

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-132**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.

HEARING DATE: January 24, 2011

ISSUE(S): Extension of time to file a Notice of Appeal

RELEVANT SECTIONS: Section 174 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

The Appellant was involved in a motor vehicle accident on January 20, 2004. A decision letter from the Appellant's case manager dated April 25, 2005 stated that the Appellant had not established that he had promised employment for the spring of 2004 and as a result would not be entitled to Income Replacement Indemnity ("IRI") benefits for that period of time.

Another decision letter from the Appellant's case manager dated November 8, 2006 stated that he was not entitled to IRI benefits because he had sustained no injury in the motor vehicle accident that would prevent him from working at his pre-accident employment as a [text deleted].

The Appellant sought a timely review of this decision and on February 2, 2009, an Internal Review Officer from MPIC dismissed both applications for review and upheld the case manager's decisions.

The Internal Review Decision stated in part:

“Right to Appeal

If you are unsatisfied with this decision, you have ninety days within which to appeal to the Automobile Injury Compensation Appeal Commission, which Commission can be reached at:

Automobile Injury Compensation Appeal Commission
301 – 428 Portage Avenue
Winnipeg, Manitoba R3C 0E2

Telephone Number: 945-4155 or 945-4277 (FAX: 948-2402)

Please note that the Commission operates independently from The Manitoba Public Insurance Corporation and its decisions are binding on MPIC subject to the appeal provisions of Section 187 of The Manitoba Public Insurance Corporation Act.

If you need assistance in appealing this decision to the Commission contact:

Claimant Adviser Office
200 – 330 Portage Avenue
Winnipeg, Manitoba R3C 0C4

Telephone Number: 945-7413 or 945-7442
Fax number: 948-3157
Toll Free: 1-800-282-8069 extension 7413

The Claimant Adviser Office operates independently of both MPIC and the Commission and is available to you at no charge.”

The Appellant did not make application in writing to appeal the Internal Review Officer's Decision within 90 days from the date the decision of the Internal Review Officer was received by the Appellant.

Rather, some 16½ months beyond the 90 day time limit, on September 27, 2010, the Appellant filed a Notice of Appeal with the Commission.

On October 14, 2010, the Appellant made application to the Commission for an extension of time for filing the Notice of Appeal pursuant to Section 174 of the MPIC Act. The Appellant stated:

“To whom it may concern –

Sorry did not know about appeal – as all paperwork was going to lawyer in Winnipeg.

Was told not to go to office of Public Insurance.

I was transferred from one adjuster to another. Swan River, Dauphin – Brandon & Winnipeg. I just don’t know.

Lawyer was doing what she could (but not an Autopac lawyer). No communication with lawyer. Was not working on case as wanted a retainer. And was not applying with deadlines.”

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his request for the 90 day extension. He explained that he had retained a lawyer to represent him in his dealings with MPIC and that lawyer handed his file over to a trainee or student lawyer at his firm. In his view, the student lawyer did not really seem knowledgeable about the MPIC process.

After attending the MPIC Internal Review Hearing, the Appellant stated that he did not hear anything from his lawyer regarding the outcome of the meeting. In fact, he testified that he did not even receive the February 2, 2009 Internal Review Decision until he got a parcel from his lawyer containing it, when she withdrew from the file, sometime in the summer of 2009. He testified he opened the parcel, containing a “whole whack of documentation on his case” and that is when he learned the outcome of the Review Hearing.

He then started looking for another lawyer in [text deleted], or even [text deleted], but found that no one wanted to handle MPIC cases.

The Appellant said that he then contacted MPIC and a case manager, [text deleted], contacted him in June of 2010, telling him to fill out the appeal forms as soon as possible and informing him of the existence of the Claimant Adviser Office, who could assist him with his appeal.

On cross-examination, the Appellant indicated that he had phoned MPIC in [text deleted], on January 20, 2009 to ask about what was happening with his case and that he also recalled speaking with [text deleted] on February 5, 2009 to advise him that he was unhappy with the Internal Review Decision and asking him to send appeal materials. When nothing was received, the Appellant indicated that he contacted [text deleted] once again, in March of 2009, to request the materials one more time.

The Appellant also indicated that he had difficulty reading some of the documents received from MPIC, although he was able to obtain some help in that regard from his mother.

He testified that he was still having trouble doing his work of running a [text deleted] company, as he had a “hole in his arm” with nerve damage. He had to hire individuals to assist him, as a result of his injuries.

The Appellant explained that he required assistance, and requested that the Commission relieve against the 90 day time limit for filing the Notice of Appeal, to allow his appeal to be heard.

Counsel for the Appellant submitted that he had initially been represented by a lawyer at the Internal Review Hearing and he did not know anything about the results of that hearing until he received notice from his lawyer that she was no longer going to represent him, sometime in the summer of 2009. The Appellant then tried to locate another lawyer but was unable to find someone to assist him.

The Appellant was further hampered by literacy issues, having acknowledged that he has some trouble reading and writing. He knew that he was not capable of representing himself and that his lawyer let things fall through the cracks.

Counsel submitted that the Appellant should not be prejudiced by his lawyer's failure to present him with the appropriate documentation until after the deadline.

Counsel referred to previous decisions of the Commission which relieved against such time limits and submitted that the Appellant should not be prejudiced by the actions of his representative or counsel who failed to represent him properly. When the Appellant was properly advised of a deadline, he showed he can meet it. When the Commission's Appeals Officer asked him for a written explanation for his delay, he did provide that letter on a timely basis.

Counsel also submitted that extending the deadline would create minimal prejudice to MPIC as the Appellant had found ways to continue with his business by training himself to use his other hand, and hiring workers, which limited the amount of IRI which would be necessary to provide him with.

The Appellant's case has merit, as his arm was crushed in the motor vehicle accident and he was unable to work for a period of time as a result. He had full intent to pursue his claim, even hiring a lawyer to do so, and counsel requested that the Commission exercise its discretion to allow an extension of the time limit in this case.

Submission for MPIC:

Counsel for MPIC submitted that the Appellant was almost 17 months late in filing his Notice of Appeal and had not provided a reasonable excuse for doing so. As such, no extension of time should be permitted in this case.

Counsel noted that the motor vehicle accident occurred in January of 2004 and that the Internal Review Decision was sent to the Appellant's counsel on February 2, 2009.

Although the Appellant's Notice of Appeal and his evidence at the hearing indicated that he had not known the results of the Internal Review Decision, the Appellant admitted on cross-examination that he had knowledge of the results of the Internal Review Decision by at least February 5, 2009, when he contacted [text deleted] to complain about that decision and [text deleted] agreed to send him the information necessary to complete his appeal. Then, about a month later, he indicated he contacted MPIC again to advise them that he had not received the information and [text deleted] agreed to send it out again.

Accordingly, counsel submitted that the Appellant was aware that there was an Internal Review Decision that had not been in favour and had discussed filing an appeal, well before he received the package of documents from his lawyer in the summer of 2009.

Then, for whatever reason, the Appellant's solicitor/client relationship with his lawyer ended in the summer of 2009. The Appellant's lawyer sent a package to him which included the Internal Review Decision. Accordingly, from the Appellant's evidence, we know that at some point in 2009, probably in the summer, the Appellant was in possession of the Internal Review Decision. Yet, at least a year passed before the Appellant did anything further in regard to filing an appeal, in September of 2010. The Appellant has failed to provide a satisfactory explanation for the passage of such a long period of time (over a year) between receiving the package of documents and filing his Notice of Appeal.

Counsel reviewed the factors which should be considered by the Commission in considering whether or not to extend the deadline for the filing of an appeal. He indicated the Commission should consider:

1. the actual length of the delay compared to the 90 day time period set out in s. 174 of the MPIC Act;
2. the reasons for the delay;
3. whether there has been any prejudice resulting from the delay;
4. whether there was any waiver respecting the delay; and
5. any other factors which argue to the justice of the proceeding.

Counsel submitted that at some point in the spring of 2009 or, at the latest, in the summer of 2009, the Appellant learned that he had not been successful in his Internal Review. At that point it became incumbent upon him to attempt to file his appeal in a timely fashion. He did not do so. Aside from trying to find some representation, he did not do anything further until June of 2010, when he spoke with [the Appellant's case manager] once again to obtain the proper documentation.

The Appellant's actions failed to show evidence of a continuing intention to appeal. No explanation was provided as to why, in each continuing month, he did not do anything regarding filing an appeal.

Further, counsel submitted that the Appellant's appeal, even if granted an extension, showed little prospect of success, as he had provided no indication of what new information would be provided to the Commission to alter the Internal Review Decision. This shows a limited chance of success of appeal.

The Appellant has shown that, regardless of whatever difficulties he may have with reading documentation, he is more than capable of handling his personal affairs and running a [text deleted] company. If he had possessed the intention to appeal the Internal Review Decision, he should have found a way to look after that without letting the matter go on for such a long time without action.

Counsel further submitted that MPIC could be prejudiced by the passage of time, as witnesses' memories and the access to medical records could be affected.

Accordingly, counsel for MPIC submitted that the Commission should not allow the Appellant's application for an extension of time in the filing of his Notice of Appeal.

Discussion:

The MPIC Act provides:

Appeal from review decision

[174\(1\)](#) A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

Requirements for appeal

[174\(2\)](#) An appeal of a review decision must be made in writing and must include the claimant's mailing address.

In considering whether to exercise its discretion under Section 174(1) of the MPIC Act, the

Commission takes into account:

1. the actual length of the delay compared to the 90 day time period set out in s. 174 of the MPIC Act;
2. the reasons for the delay;
3. whether there has been any prejudice resulting from the delay;
4. whether there was any waiver respecting the delay; and
5. any other factors which argue to the justice of the proceeding.

I have reviewed the documentary evidence on file, the evidence of the Appellant and the submissions of counsel.

Upon a consideration of the totality of the evidence, both oral and documentary, and upon a consideration of the relevant factors surrounding the delay, the Commission finds that the Appellant has not provided a reasonable excuse for his failure to appeal the Internal Review Officer's Decision to the Commission within the 90 day time limit set out in Section 174 of the MPIC Act.

The Appellant did give evidence regarding his counsel's failure to act on a timely basis in providing him with notification of the Internal Review Decision of February 2, 2009, and the

Commission does not believe that the Appellant should be responsible for the omissions of legal counsel, upon whom he relied to protect his interests.

However, the evidence established that, even following the Appellant's receipt of the Internal Review Decision, in the spring or summer of 2009, the Appellant failed to take appropriate action in filing a Notice of Appeal for the period of a further year. Although he has explained that this was a result of his literacy issues and his unsuccessful attempts to obtain further representation, the Commission is of the view that the further delay of over one year following the Appellant's discussions with [text deleted], and his receipt of the Internal Review Decision does not show a continuing intention on the part of the Appellant to appeal the Internal Review Decision.

The Commission finds that the Appellant's significant delay in filing the appeal following his receipt of the decision in the summer of 2009 and his failure to proceed with the matter on a timely basis thereafter establishes a failure on the part of the Appellant to provide a reasonable excuse for his failure to appeal the Internal Review Decision within the 90 day time limit.

Accordingly, the Commission will not extend the time limit within which the Appellant may appeal the Internal Review Decision dated February 2, 2009 to the Commission.

Dated at Winnipeg this 17th day of February, 2011.

LAURA DIAMOND