Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-19-048

PANEL:	**Ms. Jacqueline Freedman, Chair** **Ms. Leona Barrett** **Ms. Sandra Oakley**
APPEARANCES:	**[Text deleted], (the "Appellant"), appeared on his own behalf;** **Manitoba Public Insurance Corporation ("MPIC") was represented by Jack Burke-Gaffney.**
HEARING DATE(S):	**June 8, 2021.**
ISSUE(S):	**Whether the Appellant was entitled to Income Replacement Indemnity benefits for the first 180 days following the MVA of October 22, 2018.**
RELEVANT SECTIONS:	**Subsections 70(1) and 85(1) 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

Background:

The Appellant was injured in a motor vehicle accident on October 22, 2018 (the "MVA"). As a result of the MVA, he suffered various injuries, including injuries to his right ankle and foot, for which he required surgery. He was not working at the time of the MVA.

On November 13, 2018, the Appellant contacted his case manager, to inquire about income support. He said that he was completing a course at the time of the MVA, and was about to look for job interviews. However, due to his MVA injuries, he was now unable to do so. The case manager considered the Appellant's request, and issued a decision dated December 7, 2018, denying the Appellant's request for Income Replacement Indemnity ("IRI") benefits for the first 180 days following the date of the accident.

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 February 27, 2019, which provided, in part, as follows:

> At the time of the accident, you did not hold employment and were correctly classified as a **non-earner**. As a non-earner, your entitlement to IRI benefits for the first 180 days is based on Section 85(1) of the Manitoba Public Insurance [Corporation] Act […]
>
> […]
>
> In order to establish that you ***would have held*** employment some of the factors that would have to be established are:
>
> - Was there a definite job opportunity that was available to you at, or after the time of the accident?
>
> - Can you demonstrate that you made an actual employment application prior to the accident that resulted in an offer of employment which you could not accept because of your injuries?
>
> […]
>
> […]
>
> You have not established, on the "balance of probabilities" that you would have held employment based on the criteria above.
>
> In light of the above, I am upholding the case manager's decision of December 7, 2018, and dismissing your Application for Review.

The Appellant disagreed with the Internal Review Decision, and filed this appeal with the Commission.

We note that this appeal hearing was held during the COVID-19 pandemic, and took place entirely by videoconference, with the consent of the parties.

Issue:

The issue which requires determination on this appeal is whether the Appellant was entitled to IRI benefits for the first 180 days following the MVA of October 22, 2018.

Decision:

Following a review of the documentary evidence on file, the testimony of the Appellant and the submissions of the parties, and for the reasons set out below, the panel finds that the Appellant has not established, on a balance of probabilities, that he was entitled to IRI benefits for the first 180 days following the MVA of October 22, 2018.

Legislation:

The relevant provisions of the MPIC Act are as follows:

> **Definitions**
>
> 70(1) In this Part,
>
> **"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;
>
> **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:

> (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.

Evidence for the Appellant:

The Appellant testified and was cross-examined at the hearing of his appeal.

He described that he came to Canada as a skilled immigrant, in order to work. At the time of the MVA, he was attending a course and the MVA occurred in the final week. It was in that last week that he had planned to meet with potential employers, and due to the MVA he lost the opportunity to do so. He said that it is clear that because of the MVA, he couldn't find a job.

Following the MVA, the Appellant had many doctors' appointments. Then, he had to have surgery in November, 2018, after which he had to rest at home for a few months. He was able to find a job in April, 2018, but then he had to have a second surgery. Following the second surgery, he was able to find another job. This is proof that the Appellant wanted to work, and that he would have worked, if he was able to do so, in the 180 days following the MVA.

Evidence for MPIC:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination.

Cross-examination covered the Appellant's education and employment history prior to his emigration to Canada in late May, 2018. He said that his immigration was accepted because he was a skilled immigrant. He completed the [program] in the field of [administration] at [university] in [text deleted] in 2012. In [text deleted], he had worked as a [text deleted], with a background in

human resources. The Appellant said that realistically, he wasn't expecting to find this type of job in Canada. He knew that he would have to find an entry-level position and then move up; his friends here had told him to prepare himself for that.

The Appellant said he did not do a job search before his arrival to Canada. As a newcomer, there are some courses that the government encourages you to take to get familiar with Canadian society, and these take about a month. He did take those courses. He thought that he would have time for a job search, and he was not in a rush, as he would also have to find a house. Prior to the MVA, he had only had one job in Canada, which was working for 2 to 3 weeks as a [text deleted]. He had applied for some other jobs, but he didn't hear back regarding the applications. The Appellant took the [text deleted] job only in order to get Canadian work experience. In his mind, it was a lower level job. When asked whether he was willing to take other jobs not related to his prior work experience, he said "I think everyone is selective, I wanted useful experience". The Appellant left the [text deleted] job after 2 to 3 weeks. He said the job put a lot of mental pressure on him, as he was given a target number of [text deleted] to process, which was difficult to meet. His supervisor was not satisfied with the number of [text deleted] that he took, but did approve of his organization. The supervisor offered him an alternate position with the company, in the [text deleted]; however, the Appellant was not willing to accept that position.

One week after leaving the [text deleted] job, the Appellant began the government course that he was taking at the time of the MVA. He did not recall whether he had applied for any jobs in the week before he started the course. The government course began on October 1, 2018, and was intended to end in the last week of October. During the last week, the Appellant was supposed to meet with potential employers. He took the course because he was having difficulty finding employment that he was aiming for. He said that it was meant to prepare people like him, who had

a higher level of education and experience in specialized fields, to find employment in Canada related to their background. He acknowledged that a lack of Canadian experience can make it difficult for skilled immigrants to find work in Canada. At the time that the Appellant came to Canada, his English was sufficient for most jobs in Canada. He has taken an English course, and even now his English could use improvement, but the Appellant did not think his English was a factor in his ability to find a job.

The Appellant confirmed that he was not employed at the date of the MVA. He was asked whether he was promised a job when he began the government course in October, 2018, and he said no. He believed that he would find a job after he completed the course. He needed to find a job. He has never relied on any type of government assistance; even when he couldn't work, he spent his own savings. When asked whether he would take "just any job", the Appellant responded that entry-level jobs are not all the same. He didn't want to work as a labourer; he wanted an entry-level office job that would add to his work experience. In the time between turning down the [text deleted] job and the MVA, he did not have any formal job offers. There were no specific job interviews set up for the Appellant in connection with the course. He said he was busy with the course and was not free to set them up. He was in the last week of the course, and the MVA occurred on the Monday, and he was not able to finish the course. Some employers cooperated with the organizers of the course and came to meet with the students. He missed that opportunity. He confirmed that there were no interviews or meetings scheduled for him.

The Appellant was questioned regarding a March 19, 2019, case manager's file note, in which it is recorded that he advised the case manager that he felt like he was capable of performing an office job at that time. He agreed that this was the case, and said that while he was not able to stand, he could sit as long as he was able to elevate his foot, so he was looking for work. He had

at least one interview, and got a job within 2 to 3 weeks. When questioned regarding the case manager's notation that he turned down a position which required hours of work from 2:00 – 10:00 p.m., the Appellant said that he did not recall, but if it was recorded in the file note, then it would be correct. He reiterated that he was looking for an office job that would help him gain experience and knowledge. He added that he could work, but he also knew he would soon need another surgery.

Submission for the Appellant:

The Appellant submitted that at the time of the MVA, he had the intention and motivation to work. It was only because of the MVA, and the surgeries that he had to undergo, that he could not work. He also noted that he was subject to significant pain and suffering. He also pointed out that even though he was not able to work after the MVA, he never went on Employment Insurance; instead, he used his savings. Although this was very hard for him, he always wanted to stand on his own two feet. He would have worked after the MVA if he could have. It was clearly because of the MVA that he couldn't find a job.

Even after the Appellant started working, he had to undergo a further surgery and then physiotherapy treatment. He is still suffering from pain and complications due to his MVA injuries, and he may require a third surgery. The Appellant submitted that he should be entitled to IRI benefits for the period that he was not able to work following the MVA.

Submission for MPIC:

Counsel for MPIC noted that there is no dispute that the Appellant was injured in the MVA and did receive certain Personal Injury Protection Plan ("PIPP") benefits. However, the onus is on him to establish his entitlement to IRI benefits. He was correctly classified as a non-earner at the time

of the MVA, as he was taking a course at that time and was not employed. The issue is whether he was entitled to IRI benefits for the first 180 days following the MVA, under the relevant legislation.

Prior to the MVA, the Appellant had only had one prior job in Canada, a brief employment as a [text deleted]. He found that job too demanding. Despite his efforts, he had not secured employment before or after that job, which is why he enrolled in the course he was taking at the time of the MVA. The Appellant said he knew he wouldn't find a job in his chosen field right away, and yet he was not willing to take just "any job". He declined the [text deleted] job and the job that required evening hours, and said he did not want to work as a labourer.

Although the Appellant said he was getting ready to look for jobs, the Appellant did not have any formal job offers or interviews arranged at the time of the MVA. He acknowledged that there was no guarantee of employment from the course that he was taking at the time of the MVA. Counsel submitted that there is not sufficient evidence that the Appellant "would have held" employment had the MVA not occurred. Further, it should be noted that by March 19, 2019, the Appellant advised MPIC that he was able to look for work, and so in any event any entitlement to IRI benefits within the first 180 days following the MVA would cease by that date. Therefore, the appeal should be dismissed.

Discussion:

The onus is on the Appellant to show that he is entitled to IRI benefits for the first 180 days following the MVA of October 22, 2018. As noted above, the Appellant was enrolled in a course, and was not working at the time of the MVA. As such, he was correctly classified as a non-earner under subsection 70(1) of the MPIC Act. His entitlement to IRI benefits for the first 180 days following the MVA is therefore governed by subsection 85(1) of the MPIC Act, as set out above.

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.

Would the Appellant Have Held Employment During the Relevant Time Period?

As set out above, paragraph 85(1)(a) of the MPIC Act provides that a non-earner is entitled to IRI benefits at any time during the first 180 days following the MVA, where he can show that he was unable to hold an employment that he "would have held" during that period if the accident had not occurred. There is no dispute that the Appellant was injured in the MVA, and that those injuries entitled him to certain PIPP benefits. However, there is a dispute as to whether the Appellant "would have held" employment during the 180 day period following the MVA. The onus is on the Appellant to show that he would have.

We note that the 180 day period following the MVA ended on April 20, 2019. However, as referred to above, in an MPIC file note date March 19, 2019, the case manager recorded the following:

> Clmt confirmed he would be able to perform an office job if he is offered employment, but clmt noted he still has to elevate right foot during the day. Clmt noted he thinks this could be accommodated but it still depends on the company. […] clmt looking for work and feels he is able to perform office work.

The file note also records the following:

> […] Clmt indicated he doesn't have an update on his interview from last week, and clmt noted he had another interview whereby the working hours are 2-10 pm. Clmt noted the timing of the shifts aren't good for him, so he passed this job up.

On cross-examination, the Appellant agreed that he was able to work, and was looking for work, as of March 19, 2019. We therefore find that as of March 19, 2019, the Appellant was not unable to hold employment due to his MVA injury.

Having made that finding, the remaining period of time that we must consider (within the 180 days following the MVA) is from the time of the MVA to March 19, 2019. As stated above, there is a dispute as to whether the Appellant "would have held" employment during this time period.

The panel accepts the Appellant's testimony that he had the intention and motivation to work at the time of the MVA. However, the Appellant acknowledged that he was selective in the employment that he was willing to accept. He wanted an office job that would help him in his future endeavors, and he declined at least two employment opportunities (the [text deleted] job, approximately one week prior to the time of the MVA, and the job requiring evening hours, on or about March 19, 2019). The Appellant's evidence was clear that in the time between turning down the [text deleted] job and the MVA, he did not receive any formal job offers. He was also clear that he was not promised a job when he began the government course in October, 2018, and that there were no specific job interviews set up for him in connection with that course.

While the Appellant believed that he would find a job after he completed the course that he was taking at the time of the MVA, and that he missed out on the opportunity to do so due to the MVA, this belief does not constitute evidence that the Appellant "would have held" employment during the relevant time period. As indicated, there is no evidence before the panel that the Appellant had received any formal job offer or promise of employment from the time of the MVA until March 19, 2019, when the Appellant advised the case manager that he had declined a job offer, by which time (as we have found) the Appellant was not unable to hold employment due to his MVA injury.

Due to the lack of evidence, it is not possible for the panel to determine, on a balance of probabilities, that it is likely that the Appellant would have held employment from the time of the MVA to March 19, 2019, had he not been injured in the MVA.

As a result, based on all of the above, we find that the Appellant has not met the onus of establishing, on a balance of probabilities, that he was unable to hold an employment that he would have held during the first 180 days following the MVA, if the accident had not occurred.

Was the Appellant Deprived of an Employment Insurance Benefit?

As set out above, paragraph 85(1)(b) of the MPIC Act provides that a non-earner is entitled to IRI benefits during the first 180 days where he can show that he was deprived of a benefit under the Employment Insurance Act (Canada). The Appellant did not assert that he was deprived of such a benefit in his testimony or in his submission, nor is there any documentary evidence which addresses this point. On the contrary, the Appellant testified that he preferred to not claim any Employment Insurance benefits.

As indicated, there was no evidence that the Appellant was deprived of an Employment Insurance benefit because of the MVA. Therefore, we find that the Appellant has not met the onus to establish, on a balance of probabilities, that he was deprived of such a benefit.

Conclusion

Based on the above, we find that the Appellant has not established, on a balance of probabilities, that he was unable to hold an employment that he would have held during the first 180 days following the MVA, if the accident had not occurred; nor has he established, on a balance of probabilities, that he was deprived of an Employment Insurance benefit because of the MVA.

We therefore find that the Appellant has not established, on a balance of probabilities, that he is entitled to IRI benefits for the first 180 days following the MVA of October 22, 2018.

Disposition:

Accordingly, the Appellant's appeal is dismissed. The decision of the Internal Review Officer dated February 27, 2019, is upheld.

Dated at Winnipeg this 16th day of July, 2021.

JACQUELINE FREEDMAN

LEONA BARRETT

SANDRA OAKLEY