

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-61**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], did not appear;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Leanne Zabudsky.

HEARING DATE: November 10, 2009

ISSUE(S):

1. Whether the Appellant had a reasonable excuse for the late filing of his application for review;
2. and if so, whether the Appellant was correctly determined into the employment of a Front Desk Clerk; and
3. whether low intensity laser therapy (LILT) is medically required in the management of the injuries the Appellant sustained as a result of the motor vehicle accident.

RELEVANT SECTIONS: Sections 184.1(1) and (2) 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

A Notice of Appeal was filed by [the Appellant] on May 25, 2006, in respect of an Internal Review Decision dated March 23, 2006. This decision related to whether the Appellant had a reasonable excuse for the late filing of his Application for Review and whether the Appellant was correctly determined into the employment category of a front-desk clerk. The Notice of Appeal also related to an Internal Review Decision dated April 25, 2006 regarding the Appellant's entitlement to funding for low intensity laser therapy (LILT).

The Notice of Appeal contained the Appellant's address in [text deleted], Manitoba. The Appellant also made arrangements for the Claimant Adviser Office to represent him in his appeals.

A case conference meeting was held by the Commission on August 25, 2009. The representative for the Claimant Adviser's office advised the Commission that he had attempted to contact the Appellant prior to the case conference meeting, but had not been successful. Accordingly, the matter was set down for hearing for November 10, 2009 to determine if the Appellant had abandoned his appeal.

The Commissioner's Secretary advised the Commission that:

- 1) On August 25, 2009 the Commission sent out a Notice of Hearing to the Appellant by regular mail (a copy of which is attached hereto and marked as Exhibit "A), dated August 25, 2009 which was forwarded by Canada Post to the Appellant's address in [text deleted], Manitoba (being the address the Appellant set out in his Notice of Appeal).
- 2) A Notice of Hearing (a copy of which is attached hereto and marked as Exhibit B), in respect of this appeal, dated August 25, 2009, was also forwarded by Canada Post Xpresspost to the Appellant's address in [text deleted], Manitoba.
- 3) On September 22, 2009, Canada Post returned to the Commission the above mentioned letter (Exhibit B), sent by Xpresspost, which indicated it had not been claimed by the Appellant.
- 4) The letter contained in Exhibit A was not returned and assumed to be delivered.

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

- 1) On October 26, 2009, the Appellant left a voicemail message indicating that the representative of the Claimant Adviser Office had been leaving phone messages for him at the wrong phone number.
- 2) The Appeals Officer for the Commission advised the Claimant Adviser Office of the correct phone number for the Appellant and discussions were held between the Appellant and the Claimant Adviser Office.
- 3) Subsequent to these communications, [text deleted] of the Claimant Adviser Office forwarded letters to the Commission dated October 20, 2009, September 8, 2009 and August 24, 2009 detailing his efforts to communicate with the Appellant and advising that the Appellant had not contacted his office.
- 4) The Commission was advised by the Claimant Adviser Office that as a result, it was withdrawing as the Appellant's representative for his appeal.
- 5) On November 2, 2009 the Appeals Officer received a voicemail message from the Appellant indicating that he was aware of the hearing date set for November 10, 2009 but was unsure if he would be able to make it due to his work schedule.
- 6) On November 2, 2009, the Appeals Officer left a voicemail message for the Appellant confirming receipt of his message and advising that he could attend the hearing via teleconference, or, if he wished to be present, he could request an adjournment, in writing, well in advance of the hearing date. She also advised him that if he was not present at the hearing, the Commission may proceed and render a decision in his absence.
- 7) No request to hold the hearing via teleconference or for an adjournment was received by the Commission from the Appellant.

The hearing commenced on Tuesday, November 10, 2009 at 9:30 a.m. Ms Leanne Zabudsky, MPIC's legal counsel attended the hearing. The Appellant did not. The Commission requested Ms Zabudsky to make a submission in respect of the issues of abandonment of the appeal and as well to make a submission in respect of the merits of the appeal.

Submission for MPIC:

Counsel for MPIC noted that the two Internal Review Decisions in issue were dated March and April of 2006. The Notice of Appeal was filed in May 2006. Some information was exchanged with the Appellant in June of 2006, but the Appellant had taken no further steps since that time to move the matter forward.

At the case conference meeting held on August 25, 2009, the Claimant Adviser's Office representative advised that he had been having difficulty contacting the Appellant. Now, the Appellant had failed to attend at the scheduled hearing for his appeal. Counsel for MPIC reviewed the Commission's decision in [text deleted] (AC-06-71). That decision outlined, at page 7, appropriate criteria to be taken into account in considering whether an appeal has been abandoned, including:

1. There must have been a continuous intention to prosecute the appeal from the time when the documents in question should have been properly filed;
2. there must be a reasonable explanation for the failure to file the documents; and
3. there must be arguable grounds of appeal.

Counsel submitted that the Appellant had not displayed a continuous intention to prosecute his appeal; rather, his actions indicated that he has had no such intention. It has been more than

three years since the Internal Review Decisions were issued, yet very little evidence beyond the Notice of Appeal has been submitted to the Commission.

Except for some references to his working long hours, the Appellant had given no indication of his reasons for this delay or his failure to appear at the hearing. Although he was given various options to accommodate his schedule, he did not pursue any of these.

In regards to the question of whether there are arguable grounds for appeal, counsel briefly reviewed the documents in the Appellant's indexed file, noting that there was a lot of conflicting information on that file which did not provide support for the Appellant's position.

For example, his explanation for the late filing of his Internal Review Application had been that he was on medication, but there was nothing in the documentation to indicate that medications had impaired him from going about his daily activities. She noted that the requirement to file an Internal Review Application is not onerous, and that the Appellant had the ability to attend to this, just as he attended to his doctors' appointments and the [rehab clinic] rehabilitation program with which he was involved. None of his doctors had expressed any concern about his abilities to conduct his affairs. The documents indicated that by November 2005, he no longer required medications, yet the Application for Internal Review was not received until February 27, 2006.

In regard to the issue of the two year determination, counsel for MPIC noted that the documents on the indexed file indicate that the Appellant actually performed the determined employment prior to the motor vehicle accident for a period of time. There was no indication in the documentation that this was an improper employment determination. The Appellant's objection

that he had not been doing the job at the time of the motor vehicle accident was not a proper criterion for consideration under the MPIC Act.

In regard to the Appellant's entitlement to laser therapy, counsel submitted that the MPIC Act required that this must be a medically required treatment. Counsel noted [MPIC's doctor's] opinion, contained in the indexed file, that this is not a medically required technique and submitted that the documents on the file did not establish the proven effectiveness of the treatment.

Counsel submitted that the Appellant had abandoned his appeal and that the appeal should be dismissed.

Discussion:

The relevant MPIC Act provides:

How notices and orders may be given to appellant

[184.1\(1\)](#) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant

(a) personally; or

(b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.

When mailed notice received

[184.1\(2\)](#) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

The Commission notes that the address in [text deleted], Manitoba was the address which was indicated in the Appellant's Notice of Appeal dated May 26, 2006.

The report from the Secretary to the Commissioner indicates that the Notice of Hearing that was sent by regular mail was not returned to the Commission. Further, the report from the Commission's Appeals Officer indicates that the Appellant was aware of the hearing date set for November 10, 2009 and had been offered various options regarding the hearing, but had indicated he was not sure whether he would attend. Although he was advised that if he was not present the Commission might proceed and render a decision in his absence, no further steps were taken by the Appellant in respect of the scheduled hearing.

Based upon these reports, the Commission finds that, pursuant to Section 184.1(1)(2) of the MPIC act, the Appellant is deemed to have received notice of the Commission's hearing scheduled for November 10, 2009.

The Commission has reviewed the decision of the Manitoba Court of Appeal in *Fegol vs Asper*, 2004 MBCA 115, which the Commission considered in the [text deleted] decision.

The Commission finds that the legal precedents set out by the Manitoba Court of Appeal in *Fegol vs Asper* (supra) relating to the issue of whether or not abandonment has occurred are relevant in this appeal.

The Commission finds that the Appellant, having filed a Notice of Appeal on May 25, 2006, did not, after the Claimant Adviser Office withdrew as his representative on October 29, 2009, make appropriate arrangements to proceed with his appeal.

The Commission determines that the Commission's officers took all reasonable steps, by telephone and letter, to set the date for the Appeal hearing and advise the Appellant of his options for attending either in person or by teleconference, or requesting an adjournment. The Appellant was made aware that if he did nothing, the Commission may proceed in rendering a decision in his absence. No further steps were taken by the Appellant in regard to the hearing or the Appeal.

The Commission therefore concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his Appeal after the Claimant Adviser Office withdrew as his representative.

In respect of the merits of the Appeal, the Commission finds that the Appellant has not established reasonable grounds to proceed with the appeal. He has failed to submit any evidence for the Commission to consider subsequent to his filing of the Notice of Appeal on May 26, 2006 and a letter to his case manager dated June 20, 2006. Since that time, the Appellant has taken no further steps to move his Appeal forward or to submit evidence in support of the Appeal.

The Commission therefore determines that the Appellant failed to establish, on a balance of probabilities, that there was a continuous intention by him to prosecute his Appeal from the time he filed his Notice of Appeal. We also find that the Appellant has failed to establish that he had a reasonable excuse for the late filing of his application for review, that he was not correctly determined into the employment category of a front-desk clerk, or that low intensity labour therapy (LILT) is medically required in the management of the injuries he sustained as a result of the motor vehicle accident.

The Commission, for these reasons, confirms the Internal Review Officer's decisions dated March 23, 2006 and April 25, 2006 and dismisses the Appellant's Appeal.

Dated at Winnipeg this 30th day of November, 2009.

LAURA DIAMOND