Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-136, AC-15-171

PANEL:	**Ms Jacqueline Freedman, Chair** **Dr. Chandulal Shah** **Ms Susan Sookram**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Matthew Maslanka.**
HEARING DATE:	**September 25, 2018.**
ISSUE(S):	**Did the Appellant provided a reasonable excuse for failing to file his Application for Review within the 60 day time limit?** **If so, was the determination of his employment as a Sales Representative, Wholesale Trade, correctly made?** **Was the Appellant able to hold the determined employment as of April 4, 2014?** **If not, were his Income Replacement Indemnity benefits correctly terminated?**
RELEVANT SECTIONS:	**Sections 84, 106 and 172 and paragraph 110(1)(c) of The Manitoba Public Insurance Corporation Act ("MPIC Act"), section 8 of Manitoba Regulation 37/94 and Schedule C to Manitoba Regulation 39/94.**

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 3-ton truck on October 27, 2011, when he fell asleep at the wheel, and his vehicle crashed through a guard rail into a riverbank. The Appellant

suffered various injuries as a result of this motor vehicle accident ("MVA") and received medical treatment.

The Appellant was self-employed as an owner/operator/distributor at the time of the MVA. He was classified as a temporary 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 (April 24, 2012), 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 June 22, 2012, that his determined employment was that of a Sales Representative, Wholesale Trade (National Occupational Classification "NOC" 6411). Under the MPIC Act, the Appellant would be entitled to ongoing IRI benefits until he was able to hold the determined employment. The Appellant did not dispute the determination of his employment at that time.

The Appellant underwent various assessments and received various treatments. MPIC reviewed the Appellant's file, and the case manager issued a decision letter dated April 16, 2014, which provides as follows:

> We are now in receipt of [MPIC's physiatrist]'s report of March 20, [2014] confirming that you have regained the functional ability to return to your determined employment as a "Sales Representative, Wholesale Trade". According to Section 110(1)(c) of the *Act* your entitlement to IRI ended as of our telephone conversation on April 4, [2014].
>
> [MPIC's physiatrist] states that over all (sic) your accident related symptoms have resolved and your current disabling symptoms are unrelated to the motor vehicle accident. He provides diagnostic recommendation for consultation with an urologist and a bone scan of the left foot. Therapeutically, although he does not feel that you would be a good candidate for a formal rehabilitation program you would benefit from returning to work in some capacity using your current physical abilities which are in the medium physical demand range.

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 August 26, 2014, which provides as follows:

> Giving consideration to all of the information on your file, I must agree with the case manager's decision of April 16, 2014, that you are substantially capable of performing the essential duties of the determined employment of Sales Representative, Wholesale Trade, as of April 4, 2014.
> …
>
> There is sufficient evidence to support the decision under review and no basis has been shown for interfering with the decision of April 16, 2014. I am, therefore, confirming the case manager's decision and dismissing your Application for Review.

The Appellant disagreed with the decision of the Internal Review Officer and filed an appeal of that decision with the Commission. Subsequent to the filing of the Appellant's appeal with the Commission, the case manager issued a decision dated March 1, 2016. That decision provided, pursuant to paragraph 110(2)(d) of the MPIC Act, that MPIC would extend the Appellant's IRI for a period of one year, inclusive, to April 4, 2015.

Subsequently, the Appellant determined that he also disagreed with the case manager's decision of June 22, 2012, which had determined his employment to be Sales Representative, Wholesale Trade, NOC 6411. On July 27, 2015, almost three years past the 60 day time limit provided for doing so under the MPIC Act, the Appellant filed an Application for Review of the case manager's decision. The Internal Review Officer issued an Internal Review decision dated September 8, 2015, which considered his Application for Review as well as the case manager's decision and provided as follows:

> The Corporation may extend the 60 day time limit if it is satisfied that the claimant had a "reasonable excuse" for late filing. Your Application for Review itself provided nothing that could be considered a "reasonable excuse for failing to apply for a review decision" within the time period as provided by legislation.

> You did not apply for a review of the decision until you were given direction to do so by the CAO. This is not a reasonable excuse, in my opinion. Accordingly, there are sufficient grounds for the Application for Review to be rejected.
>
> Our custom is to review the claims decision on its merits when this sort of situation arises. …
>
> In my opinion the 180 Day Determination was completed correctly based on your five year work history. …
>
> Based on my review, there is no basis for interfering with the decision of June 22, 2012.

The Appellant disagreed with the decision of the Internal Review Officer and filed an appeal of that decision with the Commission.

At the hearing of the appeal, the Appellant withdrew his appeal with respect to entitlement to funding for various medications, in respect of an Internal Review decision dated December 17, 2014.

Issues:

The issues which require determination on this appeal are as follows:

1. Did the Appellant have a reasonable excuse for failing to file his Application for Review relating to the case manager's decision of June 22, 2012, regarding the determination of his employment, within the 60 day time limit?
2. If so, was the decision regarding the Appellant's determination of employment correctly made?
3. Depending on the answers to questions #1 and #2, was the Appellant able to hold the determined employment of Sales Representative, Wholesale Trade as of April 4, 2014?
4. If not, were the Appellant's IRI benefits correctly terminated as of April 4, 2014?

Decision:

For the reasons set out below, the panel finds as follows:

1. The Appellant has not established, on a balance of probabilities, that he had a reasonable excuse for failing to file his Application for Review relating to the case manager's decision of June 22, 2012, regarding the determination of his employment, within the 60 day time limit.
2. Given our finding on question #1, the Appellant is not able to appeal the determination of his employment, and the Commission does not have jurisdiction with respect to this issue.
3. The Appellant has not established, on a balance of probabilities, that he was unable to hold the determined employment of Sales Representative, Wholesale Trade as of April 4, 2014.
4. Given our finding on question #3, the Appellant's IRI benefits were correctly terminated as of April 4, 2014, subject to the decision of the case manager dated March 1, 2016, which extended the Appellant's IRI for a period of one year, inclusive, to April 4, 2015.

Evidence for the Appellant:

The Appellant testified at the appeal hearing, and described the circumstances of the MVA. He spoke about going off the bridge while his vehicle was on cruise control and coming to an abrupt stop when the vehicle hit the riverbank. He said he felt immense pain throughout his body after the MVA, especially in his lower back. While some things are better for him now, some are not. He still deals with constant neck pain as well as pain in his mid and lower back. He also has shooting pain in his legs down to his feet. Due to his neck pain, he has a hard time sleeping. He wakes up every few hours and so is never fully rested. Always being tired really affects his ability to concentrate. He finds his biggest concern is constant headaches, which cause him pain to the point where he needs to lie down and apply heat to try to ease the pain. The headaches can last from a half hour to a whole day, and they also affect his ability to focus.

The Appellant said that he never had these kinds of issues before the MVA. All of his prior jobs have been physical. After the MVA, he tried to do physical work but was unable to, and his inability to do so was weighing on his mind. Therefore, his self-confidence decreased and he suffered from depression.

The Appellant described his job duties prior to the MVA. Immediately prior to the MVA, he was self-employed, as a wholesale sales distributor and operator with [text deleted]. He described his job duties as "very hard". He said he worked seven days a week. While there was some paperwork, the job was very physical. He said the job should be classified as a heavy strength job. Prior to working with [text deleted], the Appellant worked with [text deleted]. He said that job also qualified as a heavy strength job. He dealt with laundry units, installing and servicing them. Although there were some sales duties involved in the job, he said that 70% of the job involved maintaining the laundry units, crawling and lifting equipment. He was on call all day, every day.

He did not return to his previous job after the MVA. At the beginning of this year, the Appellant started his own handyman business. He can only take on small jobs, things that he can handle based on how he is feeling. He recently installed some flooring, and then had to rest for two days.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. He asked the Appellant about the case manager's decision of June 22, 2012, regarding the determination of employment. The Appellant said that he recalled receiving it, and he did read it, including the instructions at the end, detailing how to file an Application for Review and outlining the 60 day time limit. The Appellant acknowledged that he didn't think the decision was something that he needed to appeal at that time. He said he was not well-versed in these matters and he thought

he was being guided by the case manager. Counsel referred the Appellant to notes of a conversation that the Appellant had with the case manager, on August 30, 2012, in which she recorded that she pointed out to him that the determination was for a light strength job, rather than a heavy strength job. The Appellant responded that he did not recall this conversation. He noted that he had many conversations with the case manager, and as well he was on a lot of medication at the time. When questioned, the Appellant responded that it was not brought to his attention that the determination of employment would have implications for him down the road. He acknowledged that it is possible that the case manager may have discussed this with him, but he said if that were the case, he is sure he would have done something about it.

Counsel referred the Appellant to the case manager's subsequent decision dated March 1, 2016, extending his IRI benefits for one year. The Appellant acknowledged that he was provided additional benefits for one year to allow him to find a job. When questioned by the panel regarding when he decided to file his appeal regarding the determination of his employment, the Appellant responded that it was not until he filed his appeal in respect of the termination of his IRI benefits that his former representative (the Claimant Adviser Officer) advised him that he ought to have filed an appeal with respect to the determination of his employment. It was after receiving that advice that he filed his Application for Review with respect to the case manager's decision regarding his determination of employment.

Submission for the Appellant:

The Appellant said that when he first received the case manager's decision regarding the determination of his employment, he thought that she had his best interest in mind. She told him that the decision would address the amount of his IRI, but he did not understand that it would later impact the end of his IRI benefits. If he would have known this at the time of receiving the decision,

he would have appealed it at that time. He said that the determination of his employment as a Sales Representative, Wholesale Trade, which is a light strength job, is not in line with his work experience, which is all with heavy strength jobs.

Regarding his late filing, he said that had everything been explained to him properly, to the point that he understood the ramifications of the employment determination, he would have filed his Application for Review on a timely basis. He noted that he only has a grade 10 education and did not understand that in accepting a determination of a lighter strength job, it would have an impact later, when MPIC would cut off his benefits because they would consider him able to perform that job.

He thinks that a more appropriate determined employment for him would be bread route delivery driver. The panel noted that this would fall within the NOC category of Delivery and Courier Service Driver, NOC 7414, and pointed out to the Appellant that had the case manager determined the Appellant's employment to be in this category, NOC 7414, his IRI would have been less than what it was when he was determined as a Sales Representative in NOC 6411. The Appellant said that he was not aware of the disparity in the IRI benefits, he was just aware that the employment that was determined for him, Sales Representative, was not in line with his work experience, and the duties of that job would be too light in view of his past experience. As he had indicated, sales was only a small part of his job duties at both [text deleted] and [text deleted].

As to his ability to work, the Appellant said he could not perform any job on a full-time basis, either now or in 2014. The main reason for this is the significant, constant pain in the back of his head and neck. This hurts him all the time and keeps him up so he can't sleep, and then he can't focus because of the lack of sleep. Although he does now have his own handyman business, he

doesn't work on a full-time basis, and he has difficulty with even simple addition. Back in 2014, his condition was worse than it is now.

Submission for MPIC:

Counsel for MPIC reviewed the issues under appeal. He submitted that the Appellant did not have a reasonable excuse for filing his Application for Review after the 60 day time limit. He pointed to the notes of a conversation between the Appellant and the case manager from August 30, 2012, in which she recorded that she pointed out to the Appellant that the determined employment was for a light strength job. The Appellant did not appeal the case manager's decision for almost three years after that conversation.

In addition, counsel pointed out that the Appellant benefited from being classified as a Sales Representative in NOC 6411, rather than as a Delivery Driver in NOC 7414, by virtue of receiving higher IRI benefits. Counsel referred to Table B to Schedule C of Manitoba Regulation 39/94, which outlines the NOC Classes of Employment Income from 2011. This Table identified that for a Sales Representative, Wholesale Trade (Non-Technical) (NOC 6411), the 2011 employment income range was from $36,934 to $72,998. In contrast, for a Delivery and Courier Service Driver (NOC 7414), the 2011 employment income range was from $19,665 to $47,455. The Appellant received IRI benefits from MPIC on the basis of his Sales Representative determination for several years. If he were now to be re-determined from a Sales Representative to a Delivery Driver, this would result in his IRI benefits having been overpaid (that is, wrongly paid to him at the higher rate). MPIC would not be able to recoup the overpayment, because pursuant to the MPIC Act, MPIC can only recoup overpayments in cases of fraud, which was not the case here. Therefore, MPIC would be prejudiced if the Appellant is permitted now to appeal the determination of his employment.

MPIC's position is that, in any event, the determination of employment was correct under subsections 84(1), 106(1) and 106(2) of the MPIC Act, taking into consideration the Appellant's work experience, education and training. With respect to the Appellant's work experience, counsel noted that the Appellant had a history of sales. He referred to a letter dated March 29, 2012, from the Appellant's former employer, [text deleted], confirming his full-time employment as a Territory Sales Manager for the periods between July 15, 2002 through to December 16, 2006 and December 10, 2007 through to November 18, 2010. Counsel submitted that there was nothing inappropriate in classifying the Appellant into the category of Sales Representative, Wholesale Trade (Non-Technical) (NOC 6411), because he was capable of performing the duties of that NOC category. He pointed out that each category in the NOC does not reflect one job specifically, but rather reflects a classification. Therefore, when an individual is determined into an employment, such as Sales Representative, that determination represents an average of all the jobs encompassed by that category. He submitted that the Appellant was capable of performing at least some of the jobs encompassed by that category, and specifically those that involved light strength demands. He submitted that the determination of employment was fair and reasonable and should not be overturned.

Counsel further submitted that the Appellant was able to hold the determined employment as of April 4, 2014. Counsel noted that on March 12 and 13, 2014, the Appellant was assessed by [MPIC's physiatrist] of [Rehabilitation Centre], a specialist in physical medicine and rehabilitation, for the purpose of conducting a Functional Capacity Evaluation (FCE). He pointed out that [MPIC's physiatrist] concluded, in his report dated March 16, 2014, that although the Appellant demonstrated many abnormal illness behaviours, thus tainting the FCE with unreliable effort, he nevertheless demonstrated "many functional abilities that would transfer to the work

setting at this time, including lifting strength at the Medium physical demand level". [MPIC's physiatrist] also provided an Independent Medical Examination (IME) report, dated March 20, 2014, which provides that "[the Appellant] has at least a Medium work capacity at the present time". Counsel pointed to [MPIC's physiatrist]'s recommendation that the Appellant "would be encouraged to resume usual physical activities, including returning to work in some capacity using his current physical abilities which are in the Medium physical demand range". He noted that this is consistent with the recommendation of the Appellant's own physician, [text deleted], who had responded in the affirmative on March 27, 2013, when asked by MPIC's case manager whether the Appellant had been "cleared to return to light job duties as a Sales Representative". Finally, counsel pointed to a report from MPIC's Health Care Services ("HCS") consultant dated March 30, 2018, which provides as follows:

> … based upon the opinions provided on file, the findings of the independent assessment and FCE and on independent review of employability by this reviewer, [the Appellant]'s collision-related medical condition would not likely have affected his ability to return to work as of April 4, 2014 and subsequently.

Counsel therefore submitted that the Internal Review decisions should be upheld and the Appellant's appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer erred in her decisions dated August 26, 2014, and September 8, 2015. In particular, the Appellant needs to show, on a balance of probabilities, that:

1. He had a reasonable excuse for failing to file his Application for Review relating to the case manager's decision of June 22, 2012, regarding the determination of his employment within the 60 day time limit;
2. The decision regarding his determination of employment was not correctly made;

3. He was unable to hold the determined employment of Sales Representative, Wholesale Trade as of April 4, 2014; and
4. His IRI benefits were incorrectly terminated as of April 4, 2014.

In making our decision, as set out below, the panel has carefully reviewed all of the reports and documentary evidence filed in connection with this appeal. We have given careful consideration to the testimony of the Appellant and to the submissions of the Appellant and counsel for MPIC. We have also taken into account the provisions of the relevant legislation and applicable case law.

Legislation

The relevant provisions of the MPIC Act are as follows:

> **Entitlement to I.R.I. after first 180 days**
>
> 84(1) For the purpose of compensation from the 181st day after the accident, the corporation shall determine an employment for the temporary earner or part-time earner in accordance with section 106, and the temporary earner or part-time earner is entitled to an income replacement indemnity if he or she is not able because of the accident to hold the employment, and the income replacement indemnity shall be not less than any income replacement indemnity the temporary earner or part-time earner was receiving during the first 180 days after the accident.
>
> …
>
> **Determination of I.R.I.**
>
> 84(3) The corporation shall determine the income replacement indemnity referred to in subsection (1) on the basis of the gross income that the corporation determines the victim could have earned from the employment, considering
>
> (a) whether the victim could have held the employment on a full-time or part-time basis;
>
> (b) the work experience and earnings of the victim in the five years before the accident; and
>
> (c) the regulations.
>
> **Factors for determining an employment**
>
> 106(1) Where the corporation is required under this Part to determine an employment for a victim from the 181st day after the accident, the corporation shall consider the

regulations and the education, training, work experience and physical and intellectual abilities of the victim immediately before the accident.

Type of employment

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

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;

...

Temporary continuation of I.R.I. after victim regains capacity

110(2) Notwithstanding clauses (1)(a) to (c), a full-time earner, a part-time earner or a temporary earner who lost his or her employment because of the accident is entitled to continue to receive the income replacement indemnity from the day the victim regains the ability to hold the employment, for the following period of time:

…

(d) one year, if entitlement to an income replacement indemnity lasted for more than two years.

Application for review of claim by corporation

172(1) Except as provided in subsection (1.1), 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.

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

(a) confirm, vary or rescind the review decision of the corporation; or
(b) make any decision that the corporation could have made.

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.

Did the Appellant have a reasonable excuse for the late filing?

The case manager's decision regarding the Appellant's determined employment is dated June 22, 2012. As indicated above, under subsection 172(1) of the MPIC Act, the Appellant had 60 days after that date within which to file an Application for Review with MPIC, or until August 21, 2012. The Appellant did not file his Application for Review until July 27, 2015, almost three years past the 60 day time limit. Under subsection 172(2) of the MPIC Act, MPIC can extend the 60 day time limit if it is satisfied that the Appellant had a reasonable excuse for the late filing. Under paragraph 184(1)(b), the Commission can make any decision that MPIC could have made, and thus can also extend the 60 day time limit.

There are several factors that the Commission looks at in determining the reasonableness of an excuse for late-filing, including:

1. The reasons for the delay;
2. The actual length of the delay compared to the 60 day time limit;
3. Whether there was any waiver respecting the delay;
4. Whether there has been any prejudice resulting from the delay; and
5. Any other factors which argue to the justice of the proceeding.

The Appellant said that his reason for not initially filing an Application for Review of the case manager's decision was that he didn't understand the impact to him of the determination of his employment. He said that he relied on the case manager and thought she had his best interest in mind. The panel notes, however, that the case manager did record that she advised the Appellant regarding the impact of the determination of employment to him. As indicated above, notes of a

telephone conversation between the case manager and the Appellant on August 30, 2012, indicate as follows:

> I called [the Appellant] to discuss status of claim. Because he worked for [text deleted] for less than a year at the time of the MVA he was classified as a temporary earner, so we did 180 determination in June 2012. He was determined into Sales Rep – Wholesale, which is a light duty job. So at the 180 day point eligibility for IRI benefits is based on whether he can perform light job duties, not heavy job duties which is what his job was found to be in the Physical Demands Analysis by [Therapy Centre]…
> …
>
> Discussed that is (sic) MPI makes a decision he doesn't agree with, he can appeal and submit results of future medical investigations.

While the Appellant said that he did not specifically recall this conversation, he acknowledged the possibility that the case manager may have discussed this with him. The Appellant did specifically recall receiving and reading the case manager's June 22, 2012, decision, including the instructions at the end, detailing how to file an Application for Review and outlining the 60 day time limit. However, the Appellant testified that it was not until meeting with his former representative regarding the termination of his IRI benefits, a few years later, that he decided to file an Application for Review with respect to the case manager's decision. The panel notes that the Appellant filed his Application for Review regarding the termination of his IRI benefits within the 60 day time limit. Further, the Notice of Appeal regarding the termination of his IRI benefits, which was filed with the assistance of his former representative, was filed with the Commission on September 11, 2014. Notwithstanding this, it was not until July 27, 2015, more than 10 months later, that the Appellant filed his Application for Review of the case manager's June 22, 2012, decision regarding his determination of employment. The Appellant did not explain this 10 month delay. The panel also notes that the Appellant's delay of almost three years in filing his Application of Review is quite long in comparison to the 60 day time limit.

As indicated above, the Appellant testified that he initially had no intention of disputing the case manager's decision; rather, he accepted MPIC's decision and IRI payments were made to him on that basis. This was essentially a tacit waiver by the Appellant of his intention to dispute the case manager's decision, at least for three years. A corollary of this is the issue of prejudice to MPIC if the Appellant is permitted to dispute the decision at this point in time. As indicated above, the Appellant seeks a new determination as a Delivery and Courier Service Driver, NOC 7414, which has a lower employment income level than his current determined employment of Sales Representative, Wholesale Trade, NOC 6411. However, he was paid IRI benefits at the higher level for several years, benefits that MPIC would not be able to recoup if the extension of time is granted and his request to have a new determination is ultimately successful.

The case manager's June 22, 2012, decision itself advised the Appellant that he would be paid IRI at a higher rate with respect to his determined employment than the IRI that he was receiving during his first 180 days. That decision states as follows:

> The 180 day determination establishes a category of employment that you could reasonably have been doing at the time of the accident. It is designed to determine your maximum earning potential based on your qualifications and work history. In your determination we considered the following:
>
> - Jobs you held in the five years before the accident;
> - Your education; and
> - Your physical and intellectual abilities.
>
> After considering these factors, we have determined your employment as that of a "Sales Representatives, Wholesale Trade", the position you held at the time of your motor vehicle accident.
>
> Considering the information we have on file with regards to your five year work history, you held employment as a Sales Representative in the past that was more remunerative than the Gross Yearly Employment Income (GYEI) used to calculate your IRI in the first 180 days. As of April 25, 2012, the 181st day since your accident, you are entitled to receive an IRI based on your GYEI of $67,989.67, resulting in a biweekly payment of $1,736.85.

As noted above, the Appellant recalled receiving and reading this decision.

Upon a consideration of the totality of the evidence, both oral and documentary, and upon a consideration of the relevant factors surrounding the delay, the panel finds that the Appellant has failed to meet the onus upon him of establishing, on a balance of probabilities, that he had a reasonable excuse for his failure to file his Application for Review relating to the case manager's decision of June 22, 2012, regarding the determination of his employment, within the 60 day time limit set out in section 172 of the MPIC Act.

Accordingly, the Commission will not extend the time limit within which the Appellant may file the Application for Review dated July 27, 2015, to MPIC.

Was the determination of employment correctly made?

As indicated above, the Commission will not extend the time limit within which the Appellant may file his Application for Review of the case manager's decision dated June 22, 2012. Therefore, the Appellant is not able to appeal the determination of his employment, and the Commission does not have jurisdiction with respect to this issue.

Was the Appellant able to hold the determined employment as of April 4, 2014?

Based on the legislation set out above, 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 as of April 4, 2014.

a. What were the Appellant's MVA-related injuries?

In his testimony, the Appellant said that after the MVA, he felt immense pain throughout his body, especially in his lower back. He said that his biggest concerns were constant headaches and neck pain, which keep him awake and affect his ability to focus. He reiterated this concern in his submission.

This is consistent with the MPIC HCS consultant's report of March 30, 2018, which contains a summary of the Appellant's MVA-related injuries, as follows:

> … In reviewing the [hospital's] ER report from the day of the collision, [the Appellant] had been seen immediately following the collision. … The physical examination reported no neurological abnormalities in either the upper or lower extremities. It identified the presence of an L1 compression fracture which was described in the CT scan taken on October 27, 2011 as being a minimal fracture of the superior endplate.
>
> The initial medical reports obtained from [the Appellant]'s treating family physician, [text deleted], dated within one month of the motor vehicle collision also documented the compression fracture of the endplate of the L1 vertebra. There were also reports of neck pain and headaches caused by a whiplash associated injury. There was an indication from a physiotherapist thereafter that [the Appellant] also developed mechanical neck pain with headaches. Based upon review of all of the medical documentation on file, obtained immediately and shortly following the motor vehicle collision, these diagnoses would be the compensable injuries. These injuries specifically consisted of a whiplash injury of the cervical spine with associated cervicogenic headaches and an L1 endplate compression fracture.

The panel accepts and finds that these were the Appellant's MVA-related injuries.

b. What were the duties of the determined employment?

The determined employment for the Appellant was Sales Representative, Wholesale Trade, NOC 6411, which both parties agreed was a light strength job. While neither party focused specifically on the duties of this position at the hearing, simply referring to it as a light strength job, there is documentary evidence in front of the panel regarding the specific duties of the position, which was

unchallenged by either party, and the panel accepts that evidence. The Government of Canada NOC description of the position provides as follows:

> Sales representatives, wholesale trade (non-technical), sell non-technical goods and services to retail, wholesale, commercial, industrial, professional and other clients domestically and internationally. They are employed by establishments that produce or provide goods and services such as petroleum companies, food, beverage and tobacco producers, clothing manufacturers, motor vehicles and parts manufacturers, hotels, business service firms, and transportation companies. …
> …
>
> Sales representatives, wholesale trade (non-technical), perform some or all of the following duties:
>
> - Promote sales to existing clients
> - Identify and solicit potential clients
> - Provide clients with presentations on the benefits and uses of goods or services
> - Estimate or quote prices, credit or contract terms, warranties and delivery dates
> - Prepare or oversee preparation of sales or other contracts
> - Consult with clients after sale or signed contracts to resolve problems and to provide ongoing support
> - Review and adapt to information regarding product innovations, competitors and market conditions
> - Represent companies that export and import products or services to and from foreign countries
> - May conduct sales transactions through Internet-based electronic commerce
> - May supervise the activities of other sales representatives.
>
> …

This was the only evidence before us regarding the specific duties of the position of Sales Representative, Wholesale Trade. The panel therefore accepts and finds that these were the duties of the Appellant's determined employment, which was a light strength job. As indicated above, a Sales Representative could perform some or all of the above duties. There was no evidence before us regarding which of the above duties were the essential duties of this position. Therefore, we are unable to make a finding in this regard, but it is not necessary for us to make a finding on that point for us to reach a decision in this matter, as both parties agreed that the position's duties as a whole consist of light strength demands.

c. Was the Appellant able to perform those duties on April 4, 2014?

In his evidence and in his submission, the Appellant said that he was unable to perform the duties of his determined employment as of April 4, 2014, due to the significant, constant pain in the back of his head and neck. He did not describe a specific functional impediment, but rather explained that the pain interferes with his ability to sleep and reduces his ability to focus. The Appellant was forthright in his testimony and the panel accepts that he suffers from pain. However, he was not able to point to any medical evidence in support of his position. Rather, the weight of the medical evidence, reflects that, notwithstanding his pain, the Appellant had the ability to perform the determined employment.

The Appellant's physician, [text deleted], provided a report dated September 27, 2012, which stated as follows:

> I do not believe that the patient has a functional limitation that would prevent him from light job duties. That being said, the patient has been prone to headaches, and, as he is currently being investigated for the possibility of an aneurysm, I would suggest that should light duties make his headaches worse, he should probably be off work entirely.
>
> These limits would be in effect until the opinion of the neurosurgeon to whom I have referred him, is obtained.

MPIC's case manager followed up with [Appellant's physician] by facsimile dated March 12, 2013, which stated as follows:

> Thank you for your report of September 27, 2012 in which you indicated that your patient, [the Appellant], would not have any functional limitations from doing light job duties. Subsequent to that, he was seen by [Appellant's neurosurgeon]. In his October 11, 2012 report [Appellant's neurosurgeon] noted that the aneurysm was likely an incidental finding and he would not recommend any treatment for this condition. [Appellant's neurosurgeon] also reported that the neurological complaints that [the Appellant] had were not related to the aneurysm but may be related to a cervical condition that required further investigation. The neurosurgeon did not limit [the Appellant] based on his cerebral aneurysm.
>
> Could you please confirm, has [the Appellant] has (sic) been cleared to return to light job duties as a Sales Representative.

[Appellant's physician] responded in the affirmative on March 27, 2013.

The Appellant was also treated by [Appellant's anesthesiologist] at the [Rehabilitation Centre], who provided a report to [Appellant's physician] dated July 14, 2014, which provides as follows:

> [The Appellant] was seen in followup after a trial of Venlafaxine. With increasing his Venlafaxine to 150 mg o.d. as well as being involved in a regular exercise program he notes a significant increase in his tolerance of activity. He also notes a significant decrease in his pain. He has currently stopped taking citalopram, Lyrica as well as Tylenol #3. …

This report, which was provided shortly after the date in issue, April 4, 2014, reflects the Appellant's self-reported condition and functional abilities.

As indicated above, the Appellant was also seen by [MPIC's physiatrist] of [Rehabilitation Centre] in March, 2014, for an FCE and an IME. In his FCE report dated March 16, 2014, [MPIC's physiatrist] stated as follows:

> Over-all the FCE performance is considered unreliable, and that true abilities likely exceed what was demonstrated. Abnormal illness behaviours were noted, as outlined in the accompanying IME report, with odd sitting postures, odd limping behaviour, and frequent shifting from sitting to standing. Despite these behaviours, he has many functional abilities that would transfer to the work setting at this time, including lifting strength at the Medium physical demand level.

In his IME report dated March 20, 2014, [MPIC's physiatrist] stated as follows:

> Over-all his accident related symptoms have resolved and his current disabling symptoms are unrelated to the motor vehicle accident.
> …
>
> … It is not felt that [the Appellant] would be a good candidate for a formal rehabilitation program, but would be encouraged to resume usual physical activities, including returning to work in some capacity using his current physical abilities which are in the Medium physical demand range.

As indicated above, MPIC's HCS consultant conducted a review of all of the medical documentation on the file and provided a report dated March 30, 2018, which provides as follows:

> … As of the date of [MPIC's physiatrist]'s assessment, the opinions provided by his family physician and [MPIC's physiatrist] (sic) were that [the Appellant] would have been functionally able to return to his job duties without restriction relating to his compensable injuries from the motor vehicle collision.
> …
>
> … None of the information obtained subsequent to the report from [MPIC's physiatrist], commented specifically on functional impairment or how [the Appellant]'s condition would have affected his ability to work. These conditions were also present at the time of [MPIC's physiatrist]'s assessment and the presence of these symptoms/conditions did not affect [the Appellant]'s ability to work per his opinion.
>
> … [The Appellant]'s L1 compression fracture healed. His cervical spine whiplash injury would not lead to a specific risk for his return to employment. With respect to his functional capacity, this had been specifically assessed in 2014 by [MPIC's physiatrist] and [Rehabilitation Centre]. Based upon the testing present, [the Appellant]'s functional status was not full at that time but the impairment related to his compensable injuries would not have precluded him from returning to work.
>
> Other medical information pertaining to the other conditions not related to the motor vehicle collision would not have led to a significant risk to him working either. In like, the physical examinations documented following the assessment by [MPIC's physiatrist] did not specifically identify a functional impairment related to objective medical findings that would decrease [the Appellant]'s capacity to perform the essential duties of his occupation related to these other conditions. What had been documented was [the Appellant]'s degree of pain and treatment for his pain. Notwithstanding this, there was no specific documentation provided in the clinical notes subsequent to the report from [MPIC's physiatrist] and subsequent to April 4, 2014 which indicated that his chronic pain affected his functional capacity for work. The reported pain for which he was being treated also did not lead to a determination of disability in the clinical notes. The clinical notes and correspondence on file were mute on this point.
>
> As such, based upon the opinions provided on file, the findings of the independent assessment and FCE and on independent review of employability by this reviewer, [the Appellant]'s collision-related medical condition would not likely have affected his ability to return to work as of April 4, 2014 and subsequently.

The panel finds that the HCS consultant, in the preparation of the report dated March 30, 2018, 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 the analyses contained therein. The panel accepts the evidence provided by the HCS consultant, which is consistent with that

provided by [MPIC's physiatrist], that the Appellant did not have an MVA-related injury which rendered him substantially unable to perform the duties of his employment as of April 4, 2014. We prefer that evidence over the evidence of the Appellant, which is not supported even by his own physicians, [Appellant's physician], who said he had been cleared to return to light job duties, and [Appellant's anesthesiologist], to whom he had reported that he noted a significant increase in his tolerance of activity.

We therefore find that the Appellant has failed to meet the onus upon him of establishing, on a balance of probabilities, that he was unable to hold the determined employment of Sales Representative, Wholesale Trade as of April 4, 2014.

Were the Appellant's IRI benefits correctly terminated as of April 4, 2014?

As noted above, the panel has found that the Appellant has not established that he was unable to hold the determined employment as of April 4, 2014. Accordingly, pursuant to the provisions of the MPIC Act, his IRI benefits were correctly terminated as of that date, subject to the subsequent decision issued by the case manager on March 1, 2016, which extended the Appellant's IRI for a period of one year, inclusive, to April 4, 2015.

Conclusion

As indicated above, the panel finds as follows:

1. The Appellant has not established, on a balance of probabilities, that he had a reasonable excuse for failing to file his Application for Review relating to the case manager's decision of June 22, 2012, regarding the determination of his employment, within the 60 day time limit.

2. Given our finding on question #1, the Appellant is not able to appeal the determination of his employment, and the Commission does not have jurisdiction with respect to this issue.
3. The Appellant has not established, on a balance of probabilities, that he was unable to hold the determined employment of Sales Representative, Wholesale Trade as of April 4, 2014.
4. Given our finding on question #3, the Appellant's IRI benefits were correctly terminated as of April 4, 2014, subject to the decision of the case manager dated March 1, 2016, which extended the Appellant's IRI for a period of one year, inclusive, to April 4, 2015.

Disposition:

Therefore, the Appellant's appeal is dismissed and the decisions of the Internal Review Officer dated August 26, 2014, and September 8, 2015, are upheld, subject to the decision of the case manager dated March 1, 2016, which extended the Appellant's IRI for a period of one year, inclusive, to April 4, 2015.

Dated at Winnipeg this 20th day of November, 2018.

JACQUELINE FREEDMAN

CHANDULAL SHAH

SUSAN SOOKRAM