Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-139

PANEL:	**Ms Jacqueline Freedman, Chair** **Dr. Sharon MacDonald** **Ms Linda Newton**
APPEARANCES:	**[Text deleted], [the Appellant], appeared on his own behalf; Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Morley Hoffman and Ms Alexandra Miles.**
HEARING DATE:	**May 16, 2017.**
ISSUE(S):	**Whether the Appellant is entitled to Income Replacement Indemnity benefits for the period between May 27, 2014 and November 25, 2014.**
RELEVANT SECTIONS:	**Paragraph 110(1)(c) of The Manitoba Public Insurance Corporation Act ("MPIC Act") and section 8 of Manitoba Regulation 37/94.**

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:

[Text deleted] (the "Appellant") was driving his car on September 28, 2013, when his brakes failed to work and he collided with two cars that were stopped at an intersection. The Appellant suffered various injuries as a result of this motor vehicle accident ("MVA") and received medical treatment.

The Appellant was unemployed and receiving employment insurance ("EI") benefits at the time of the MVA. As a result, he was classified as a non-earner for Income Replacement Indemnity ("IRI") purposes and received IRI benefits for the first 180 days following the MVA. Due to his injuries, the Appellant was unable to hold employment on the 180th day following the MVA (March 27, 2014), and consequently, MPIC determined an employment for him pursuant to the provisions of the MPIC Act. MPIC advised him, by case manager's decision letter dated April 16, 2014, that his determined employment was that of a car salesman. Under the MPIC Act, the Appellant would be entitled to ongoing IRI benefits until he was able to hold the determined employment.

The Appellant underwent various assessments and attended at various treatments for reconditioning purposes. MPIC reviewed the Appellant's file, and the case manager issued a decision letter dated May 27, 2014, which provides as follows:

> As discussed, we have reviewed your file in our health care services department and based on the medical information on file your injuries no longer prevent you from performing your work duties as a car salesman. Therefore, according to Section 110(1)(c) of the Manitoba Public Insurance Corporation Act (the Act), your entitlement to IRI ends as of May 27, 2014.

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer considered the decision of the case manager and issued an Internal Review decision dated September 15, 2014, which provides as follows:

> The medical information supports the decision that you are able to hold the determined employment. The decision to end your entitlement to Income Replacement Indemnity (IRI) benefits as of May 27, 2014 is confirmed.

The Appellant disagreed with the decision of the Internal Review Officer and filed this appeal with the Commission. Prior to the hearing of this appeal, a Case Conference Hearing ("CCH") was held (on December 12, 2016) to discuss preliminary matters. At that CCH, the Appellant

noted that he returned to work as a car salesman at [text deleted] on November 25, 2014 and worked there until the end of February, 2016. As a result, the parties and the Commission agreed that at the hearing of this appeal, the time period under consideration for IRI benefits would be the period between when MPIC ceased paying IRI benefits to the Appellant (May 27, 2014) to when the Appellant began working at [text deleted] (November 25, 2014). Accordingly, the issue which requires determination on this appeal is whether the Appellant is entitled to IRI benefits for the period between May 27, 2014 and November 25, 2014.

Decision:

For the reasons set out below, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, that he is entitled to IRI benefits for the period between May 27, 2014 and November 25, 2014.

Preliminary Matter:

Several weeks in advance of the appeal hearing, counsel for MPIC provided a document to the Commission, which appeared to be MPIC file notes regarding a meeting that had been held in November, 2014 (the "Document"). The Document was enclosed with a letter from counsel for MPIC dated March 31, 2017, which provided as follows:

> I came across a document which should be added to the Index binder. It relates to documents 61-63. It was apparently prepared by SIU [Special Investigations Unit] investigator [text deleted]. Thank you.

The Commission provided the Document to the Appellant for his review and comments. The Appellant objected to the Document being included in the indexed file. Since there was a dispute regarding the Document, the Commission advised the parties that the appeal panel would hear submissions from them regarding the admissibility of the Document at the appeal hearing.

At the outset of the hearing, counsel for MPIC made submissions in support of the argument that the Document should be admissible, primarily relating to the fact that the contents of the Document reflect negatively on the credibility of the Appellant. The Appellant argued against the admissibility of the Document, taking the position that the Document is not relevant to the issue under appeal, IRI, but rather relates to a different issue, being whether he had a promised employment during the first 180 days after the MVA, which is no longer an issue in dispute.

After considering the submissions made by the parties and noting that the Document is undated and unsigned, and that MPIC was unable to establish, on a balance of probabilities, who had authored the Document, the panel determined that the Document was not a reliable form of evidence and should not be admitted.

Evidence for the Appellant:

The Appellant testified at the appeal hearing, and described the circumstances of the MVA. He noted that his brakes failed and that the MVA was a serious accident. He continues to take medication and is currently receiving facet block injections. He is in receipt of federal disability benefits.

The Appellant discussed the numerous duties of a car salesman. He said that it is part of a car salesman's duties to carry a battery pack in order to be able to start the cars on the lot, or to wheel a dolly on which the battery pack rests, sometimes as far as 300 yards. Often they will be asked to move the cars on the lot, or to brush the snow off the cars. If a car gets stuck in snow, a team effort is required and as part of the team, the Appellant said he was not in a position to be able to say he couldn't help. During the time period in question, the Appellant noted that he was having difficulty standing and sitting for long periods of time and yet this was what the job

entails. There are also a lot of emails to read and product knowledge to review and this involves a lot of sitting. In addition, he said that getting in and out of the cars was difficult for him and he characterized the activity as “repetitive bending”. He said the job is not just sitting around and in any event, sitting was difficult for him.

Since the MVA, the Appellant has been receiving continual medical treatment. He stated that he was very persistent in pursuing this treatment because he wanted to get better, both for himself, because he doesn’t want to be limited in his ability to function, and also because he has a grandson that he wants to be able to play football with. He regularly saw his family physician, [text deleted], as well as a neurosurgeon, [text deleted].

The Appellant noted that [Appellant’s doctor #1] ordered an MRI on March 20, 2014, which showed mild degenerative changes. When he saw [Appellant’s neurosurgeon] on July 10, 2014, [Appellant’s neurosurgeon] identified that he had restrictions in his lumbar spine range of motion. The Appellant said that although [Appellant’s neurosurgeon] recommended physiotherapy and aquasizing, he was unable to pursue this as he could not afford it. The Appellant continued to see [Appellant’s neurosurgeon], in order to pursue treatment for his injuries.

The Appellant pointed out that [Appellant’s doctor #1] noted that he was unable to work on the application for EI benefits dated May 29, 2014, with an “unknown” expected recovery date. The Appellant said that his EI benefits were approved for reinstatement within nine days of the application.

Although the Appellant was accepted for the EI sickness benefits, he said that the benefits were soon reduced by the IRI benefits he initially received. He therefore had to go on social assistance. However, the Appellant found it difficult to get by on the amount of social assistance he received. Therefore, he did find a car salesman position (at [text deleted]) that would pay him a fixed salary rather than pay him on a commission basis (even though this was unusual). Although the Appellant went back to work, he continued to pursue treatment with his doctors.

The panel questioned the Appellant regarding his employment with [text deleted], which started on November 25, 2014. The Appellant indicated that it was a secure, salary-based job. He said that they didn't ask whether he was physically able to do that job and therefore he didn't have to lie. He said that he was able to do the job because he is a good salesman. He said that he called in sick approximately one or two times per month and that medication assisted him in coping. When asked why he didn't get the job any earlier than November, the Appellant responded that he didn't want to get the job, but he was forced to because his disability benefits ended and he was already two months behind in his rent. He commented that "I wasn't dead, I was hurting".

The Appellant pointed out that on March 6, 2014, [Appellant's doctor #1] advised MPIC that he was having difficulty tolerating the reconditioning program at [text deleted] Physiotherapy. [Appellant's doctor #1] suggested a gradual progression at the program.

The Appellant addressed his difficulties with the reconditioning assessment at [rehab clinic]. He said that he was in pain when he was at [rehab clinic]. He said he didn't feel comfortable with the heavy-duty weight program that was being suggested to him, because he felt that it was too big a transition from the elastic bands he had been working with. The Appellant said he had been told by the assessors at [rehab clinic] that if you can't do something, then don't do it; however, it

was later reported by them that he had refused to do things. He said that this was an unfair basis on which to cut off his benefits. He noted that the [rehab clinic] report indicated that he was not a good candidate for rehabilitation, but he disagrees with this. He said that he has not really progressed, he has just learned how to handle the pain.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. Counsel asked the Appellant for details regarding the job duties of a car salesman. The Appellant said that he would have to approach cus[the Appellant]ers and bring them in, which may involve sitting for quite a while. He has a 7-step sales process that he uses. He would then have to go and fetch the vehicle and show it to the cus[the Appellant]er. If the vehicle is a truck, he would have to step onto a bar to enter the vehicle. The cars are often parked close together, so he may have to squeeze into a car by twisting his body and that's not easy. The Appellant would sometimes take cus[the Appellant]ers for a test drive, which could last from 10 to 30 minutes. If he were negotiating the sales price with the cus[the Appellant]er, this would be done sitting at a table, but he would also have to go up to the manager who is on another level. Figuring out the financing could involve going up and down the stairs to the manager, up to five times.

The Appellant said the sales team does training sessions. Every morning at 8 a.m. they did role-playing, which involved everyone on the team. Sometimes they even did a tire throwing contest, which he could not excuse himself from even though he was injured, and he injured his bicep in July 2015 through this exercise.

When the Appellant goes to fetch a car, if the car doesn't start he would have to fetch the dolly, or carry a hand starter, which is heavy, especially through the snow. The charger is 25 pounds, and he would have to carry it over a distance of 300 yards. He said no one helps you in the car business. The Appellant acknowledged that there were lot attendants at the dealership, but he said that they were just responsible for organizing the lot. Although they did boost the cars occasionally, they have their own job to do and they are independent from the salespeople. He said that they don't have to help the salespeople and "you're on your own".

Counsel asked the Appellant to describe the dolly. He said it is a regular dolly, on which rests a heavy-duty battery and heavy-duty cables. He said it's very heavy, especially when you have to drag it both ways to and from the service department. He said it is very hard if you have trouble walking. When asked if a lot attendant could assist him, the Appellant said that nobody wants to do anything outside their job duties. He said that there are some people who are kind, but it's not really their job. Counsel asked how often he would need the dolly. The Appellant said that Winnipeg has winter for four months and if cars are not started for two weeks, they may not start and you will need the dolly. He noted that the dealership can be busy in those months and he has sold many cars in the winter months. He said it is a job requirement to be a team member and although these duties (starting cars and carrying the dolly) are not specifically outlined, it is your job to be a part of the team.

Counsel raised with the Appellant his attendance at [text deleted] Physiotherapy for rehabilitation. Counsel noted that the Appellant was supposed to attend 24 sessions but only attended for 12 sessions. The Appellant acknowledged that this was the case, but noted that the rehabilitation was scheduled during the month of March, when it was very cold, and he was very inflamed and in pain at that time. He was having difficulties and couldn't manage to overcome

the pain in order to attend. When questioned whether he went to the hospital or took pain medication to manage the pain, the Appellant responded that he could not afford the pain medication, but continued to see his physicians, [Appellant's doctor #1], [Appellant's neurosurgeon] and [Appellant's doctor #2]. He acknowledged that he was focused on his pain. He said that in addition to the physical stress, he felt that he was under mental stress as he was struggling to survive. He said that he was forced to go back to work because he was cut off by MPIC. He noted that he lost two homes as a result of being cut off, the first before he initially received his IRI benefits and the second after he was cut off.

Counsel questioned the Appellant regarding his assessment at [rehab clinic]. The Appellant noted that he was only there for one hour and said that he found it concerning that there were so many conclusions made after such a short period of time. Counsel pointed out that [rehab clinic] had identified some inconsistencies in his evaluation, such as a limited range of motion during testing, but a more full range of motion after the evaluation was completed, when he was pulling his pant legs back down. The Appellant responded that he did not recall that incident specifically, but that it is possible that his body became more flexible after warming up. When questioned regarding the impression in the report that he had refused to complete certain areas of testing, the Appellant noted that he had been told not to do things if he didn't feel that he could complete them and yet this was then recorded as refusal. Counsel questioned the Appellant regarding his assertion that [rehab clinic] had recommended heavy weight-training. The Appellant said that it was a verbal discussion, and that he wasn't ready for that level of training.

With respect to the recommendation from [Appellant's neurosurgeon] that the Appellant pursue physiotherapy and aquasizing, counsel questioned the Appellant whether he did pursue this after he became employed in November 2014. The Appellant responded that even after that time, he

still did not have sufficient funds to permit him to pursue those treatments. He noted that physiotherapy costs $80 per hour. He said that he has pursued other treatments, however, which are covered by the health care system, including 16 cortisone shots on his spine.

Submission for the Appellant:

The Appellant argued that he was not able to perform the duties of a car salesman during the period in question. He noted that during that time, he was continuing to seek medical treatment for his injuries, and his medical providers had identified that he had limitations. He referred to the report of [Appellant's neurosurgeon] dated July 10, 2014, which stated as follows:

> On today's examination, range of motion of the lumbar spine was restricted with some 70% flexion and 50% extension. Rotation and lateral bending were approximately 70%. There was some obvious discomfort associated with flexion and particularly with combined extension and rotation. The paravertebral muscles were tight. ...
>
> ... While remaining active, I would recommend that the patient avoid more strenuous physical activities involving repetitive bending or heavy lifting.

The Appellant also referred to [Appellant's neurosurgeon's] report dated October 24, 2014, which states as follows:

> On examination, range of motion of the lumbosacral spine is restricted with some 50%-60% flexion and extension. Rotation and lateral bending are approximately 70%. ...

Although not directly relating to the period in question, the Appellant pointed out that in [Appellant's neurosurgeon's] report dated April 28, 2016, a similar comment is made regarding restriction in the range of motion of his lumbosacral spine. [Appellant's neurosurgeon] notes in that report, as well as in his report dated November 17, 2016, that the Appellant has had some success with facet block injections.

The Appellant noted that he has seen [Appellant's doctor #1] since prior to the MVA. [Appellant's doctor #1] provided a report dated February 6, 2017. The Appellant argued that [Appellant's doctor #1's] report supported his argument that he was not able to perform the duties of a car salesman at the relevant time. The report provides as follows:

> I understand he was not able to work as a car salesman since May 27, 2014 till November 25, 2014. He could not stand, walk or bend his back for longer period to fulfil the nature of his job. There were initial recommendations from [text deleted], the neurosurgeon, to do regular physiotherapy, some aqua-sizing. It was also recommended to avoid more strenuous physical activities involving repetitive bending or heavy lifting.

The Appellant noted that he applied for the federal disability tax credit on December 30, 2014 and was accepted. He is currently in receipt of those benefits. He pointed out that he had also received EI sickness benefits. The Appellant argued that if the federal government considered that he qualified for disability benefits and EI sickness benefits, then MPIC should also understand that he was unable to work.

The Appellant argued that he could not hold employment as a car salesman during the relevant time. He had difficulty standing, so much so that he qualified for federal benefits. As well, [Appellant's neurosurgeon] continued to treat him and sent him for facet point injections to address the problems with his back. The job duties of a car salesman are not light duties; boosting the cars is not an occasional duty but a regular duty and he could not perform the duties of the employment during the period in question.

Submission for MPIC:

Counsel for MPIC submitted that the issue is whether the Appellant is able to hold the determined employment of car salesman during the relevant period. If he is able to hold that employment, he is not entitled to any further IRI benefits. Counsel noted that the Internal Review

Decision dated September 15, 2014, noted that the physical demands for a car salesman involve sitting and standing, upper limb coordination and handling loads of 5 kg but less than 10 kg. Counsel argued that there was evidence that the Appellant was able to function at that level as of May 2014.

In a medical note provided to MPIC on December 31, 2013, [Appellant's doctor #2] stated: "it is my opinion [the Appellant] will function at work and at home. I give [the Appellant] medical clearance to go back to work." Counsel noted that the Appellant was given a reconditioning program at [text deleted] Physiotherapy to assist in his return to work. However, his attendance at the program was poor and the findings were unreliable because of limited testing. He was therefore referred to [rehab clinic] for additional reconditioning assessment.

The reconditioning assessment report from [rehab clinic] dated April 16, 2014, concluded as follows:

> ... It is not felt that he is an acceptable rehab candidate ... However, there have been no medical findings noted prior to this evaluation, or during this evaluation, that would indicate he continues to require medical restriction from returning to his prior occupation as a car sales person if that was what he chose to do.

MPIC's Health Care Services (HCS) medical consultant reviewed the file materials and provided a report dated May 15, 2014. The consultant stated as follows:

> ... a specific opinion regarding his functional capacity cannot be made at this time due to lack of objective measure of function. Thus, a reviewer must rely on opinions provided by his treating practitioners to determine his likely functional capacity.
>
> … it was his choice to limit his function so that an objective determination of function cannot be determined. Barring objective evidence that harm will likely occur with a return to work or that he is physically incapable of working due to objective impairment in function, it can only be concluded that he likely could perform his work tasks if he chose to do so. It is that choice not to perform activities that is his restriction to returning to work at this time.

Counsel for MPIC argued that a requirement to carry a car battery or a dolly is not a true job requirement of a car salesman, or if it is, that duty would only be a rare or sporadic occurrence. Therefore, any limitations on the Appellant from carrying out heavy lifting should not be an impediment to him performing the duties of a car salesman.

Counsel pointed to the report of [Appellant's neurosurgeon] from July 10, 2014, which does recommend that the Appellant avoid more strenuous physical activities involving repetitive bending or heavy lifting. Counsel argued that this report does not say that the Appellant cannot work as a car salesman. Further, the report notes that the Appellant has a history of recurrent low back pain, dating back to the year 2000. Counsel acknowledged that the report does identify some functional limitations in the Appellant's lumbar spine range of motion. However, MPIC's HCS medical consultant reviewed the report and came to the same conclusion as in his earlier report. The medical consultant's report dated September 11, 2014 provides as follows:

> ... the previous opinion would be amended to indicate that there were some functional limitations present on physical examination. These limitations were in the restrictions in range of motion documented by [Appellant's neurosurgeon]. It is unlikely that these minor restrictions would have a significant impact on his functional abilities as they pertain to what is required of him as a car salesman. Outside of that, the previous opinions regarding his degree of disability would be unchanged. To summarize the previous opinion, it is probable that [the Appellant] would be functionally able to safely perform his work duties if he so (sic) chose to do so. ...

Counsel submitted that although the Appellant continued to seek medical treatment from [Appellant's neurosurgeon], including an additional MRI, nothing in the reports received from [Appellant's neurosurgeon] supports the Appellant's position that he could not return to work as a car salesman.

Counsel addressed the report from [Appellant's doctor #1] dated February 6, 2017, which says that [Appellant's doctor #1] understands that the Appellant was not able to work as a car

salesman during the relevant period. Counsel submitted that this report should not be persuasive, because [Appellant's doctor #1] does not give any objective evidence to support his conclusions that the Appellant had difficulty standing, walking and bending. Further, [Appellant's doctor #1] reports that he "understands" that the Appellant was not able to work, which suggests that he is just repeating what the Appellant told him.

On the issue of the Appellant's eligibility to other benefit programs, counsel pointed out that federal benefit programs may have different tests for eligibility than the test for IRI benefits under the MPIC Act. The fact that the Appellant may have received other benefits is of no relevance to the matter at issue here.

Counsel submitted that the Appellant has not discharged the onus upon him of showing that the Internal Review decision is incorrect; that he has not shown that he was unable to perform the duties of a car salesman during the period in question. Counsel for MPIC submitted that the Appellant's appeal ought to be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer dated September 15, 2014, is incorrect. In particular, the Appellant needs to show, on a balance of probabilities, that he is entitled to IRI benefits for the period in question, being between May 27, 2014 and November 25, 2014. The relevant provision of the MPIC Act is as follows:

> **Events that end entitlement to I.R.I.**
>
> 110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

> ...
>
> (c) the victim is able to hold an employment determined for the victim under section 106;
>
> ...

Manitoba Regulation 37/94 provides, in part, as follows:

> **Meaning of unable to hold employment**
>
> **8** A victim is unable to hold employment when a physical or mental injury that was caused by the accident renders the victim entirely or substantially unable to perform the essential duties of the employment that were performed by the victim at the time of the accident or that the victim would have performed but for the accident.

Based on the foregoing, the onus is on the Appellant to establish, on a balance of probabilities, that he suffered an injury that was caused by the MVA, which rendered him entirely or substantially unable to perform the essential duties of the determined employment during the period in question.

At the hearing, the dispute between the parties centred on whether the Appellant could perform the determined employment, car salesman, and what the duties of that employment were. MPIC argued that, as of May 27, 2014, the Appellant was able to hold the determined employment. The Appellant disagreed, and said that he was not able to hold that employment until he became employed with [text deleted] on November 25, 2014.

The panel notes that the Appellant also made reference to his receipt of federal EI and disability benefits and argued that his entitlement under those programs should help persuade the panel of his inability to work during the relevant period. However, we note that the Appellant's eligibility

to federal benefits programs is not relevant to a consideration of entitlement to benefits under the MPIC Act.

What are the Duties of a Car Salesman?

There was a dispute between the parties as to what constituted the duties of a car salesman. MPIC relied upon the job demands as outlined in the National Occupational Classification ("NOC"). The NOC job demands are identified in the decision of the Internal Review Officer dated September 15, 2014, as follows:

> The physical demands for a Car Salesman involves sitting and standing, upper limb coordination and handling loads of 5 kilograms but less than 10 kilograms. This would be considered a light strength demand occupation.

The Appellant disputed some of the aspects of the NOC job demands. In his testimony, both in direct and cross-examination, he gave evidence as to the duties of a car salesman. He did not disagree that the job involves sitting and standing. He testified that as a car salesman, he would do the following:

- Stand and greet cus[the Appellant]ers;
- Sit with cus[the Appellant]ers and negotiate sales;
- Go up and down stairs to negotiate financing with the manager;
- Take cus[the Appellant]ers for test drives;
- Sit at his desk to review materials;
- Move cars on the lot if necessary; and
- Participate in sales team training sessions.

The panel accepts that these were part of a car salesman's duties.

In addition to the above duties, the Appellant testified that during the winter months, it would also be a regular part of his duties to start cars if they wouldn't start. This would involve carrying a car battery, which could weigh 25 pounds, or wheeling one on a dolly, often over a distance of 300 yards. The Appellant did acknowledge that occasionally there were other employees, known as lot attendants, who may help out from time to time, but this was not common.

His testimony on this point was unchallenged and the panel accepts the Appellant's evidence that, in addition to his other duties, during the winter months in Winnipeg, he would have been required to carry a car battery or wheel a dolly to start cars on the lot as part of his duties as a car salesman. The panel notes that the period at issue in this appeal, between May 27, 2014 and November 25, 2014, falls mainly during the spring, summer and fall months.

Was the Appellant able to Perform those Duties?

The issue that then arises is whether the Appellant was entirely or substantially unable to perform the essential duties of a car salesman, as identified above, during the period in question, between May 27, 2014 and November 25, 2014.

It was the Appellant's position that he was not able to perform those duties during the relevant period, and he relied on the reports of his treating physicians, [Appellant's doctor #1] and [Appellant's neurosurgeon], in support of his position. Counsel for MPIC submitted that that the Appellant was able to perform the duties of a car salesman after May 27, 2014, and relied on the reports from MPIC's HCS medical consultant.

The Appellant relies on the report from [Appellant's doctor #1] dated February 6, 2017, in support of his position. That report provides as follows:

> ... [The Appellant] is a known case of recurrent low back pains. It started with a motor (sic) accident in the year 2000.
>
> In September 29, 2013 and again in November of the same year, he had another MVA. He experienced a flare up at his lumbo-sacral pains. He was seen repeatedly since March 11, 2011.
>
> …
>
> I understand he was not able to work as a car salesman since May 27, 2014 till November 25, 2014. He could not stand, walk or bend his back for longer period to fulfil the nature of his job. …

The panel has carefully considered this report from [Appellant's doctor #1] and finds that it does not support the Appellant's position. While [Appellant's doctor #1] says that the Appellant was not able to work during the relevant period, this is stated in the report as something that "I understand". The panel interprets this wording to mean that what follows is something that [Appellant's doctor #1] has been told, rather than a conclusion or opinion that [Appellant's doctor #1] has reached on his own, on the basis of investigations or examinations that he has conducted. In fact, apart from a description of MRI results, the report contains no objective measurements at all to support [Appellant's doctor #1's] comments that the Appellant "could not stand, walk or bend his back for longer period". Therefore, the panel has given no weight to this report.

As noted above, [Appellant's neurosurgeon] provided a report dated July 10, 2014, which recommended a physical limitation on the Appellant. The report stated:

> ... I would recommend that the patient avoid more strenuous physical activities involving repetitive bending or heavy lifting.

The panel reviewed the duties involved in the car salesman position, as identified above, to determine whether there were any duties which fall within the phrase "strenuous physical activities involving repetitive bending". The Appellant testified that sometimes getting in and out

of the cars can involve twisting his body, if the cars are parked close together. He also said that he considered getting in and out of cars to be "repetitive bending". While the panel accepts that there is bending (and sometimes twisting) involved in getting in and out of cars, the Appellant has not established that this was a "strenuous physical activity" such as would have been prohibited by the report of [Appellant's neurosurgeon]. Therefore, the duty of getting in and out of cars would not have been an impediment to the Appellant's ability to perform the job of car salesman.

With respect to [Appellant's neurosurgeon's] prohibition on "strenuous physical activities involving ... heavy lifting", it is possible that the duty of carrying a car battery or wheeling a dolly may fall within the scope of this phrase (although [Appellant's neurosurgeon] did not identify a weight limitation). However, as noted above, the Appellant testified that the duty of starting the cars on the lot only applied during the winter months. The time period in question in this appeal is the period between May 27, 2014 and November 25, 2014. The panel takes note that in Winnipeg, winter typically begins at the end of October. Therefore, the panel finds that during the period in question, the duty of starting cars, which might involve heavy lifting, would not have been a significant impediment to the Appellant's ability to perform the job of car salesman.

MPIC's HCS medical consultant reviewed all of the file material and provided a report dated May 15, 2014, which was prior to [Appellant's neurosurgeon's] July report. At that time, the medical consultant opined as follows:

> ... Barring objective evidence that harm will likely occur with a return to work or that he is physically incapable of working due to objective impairment in function, it can only be concluded that he likely could perform his work tasks if he chose to do so. It is that choice not to perform activities that is his restriction to returning to work at this time.

After receipt of [Appellant's neurosurgeon's] July 10, 2014 report, MPIC's HCS medical consultant conducted another review of all of the file material and provided a report dated September 11, 2014. MPIC's medical consultant acknowledged that [Appellant's neurosurgeon] had identified restrictions in the Appellant's lumbar spine range of motion in his July 10, 2014 report. (Similar restrictions are identified by [Appellant's neurosurgeon] in his report of October 24, 2014.) The medical consultant's September 11, 2014 report provides as follows:

> ... the previous opinion would be amended to indicate that there were some functional limitations present on physical examination. These limitations were in the restrictions in range of motion documented by [Appellant's neurosurgeon]. It is unlikely that these minor restrictions would have a significant impact on his functional abilities as they pertain to what is required of him as a car salesman. … it is probable that [the Appellant] would be functionally able to safely perform his work duties if he so (sic) chose to do so. His limiting factor at this time appears to be his pain and concern about potentially worsening his condition with performing job duties.

The panel finds that the HCS consultant, in the preparation of his reports dated May 15, 2014 and September 11, 2014, had the opportunity to review all of the medical reports, assessments and reports of interventions on the Appellant's file and was thorough and comprehensive in his analysis. The panel accepts the opinion of the medical consultant that "it is probable that [the Appellant] would be functionally able to safely perform his work duties if he ... chose to do so". This opinion was borne out by the fact that the Appellant went to work with little difficulty shortly thereafter, as discussed below.

The Appellant testified that he was unable to perform the duties of car salesman during the time period in question. That time period ends when the Appellant began his employment as a car salesman with [text deleted] on November 25, 2014. When questioned regarding this employment, the Appellant said that he was able to do the job because he is a good salesman. He did have to call in sick one or two times a month and did rely on medication to assist him in coping with his pain, but he was able to perform his job duties. The Appellant identified financial

need as motivating him to get the job; when asked why he got the job in November and not earlier, the Appellant did not identify a change in his functional ability, but rather an increase in his financial need. Thus, the Appellant's testimony was somewhat inconsistent. While on the one hand, he said that he was unable to perform the duties of car salesman during the period in question, on the other hand he did not identify a functional impediment as the reason he did not secure his employment with [text deleted] earlier than November 25, 2014. Therefore, while we sympathize with the Appellant and understand that during the relevant period he was suffering from pain and going through a difficult time financially, the panel is left to conclude that the Appellant could have started work with [text deleted] earlier, if he so desired, and that there were no functional impediments to him so doing.

Conclusion:

Accordingly, after a careful review of all the reports and documentary evidence filed in connection with this appeal and after careful consideration of the testimony of the Appellant and of the submissions of the Appellant and counsel for MPIC and taking into account the provisions of the relevant legislation, the panel finds that the Appellant has not met the onus of establishing, on a balance of probabilities, that he was entirely or substantially unable to perform the essential duties of a car salesman during the relevant period. Therefore, he is not entitled to IRI benefits for the period between May 27, 2014 and November 25, 2014.

Disposition:

Therefore, the Appellant's appeal is dismissed and the decision of the Internal Review Officer dated September 15, 2014, is upheld.

Dated at Winnipeg this 29th day of June, 2017.

JACQUELINE FREEDMAN

DR. SHARON MACDONALD

LINDA NEWTON