

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-184**

PANEL: Ms Laura Diamond, Chairperson

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

HEARING DATE: October 24, 2011

ISSUE(S):

1. Entitlement to further physiotherapy treatment benefits.
2. Whether the Appellant received a Notice of Hearing pursuant to Section 184.1(1) and (2) of the MPIC Act.
3. Whether the above mentioned appeal should be dismissed on the grounds of abandonment.

RELEVANT SECTIONS: Sections 136, and 184.1(1) and (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation 40/94.

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 December 3, 2006 in respect of an Internal Review Decision dated October 16, 2006, relating to physiotherapy benefits. The Notice of Appeal contained the Appellant's address in Manitoba. The Commission's secretary was instructed by the Commission to set this appeal down for a hearing and, as a result, a hearing was set for October 24, 2011 at 9:30 a.m., at the Commission's office in Winnipeg. The Commission's secretary further advised the Commission that:

1. A Notice of Hearing (a copy of which is attached hereto and marked as Exhibit “A”) in respect of this appeal, dated June 23, 2011 was forwarded by Canada Post Xpresspost to the Appellant’s address at [text deleted], being the address the Appellant set out in his Notice of Appeal.
2. A scanned delivery date and signature, dated July 5, 2011 was provided by Canada Post to the Commission on July 28, 2011. A copy of this scanned delivery date and signature of the recipient from Canada Post is attached hereto and marked as Exhibit “B”.

The appeal hearing commenced on October 24, 2011 at 9:30 a.m. MPIC’s legal counsel, Mr. Matthew Maslanka, was present at the commencement of the hearing, but the Appellant did not attend at that time.

The Commissioner’s secretary advised that she telephoned the Appellant to inquire as to his whereabouts and he advised her that he was not coming to the hearing and did not want to participate either in person or by telephone, asking that the appeal hearing proceed without him.

Accordingly, the hearing convened without the Appellant’s participation at 9:40 a.m.

At the commencement of the hearing, MPIC’s legal counsel submitted that the Appellant had been properly served with the Notice of Hearing pursuant to Section 184.1(1)(b) and Section 184.1(2) of the MPIC Act which provides as follows:

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

(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.

Counsel further submitted that since the Appellant had been properly served with the Notice of Hearing pursuant to the provisions of the MPIC Act, the Commission had jurisdiction to hear the merits of the appeal in order to determine whether or not the Appellant, on a balance of probabilities had established that MPIC had not properly assessed his entitlement to physiotherapy benefits.

MPIC's legal counsel further submitted that the Commission was entitled to dismiss the Appellant's appeal on the grounds that the Appellant had abandoned his appeal and had not established, on a balance of probabilities, that the physiotherapy benefits awarded by MPIC had not been properly assessed.

Counsel referred the Commission to its previous decision in *[text deleted]* (AC-06-71), which adopted criteria set out by the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115 in regard to the question of deemed abandonment. In the *Fegol v Asper* case, the applicant was seeking an order restoring his appeal following his deemed abandonment as a result of the Appellant's failure to comply with the Court of Appeal rules (Civil). Madame Justice Steel,

referring to the decision of Freedman, J.A. in *Elias v Wolf*, (2004) MBCA 99, set out the appropriate criteria to be considered:

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 for MPIC addressed these three criteria. He noted that he was not aware of any communication between the Appellant and the Commission beyond the filing of the Notice of Appeal, which would show an intention on behalf of the Appellant to prosecute his appeal.

Nor was he aware of any documents filed or explanations made to provide a reasonable explanation for his failure to file further documentation or evidence or to appear at the hearing of his appeal.

Counsel for MPIC also noted that the Appellant had not established arguable grounds for his appeal. A review of the Internal Review Decision under appeal showed that the Internal Review Officer had concluded that there was insufficient evidence to support a causal relationship between the Appellant’s current signs and symptoms and his motor vehicle accident, and as such MPIC declined to provide reimbursement for the cost of his physiotherapy treatments. The motor vehicle accident at issue occurred on August 12, 2003, and the Appellant’s physiotherapist did not provide an initial therapy report to Manitoba Public Insurance Corporation until June 12, 2006, some three years after the motor vehicle accident.

Although sometime after the motor vehicle accident the Appellant had reported to his healthcare providers that he was suffering from whiplash symptoms, and had been provided with chiropractic treatments, no information was provided or available regarding any further treatment following October of 2003. When the Appellant's chiropractor was contacted for information, MPIC was advised, in December of 2003, that the chiropractor had lost communication with the Appellant and had not seen him for a while.

No activity on the file followed, and MPIC closed its file that month.

MPIC forwarded the request for physiotherapy treatments to its healthcare consultant, [MPIC's Doctor], for a review regarding a causal connection between the symptoms reported and the motor vehicle accident in 2003. [MPIC's Doctor] provided feedback on September 5, 2006, indicating that there was an absence of documentation to establish a causal relationship between these complaints in June 2006 and the motor vehicle accident three years prior. There was no assessment, treatment or documentation of any complaints between the Appellant's last chiropractic visit in 2003 and his attendance at physiotherapy. As such, causality between the current symptoms and the motor vehicle accident was not in her view supported.

The Appellant's Notice of Appeal included a statement which noted:

"2). Lack of proper treatment facilities where I live. Until recently when a Physiotherapist clinic was opened in [text deleted], MB.

3). Due to recorded medical injuries caused by Chiropractors who "crunch" bones back into place I will not seek the services of any in the area. The Chiropractors I was seeing in [text deleted], Mb before moving used massage techniques and mechanical stimulus to move bones. This is far safer than forcing bones back into place as is common throughout the industry but these services are difficult to find.

4). Due to Financial considerations could not afford to drive over an hour each way from my home to seek treatment."

Counsel submitted that given the lack of any other evidence submitted, this statement failed to meet the onus on the Appellant of establishing that there was a causal connection between the motor vehicle accident and the symptoms. He had not established that the Internal Review Officer had erred in upholding the case manager's decision to deny him physiotherapy treatment.

The Appellant had failed to establish that the care, pursuant to Section 136(1) of the MPIC Act and Section 5 of Manitoba Regulation 41/94, was medically required as a result of injuries sustained in the motor vehicle accident. The Appellant had not provided evidence to establish that care providers were not available within a reasonable distance so that he had been prevented from seeking care closer in time to the motor vehicle accident, or that his symptoms were connected to the motor vehicle accident. He submitted that the decision of the Internal Review Officer should be upheld and that the Appellant's appeal should be deemed abandoned.

Discussion:

The Commission finds that the Appellant received the Notice of Hearing, as evidenced by his signature on the Xpresspost Delivery Receipt. As a result, the Commission finds that the Appellant had been properly served with a Notice of Hearing pursuant to Section 184.1 of the Act.

The Commission also finds that the legal principles set out by the Manitoba Court of Appeal in *Fegol v Asper* relating to the issue of abandonment are relevant in this appeal to the issue of whether or not abandonment has occurred.

Following the filing of his Notice of Appeal, the Appellant did not file any further evidence or documentation in support of his appeal. He failed to attend at the date scheduled for his appeal hearing and also declined when offered to participate in the hearing by teleconference. He requested that the hearing continue and a decision be made without his participation.

The Commission therefore concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal and has not provided any reasonable explanation to the Commission for this failure.

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, given his failure to establish a causal relationship between symptoms reported in June of 2006 to the motor vehicle accident of August 12, 2003, and the lack of any evidence regarding the symptoms, or treatment, on the Appellant's indexed file, or at the hearing.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly assessed his entitlement to physiotherapy treatments.

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

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

The Commission, for these reasons, confirms the Internal Review Officer's decision dated October 16, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 24th day of November, 2011.

LAURA DIAMOND