PART C – Decision under Appeal

The Decision under Appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision, dated August 25, 2015, which found that the appellant did not qualify as a Person with Persistent Multiple Barriers, (PPMB), under S. 2(4)(b) of the Employment and Assistance Regulation. The Ministry determined that the appellant's restrictions, in their opinion, did not preclude the appellant from searching for, accepting, or continuing in all types of employment including light-duty or sedentary type employment.

PART D – Relevant Legislation

EMPLOYMENT AND ASSISTANCE REGULATION- (EAR)-SEC. 2

PART E – Summary of Facts

The relevant evidence before the ministry at the reconsideration level was a two page "Medical Report-Persons with Persistent Multiple Barriers," signed by a physician, a neurosurgeon, on Feb. 19, 2015; a one page document entitled "Employability Screen" which gave the appellant a score of 11; a two page document dated July 9, 2015 from a Community Services organization containing further information from the physician; a two page letter from the physician to the appellant's GP regarding the results of a neurological exam of the appellant; and, a two page letter dated June 16, 2014 from the physician to the GP again setting out an examination of the appellant by the physician, including the results of an MRI.

The physician's report stated the primary medical condition is mechanical low back pain due to degenerative disc disease. Secondary conditions were alcoholism, ruptured right biceps tendon with subsequent surgery, left carpel tunnel syndrome and broken jaw with two steel pins. The expected duration of the medical condition(s) was over two years and they were not episodic in nature. The restrictions reported were lifting more than 40 pounds, repetitive flex/extension and twisting movements. Treatments listed were only medications.

The physician noted in the Oct. 7, 2014 letter that the appellant suffered from disc protrusions and that the appellant would continue with non-operative measures given his stable neurological status. The June 16, 2014 letter noted the appellant had worse pain with prolonged sitting, standing, bending, lifting and walking, and that the appellant walked with a severe limp. An MRI showed two disc bulges without any major or significant nerve root impingement.

The two page document sent from the Community Services organization asked the physician to agree or disagree with a number of listed medical conditions and restrictions. The physician did not tick any boxes, agreeing or disagreeing with any conditions or restrictions, but simply wrote on the bottom of the form that the appellant "is awaiting further assessment with Lumber-MRI and E.M.G. testing. This will help determine need for intervention in the interim the pain he describe is not allowing him to pursue any meaningful employment." This was signed on Aug. 6, 2015.

The reconsideration decision agreed that as the appellant had been receiving assistance for 12 of the last 15 months he qualified under sec. 2(2) of the EAR to apply for PPMB. It also determined that as his score on the employability screen was 11, the assessment for PPMB would fall under Sec. 2(4) of the EAR. Further, the decision also found that the as the medical practitioner confirmed the appellant has a medical condition that has continued for at least one year and was likely to continue for at least two years, the appellant met the requirements of sec. 2(4)(a)(i). However, the decision found under that under sec. 2(4)(b), the physician's opinion was that the medical conditions made finding meaningful employment difficult and that this did not preclude the appellant from light-duty or sedentary employment thus denying his application.

In the Notice of Appeal, the appellant stated that he needs a scooter for transport; his leg feels like it is in a vice; and, he has upcoming dates for an MRI and EMG. Also copies of an appointment notice for an MRI in June of 2016, an appointment notice for a neurology appointment, with a different neurologist, set for Sept. 29, 2015 were provided. A further submission was also provided; a two page letter from the Community Services organization dated Sept. 21, 2015, (the same form dated July 9, 2015 above, which had been sent to the physician.) This document confirmed a number of

medical conditions and restrictions. Of note the document, from the appellant's GP, stated that the appellant was not restricted in a number of the activities listed. Further the GP wrote on the form that the appellant "can not do heavy manual work."

At the hearing the Appellant and his wife gave evidence. His wife stated that she sees the appellant on a daily basis and that she knows that many of the things that the GP stated the appellant could do were wrong. On bad days he would just stay in bed all day and she would tend to him. Even if he could do a desk job he could not keep the job because of the bad days. In relation to the two page document of Sept. 21, completed by the appellant's GP, he could not stand for 10 minutes with no weight on his left leg, he wakes constantly thru the night, he has poor short term memory, he needs reading glasses, he can lift hardly any weight, he is unable to maintain repetitive actions and he is in constant pain. His bad days occur 60% to 70% of the time. If not for his scooter he could not get down the hallway of their apartment building.

The appellant gave evidence that he flip flops all night and can't sleep as he can't get comfortable. He can't stand for any length of time and constantly changes positions. He previously helped his wife with gardening but can't even lift a shovel now. Luckily his sister gave him a scooter so he can now get to the doctor and do his grocery shopping. When shopping, the store staff obtains his list and picks up his groceries items for him. His GP was wrong when he said he could do some of these things. When the GP filled out the form from his advocate the GP never asked him any questions about his restrictions he was simply asked to leave the form and pick it up later. He believes his GP does not like him. He has never asked the GP about the discrepancies. He takes pain medication every day but it is not effective. His appointment for the MRI was in relation to his right ulnar nerve; he does not yet know the results of that test.

The evidence given on behalf of the appellant was new and was not before the reconsideration officer at the time of the reconsideration. Also the GP's letter of Sept. 21 was new and not before the reconsideration officer. As this new evidence substantiates the information available at reconsideration it is in support of the information and records before the minister at the reconsideration and the panel admits it pursuant to section 22(4)(b) of the Employment and Assistance Act.

The Ministry representative argued the reconsideration decision was reasonable as the information did not provide a medical basis to say the appellant was precluded from all types of employment.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined the Appellant was not eligible for PPMB as he was not precluded from light or sedentary type of employment. The ministry has to be satisfied the person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and in the opinion of the minister is a barrier that precludes the person from searching for, accepting or continuing in employment under
S. 2(4)(b) of the Employment and Assistance Regulation.

The governing legislation in this situation is as follows:

Persons who have persistent multiple barriers to employment

2 (1) To qualify as a person who has persistent multiple barriers to employment, a person must meet the requirements set out in

(a) subsection (2), and

(b) subsection (3) or (4).

(2) The person has been a recipient for at least 12 of the immediately preceding 15 calendar months of one or more of the following:

(a) income assistance or hardship assistance under the Act;

(b) income assistance, hardship assistance or a youth allowance under a former Act;

(c) a disability allowance under the Disability Benefits Program Act;

(d) disability assistance or hardship assistance under the Employment and Assistance for Persons with Disabilities Act.

(3) The following requirements apply

(a) the minister

(i) has determined that the person scores at least 15 on the employability screen set out in Schedule E, and

(ii) based on the result of that employability screen, considers that the person has barriers that seriously impede the person's ability to search for, accept or continue in employment,

(b) the person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,

(i) in the opinion of the medical practitioner,

(A) has continued for at least one year and is likely to continue for at least 2 more years, or

(B) has occurred frequently in the past year and is likely to continue for at least 2 more years, and

(ii) in the opinion of the minister, is a barrier that seriously impedes the person's ability to search for, accept or continue in employment, and

(c) the person has taken all steps that the minister considers reasonable for the person to overcome the barriers referred to in paragraph (a).

(4) The person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,

(a) in the opinion of the medical practitioner,

(i) has continued for at least one year and is likely to continue for at least 2 more years, or

(ii) has occurred frequently in the past year and is likely to continue for at least 2 more years, and

(b) in the opinion of the minister, is a barrier that precludes the person from searching for, accepting or continuing in employment.

The Ministry argues that the appellant's restrictions, in their opinion, did not preclude the appellant from searching for, accepting, or continuing in all types of employment including light or sedentary work. The appellant argues his pain is such that he is not able to search for, accept or continue in employment.

The original medical report from the physician, a specialist neurosurgeon, states the appellant has mechanical low back pain and the restrictions noted are in relation to heavier type of work: lifting more than 40 pounds; repetitive flex/extension; and, twisting movements. When asked to comment further in the document dated July 9, the physician did not tick any boxes agreeing or disagreeing with any conditions or restrictions. He simply wrote on the bottom of the form that the appellant is awaiting further assessment which will help determine need for intervention and in the interim the pain he described is not allowing him to pursue any meaningful employment. This was signed on Aug. 6, 2015. It is noteworthy that this specialist chose the words "any meaningful employment" and not "any employment." This would seem to indicate that he was of the opinion that there was some employment the appellant could pursue.

In response to the decision to deny, the appellant attempted to obtain further helpful information from his own GP. The material from the GP, the letter dated Sept. 21, 2015, confirmed a number of medical conditions and restrictions. However the appellant's GP, noted that the appellant was not restricted in a number of activities. But most importantly the GP stated that the appellant could not do heavy manual work. This would appear to confirm what the neurosurgeon stated in August as well. In effect, the appellant has provided further information that supports the reconsideration decision in that the opinion of his own medical practitioner is that he is precluded from heavy manual labour. It does not say he is precluded from any work. It does not say he is precluded from light, sedentary or part-time work.

The issue for the panel is whether it was reasonable for the ministry to find the medical condition(s) are not a barrier precluding a search for, accepting or continuing employment. The word “preclude” is to be contrasted with the wording in sec. 3(b)(ii) which states an applicant under that section, is a barrier that “seriously impedes” the ability to search for, accept or continue in employment. Preclude, in its ordinary use, means to make impossible or prevent from happening. It is a higher burden than seriously impedes.

The initial medical opinion concluded the appellant will find it difficult to obtain meaningful employment. It does not state that he is precluded from searching for, obtaining or performing light, sedentary or even part time work. There must be, according to the legislation, information from a medical practitioner to satisfy the ministry that he is precluded from searching for, accepting or continuing in employment. Further, the evidence from his own GP, obtained only last month, is in support of the reconsideration decision, in that it states his is precluded only from heavy manual labour.

Based on the medical opinion of two different doctors, a neurosurgeon and the appellant’s GP, the panel finds that the ministry is reasonable in a determination that the appellant has not satisfied this section of the legislation. When one considers the new evidence of the GP, the panel finds this is in support of the original medical opinion. Although the appellant and his wife are of the opinion he can’t work, and further that the GP has incorrectly stated he is not restricted in some activities, the ministry has reasonably relied on the medical evidence which does not show the appellant is precluded from light, sedentary or part-time employment.

The appellant must meet all the legislated criteria to qualify for PPMB designation. As he has not satisfied sec. 2(4)(b) of the EAR the panel finds that the Ministry’s Reconsideration Decision is reasonably supported by the evidence and is a reasonable application of the legislation. The decision is confirmed.