only heard part of the conversations which the Appellant was alleging. Her evidence was ambiguous and not as conclusive as the evidence provided by [project contractor], the person who was alleged to have actually made the job offer, yet denied doing so.

Counsel for MPIC also submitted that even if the Appellant had a job offer, he was not entitled to Income Replacement Indemnity benefits, as he was physically capable of performing the job of a Heavy Equipment Operator. He relied in large part upon reports provided by the Appellant's own doctor, [Appellant's doctor], who wrote on March 21, 2010 that the Appellant had a deep rooted feeling that he was disabled. [Appellant's doctor] believed that the Appellant had convinced himself that he was functionally disabled by a prior injury. He stated:

> "At each visit I have stressed to [the Appellant] that he does not have any demonstrateable or reproducible loss of function that is significant. In the light of the above I cannot give a strong reason for the patient not to be able to perform some form of Occupational duties."

Again, in a written note to the Internal Review Officer on June 24, 2010, [Appellant's doctor] stated:

> "I am not of the opinion that he is so incapacitated and any report will not support this."

This was fully supported by the report from [rehab clinic] dated March 29, 2010, which, following extensive functional testing of the Appellant's abilities, concluded that he was able to return to at least a medium level of physical work and perhaps even a more strenuous level.

Counsel submitted that the only evidence of the Appellant's incapacity were his reports of pain. There was no documentation of an inability to function.

Counsel for MPIC submitted that the Appellant had failed to prove that injuries resulting from the motor vehicle accident prevented him from doing his work duties, and both [rehab clinic] and [Appellant's doctor] supported his abilities to do these duties as of March 29, 2010. Accordingly, counsel for MPIC submitted that the Appellant's appeal should be dismissed and the decision of the Internal Review Officer upheld.

Discussion:

The MPIC Act provides:

> **Definitions**
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> 70(1) In this Part,
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> **"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; (« non-soutien de famille »)
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> **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:
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> (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;
>
> (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.
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> **Basis for determining I.R.I. for non-earner**
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> 85(3) The corporation shall determine the income replacement indemnity for a non-earner on the following basis:
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> (a) under clause (1)(a), the gross income the non-earner would have earned from the employment;
>
> (b) under clause (1)(b), the benefit that would have been paid to the non-earner.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in concluding that he was not entitled to Income Replacement Indemnity ("IRI") benefits due to his ability to perform the essential tasks of his occupation, and due to his failure to establish that he would have held employment if not for his motor vehicle accident injuries.

The panel has reviewed the testimony of the Appellant and [Appellant's education counsellor] as well as the documentation on the Appellant's indexed file and the submissions of counsel.

The panel finds that the Appellant has not brought any medical evidence to establish that after March 29, 2010 he suffered from injuries as a result of the motor vehicle accident. He has not provided a medical report to support his appeal in this regard, and no diagnosis has been noted in the documents on his file which would have prevented him from working as a Heavy Equipment Operator at that time.

The Appellant's counsel analyzed and criticized reports which were provided by MPIC and by the Appellant's doctor, [Appellant's doctor], which stated that he could work and that there was nothing functionally wrong with him arising out of the motor vehicle accident. The Appellant sought to show inconsistencies in their reporting, but the evidence from [rehab clinic] and [Appellant's doctor] remains the only medical evidence in the file. The Appellant failed to submit any medical evidence of a diagnosis or a medical opinion which stated that he was not able to perform his duties at that point in time.

Accordingly, the panel finds that the Appellant has failed to show, on a balance of probabilities, that he was unable to work as a Heavy Equipment Operator as of the 181st day following the motor vehicle accident, and the decision of the Internal Review Officer dated July 5, 2010 is upheld in this regard.

The Appellant has also failed to show, on a balance or probabilities, that he would have held employment had it not been for the motor vehicle accident. Although the Appellant established that there was a possibility he might have found work at [text deleted], the panel finds that he has failed to establish this on a balance of probabilities.

The Commission accepts that the Appellant did speak with [project contractor], of [text deleted], a few times. It is possible that the Appellant could have interpreted these multiple phone calls and honestly believed that this meant there was a job offer for him. But [project contractor]'s correspondence clearly stated that he had not offered the Appellant a job.

The Appellant also submitted some email correspondence which attempted to address how the procedures for hiring at [text deleted] worked. However, following our review of this document,

many questions remained, and no witnesses were called who could explain or answer these questions.

The panel finds that there was a lack of clear evidence on how the procedures for hiring at [text deleted] really worked and too many questions remained as a result.

This lack of strength in the Appellant's evidence must be weighed against the specific documentary evidence from [project contractor], who confirmed that he did not make a job offer, and did not have the authority to make such an offer. He indicated that he just referred names of potential employees to his superintendant and that in none of his conversations with the Appellant did he have any intention of making a job offer. When the Appellant asked him why he wouldn't give a letter confirming the job offer, he noted that it was because he had not made a job offer. This was confirmed by his handwritten notes and his correspondence with MPIC.

Faced with this evidence, the Commission would require much stronger and clearer evidence from the Appellant to establish that an offer had in fact been made.

It is therefore not possible for the panel to determine, on a balance of probabilities, from the evidence submitted by that the Appellant, that he would likely have held employment at [text deleted] had he not been injured in a motor vehicle accident.

As a result of the lack of such evidence provided by the Appellant, the Commission finds that the Appellant has failed to establish on a balance of probabilities that the Internal Review Officer erred in concluding that the Appellant would not have held employment at the [text deleted] which would have entitled him to receive IRI benefits pursuant to section 85 of the MPIC Act.

Accordingly, the decision of the Internal Review Officer dated July 5, 2010 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 1st day of November, 2012.

LAURA DIAMOND

JACQUELINE FREEDMAN

LINDA NEWTON