

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-82**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: February 16, 2010

ISSUE(S):

- 1. Whether the Appellant had a reasonable excuse for the late filing of her Application for Review;**
- 2. Whether the Appellant's Permanent Impairment entitlement was properly assessed and calculated;**
- 3. Whether the above mentioned appeal should be dismissed on the grounds of abandonment.**

RELEVANT SECTIONS: Sections 127, 172 and 184.1 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

A Notice of Appeal was filed by the Appellant on August 20, 2008 in respect of an Internal Review Decision relating to Permanent Impairment benefits and the Appellant's failure to file her Application for Review within the 60 day period set out under the MPIC Act.

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

1. The Claimant's Adviser Office ("CAO") who was representing the Appellant, advised, on October 28, 2009 that they had lost contact with the Appellant and were withdrawing their representation.
 - a) The CAO advised that they had sent two registered letters which were both successfully delivered to the Appellant's address of [text deleted]. They had also sent other correspondence to the Appellant via regular mail to that address and the letters were not returned.
 - b) The CAO also advised that they had attempted to telephone the Appellant at the number she had provided but received messages advising that the "cellular customer was not available". Further attempts to contact the Appellant's neighbours were also unsuccessful as those numbers were not in service.
2. The Appeals Officer then sent a letter to the Appellant requesting that she contact the Commission to discuss her appeal, enclosing a Notice of Withdrawal form. No response was received and the letter was not returned to the Commission.
3. On November 19, 2009, the Appeals Officer telephoned the Appellant but received the message that the "cellular customer is not available".
 - a) The Appeals Officer also attempted to contact the Appellant's neighbours but those numbers were not in service. Attempts to contact various numbers noted in the Appellant's file were made but this was not successful.
4. The Appeals Officer sent a further letter to the Appellant requesting her to contact the Commission to discuss her appeal. No response was received and the letter was not returned to the Commission.

On January 8, 2010, the Commission issued a Notice of Hearing which stated:

You have filed a Notice of Appeal from an Internal Review decision dated July 9, 2008

The Commission has fixed:

Date: Tuesday, the 16th day of February, 2010
Time: 9:30 a.m.
Place: 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

for a hearing into your appeal.

The subject of the hearing is to determine whether the appeal has been abandoned.

At this hearing, you will have the opportunity to make submissions that you have not abandoned your appeal.

If you do not attend the hearing, the Commission may consider whether you have abandoned your appeal. Alternatively, the Commission may proceed with the hearing of your appeal and may issue its final decision.

The time and date are firm; postponements will only be granted under extraordinary circumstances.

This Notice addressed to the Appellant, was sent by both regular mail and Xpresspost to the Appellant at [text deleted].

A report from a member of the Commission's staff indicates that the Notice of Hearing that was sent by regular mail was not returned to the Commission. In respect of the Xpresspost mail, Canada Post provided a copy of the scanned delivery date and signature of the recipient of the item, dated January 13, 2010.

The Commission finds that pursuant to Section 184.1(1) and (2) of the MPIC Act, the Appellant is deemed to have received notice of the Commission's hearing scheduled for February 16, 2010.

Hearing:

The hearing commenced on Tuesday, February 16, 2010 at 9:30 a.m. Ms Danielle Robinson, MPIC's legal counsel attended the hearing. The Appellant did not. The Commission requested Ms Robinson to make a submission in respect of the issue of abandonment of the appeal as well as in respect of the merits of the appeal.

Counsel for MPIC submitted that:

“The Automobile Injury Compensation Commission (the “Commission”) has considered the issue of Abandonment of an Appeal in the Appeals of [text deleted] ([2008] M.A.I.C.A.C.D. No. 27) and [text deleted] (AC-04-71) and in those decisions, adopted the criteria set out by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115 in determining whether an Appeal before that Court had been abandoned. The criteria to be considered are:

- 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 addressed each of these questions.

- 1) Continuous intention to prosecute the appeal?

Counsel submitted that the Appellant has failed to demonstrate any intention to prosecute her appeal as she has taken no steps to move the matter forward and has been non-responsive to the CAO and the Commission's contact.

- 2) Reasonable explanation for delay?

Counsel submitted that to MPIC's knowledge, the Appellant has not provided any explanation for failing to pursue her Appeal. Where no explanation has been provided, she submitted there could not be a determination of reasonableness and the Appellant cannot meet this requirement.

3) Were there arguable grounds for the Appeal regarding Permanent Impairment?

Counsel submitted that the issue in the appeal is whether the Appellant had a reasonable excuse for the late filing of her Application for Review and whether she is entitled to a Permanent Impairment benefit.

Regarding the merits of the Permanent Impairment award, as noted by the Internal Review Officer at page 3 of the Internal Review Decision dated July 9, 2008:

“The decision was based upon an assessment completed by [Appellant’s Occupational Therapist] with [text deleted], who, in my opinion, arrived at the correct conclusion. Based on my review of the file, your Permanent Impairment award with respect to the items outlined in the decision of September 25, 2007 was correctly assessed and calculated.

With respect to your allegation of “memory loss”, I suggest you discuss this with your case manager as this issue is not before me on this review.

The decision of September 25, 2007 is in accordance with both the legislation and evidence, and no basis has been shown for interfering with this decision.”

Nor, she submitted, was any reasonable excuse provided for the Appellant’s delay in filing the Application for Review. Counsel for MPIC submitted that the appeal should be dismissed.

Discussion:

The Commission reviewed the decision of the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, (Man. C.A.) in its decision in [text deleted] (File No. AC 06-71), where the Commission noted:

“In that case the Applicant was seeking an order restoring his appeal following its deemed abandonment as a result of the Appellant’s failure to comply with The Court of Appeal Rules (Civil). In arriving at her decision in respect of this application, Madam

Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99, 2004 CarswellMan 300 (Man. C.A.) and stated:

I also agree with Freedman J.A. in *Elias*, at para. 8, that the appropriate criteria to be considered are those set out in *Bohemier v. CIBC Mortgages Inc.* (2001), 160 Man. R. (2d) 39, 2001 MBCA 161 (Man. C.A.), and are:

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.

Madam Justice Steel found that the Appellant had a continuous intention to prosecute the appeal but failed to satisfy the last two (2) criteria and, as a result, dismissed the Appellant's Application to the Court."

The Commission concludes that the Appellant's conduct clearly indicated that she had no continuous intention of processing her appeal after it was filed on August 20, 2008. She did not respond to any attempts to contact her made by the CAO, or by the Appeals Officer of the Commission, nor did she provide any further evidence or information regarding her appeal.

In respect of the merits of the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal.

The Commission finds that the Appellant has not provided any reasonable excuse, or any excuse whatsoever, for her failure to file her Application for Review within the 60 day time frame set out under the MPIC Act.

Further, the Internal Review Officer based her decision upon the findings of an occupational therapist assessment of Permanent Impairment. The Appellant has provided no further evidence or information to contradict or challenge the findings of the Internal Review Officer in assessing the Appellant's Permanent Impairments.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that the Internal Review Decision of July 9, 2008 was in error. The Appellant has not established that she had a reasonable excuse for the late filing of her Application for Review or that she is entitled to further Permanent Impairment benefits.

In summary, the Commission concludes that the Appellant abandoned her appeal for the following reasons:

1. There was not a continuous intention by the Appellant to prosecute the appeal from the time she filed her Notice of Appeal.
2. The Appellant did not provide a reasonable explanation for delaying the processing of her appeal.
3. There were no arguable grounds for her appeal.

The Commission, for these reasons, confirms the Internal Review Officer's decision dated July 9, 2008 and dismisses the Appellant's appeal.

Dated at Winnipeg this 2nd day of March, 2010.

LAURA DIAMOND