

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-05-071**

PANEL: Ms Laura Diamond, Chairperson
Dr. Sharon Macdonald
Mr. Les Marks

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

HEARING DATE: October 22, 2013

ISSUE(S): Whether the Appellant is entitled to Personal Injury Protection Plan benefits for his left foot symptoms

RELEVANT SECTIONS: Section 189.1 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

The Appellant was involved in a motor vehicle accident on October 19, 2003. In a decision of March 4, 2005, an Internal Review Officer for MPIC upheld the decision of the case manager that there was insufficient evidence to support a causal relationship between the accident and the Appellant's symptoms. The Appellant filed a Notice of Appeal on May 6, 2005. The Notice of Appeal contained the Appellant's address in [text deleted].

The Appellant obtained representation from the Claimant Adviser Office, but he ceased to be represented by that office in June of 2009, and continued his appeal on a self-represented basis.

Further medical reports were obtained, and as a result, counsel for MPIC, [text deleted], advised the Commission that MPIC's Health Care Services team had concluded that the accident had exacerbated the Appellant's symptoms and that the file would be referred back to the Appellant's case manager to determine payable benefits. Medical and tax information concerning the Appellant were obtained through to October 31, 2011, and the Appellant was paid Income Replacement Indemnity ("IRI") benefits and benefits regarding medication and medical supplies.

However, beginning in October of 2012, mail sent to the Appellant by MPIC was returned with an indication from Canada Post that the Appellant had moved with no forwarding address provided. A letter from the Commission to the Appellant dated February 5, 2013 was returned to the Commission marked "return to sender". Attempts to contact the Appellant by telephone were unsuccessful. Emails from the Commission to the Appellant were sent, but no response was received. The Appellant last contacted the Commission by email on May 19, 2010.

The Appellant had provided the Commission with a new address in [text deleted] on March 4, 2010. However, the Commission's attempts to contact the Appellant at this address were unsuccessful. The Commission's staff obtained information that the Appellant attended the [text deleted], and attempted to obtain an address for him through this source. A second address in [text deleted] was obtained and the Commission sent a letter to the Appellant at that address. It was returned marked "moved/unknown".

MPIC indicated that their emails to the Appellant became undeliverable towards the end of 2012.

On February 14, 2013, the Appellant's IRI benefits were suspended by MPIC on the basis of his lack of contact and his failure to provide copies of his Income Tax Returns for 2011 and 2012.

The Commission's secretary was instructed by the Commission to set the appeal down for a hearing, and as a result, a hearing was set for October 22, 2013 at 10:00 a.m. at the Commission's offices 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 September 5, 2013 was forwarded by Canada Post Xpresspost and regular mail to the last [text deleted] address provided by the Appellant to the Commission and to the Appellant, care of the [text deleted].
2. A scanned delivery date and signature, dated September 10, 2013 was provided from the [text deleted]. The Notice sent to the Appellant's latest [text deleted] address was unclaimed.

The appeal hearing commenced on October 22, 2013, shortly after 10:00 a.m. MPIC's legal counsel, Mr. Andrew Robertson, was present at the commencement of the hearing, but the Appellant did not attend at that time. The Appellant did not telephone the Commission and the Commission had no telephone number at which to reach the Appellant.

Accordingly, the hearing convened without the Appellant's participation.

At the commencement of the hearing, MPIC's legal counsel submitted that the Appellant had been properly served in accordance with Section 184.1 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

(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.

Counsel further submitted that as 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 appeal and was entitled to dismiss the Appellant's appeal on the grounds that he had abandoned his appeal.

Counsel referred the Commission to the previous decisions in *[text deleted]* (AC-06-71) and *[text deleted]* (AC-04-71). In those decisions, the Commission 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 for MPIC addressed these three criteria. He indicated that the last contact the Appellant had with the Commission was an email asking for a status update on May 19, 2010. Since that time, letters sent to the Appellant by the Commission have been returned and attempts to reach the Appellant by telephone have been unsuccessful. Additionally, the Appellant has been out of contact with MPIC since approximately October of 2012. With no indication that the Appellant had taken any steps to advance the appeal since May 19, 2010, it was MPIC's submission that the Appellant's failure to take any steps in the past 3½ years showed a lack of continuous intent to prosecute the appeal.

To MPIC's knowledge the Appellant had not provided any explanation for failing to pursue his appeal.

The issue on the appeal is whether or not there is a causal connection between the Appellant's accident of October 19, 2003 and his subsequent pain symptoms. However, counsel indicated that MPIC had already accepted that there is such a relationship, and has paid benefits to the Appellant for some time on the basis of the existence of that causal relationship.

The Commission was referred to a letter from MPIC's previous counsel, [text deleted], dated May 24, 2013. The letter stated:

“We have not been able to locate [the Appellant] as all previous contact information is outdated. Previously, we believe that his email address was [text deleted] which now delivers back a message “undeliverable address”. His former address was [text deleted] and the last correspondence to him was returned marked “moved unknown”. He had previously attended at the [text deleted], and was to have returned in November, 2012 for further testing. He did not keep his scheduled appointment. We did suspend his Income Replacement Indemnity on February 14, 2013 as he had not returned his filed Income tax

returns for 2011 and 2012 together with assessments. We had hoped that this would spur [the Appellant] into contacting our office as no monies are now being deposited to the credit of his account.

In the circumstances, and in order to close this matter, at the Commission, we confirm that MPI has undertaken to pay [the Appellant] both his IRI and related medical expenses in connection with this claim when he is again in contact with the Corporation.”

Counsel for MPIC indicated that should the Appellant wish to dispute any decisions that had been made concerning the case management of this file since MPIC began paying benefits in 2010, he could seek a new Internal Review of any specific decision by a case manager. It was MPIC’s position that there is currently no longer any dispute on this specific appeal, and therefore that there were no arguable grounds for appeal.

Accordingly, counsel submitted that the appeal should be dismissed on the basis that it has been abandoned by the Appellant.

Discussion:

The Commission has reviewed the documents on the Appellant’s indexed file, as well as the submissions of counsel for MPIC and the decision of the Manitoba Court of Appeal in *Fegol v. Asper* (supra).

The Commission concludes that the Appellant’s conduct clearly indicated that he had no continuous intention of processing his appeal since the last contact with the Commission in May of 2010. He has not responded to any attempts to contact him made by the Commission or by MPIC, nor did he provide any further evidence or information regarding his appeal.

In respect of the merits of the appeal, the Commission finds that the Appellant does not have any arguable grounds to proceed with the appeal, as MPIC has agreed that, subject to complying with its procedural requirements, MPIC has undertaken to pay the Appellant both his IRI and related medical expenses in connection with his claim, when he is again in contact with the Corporation.

Accordingly, the panel agrees with counsel for MPIC and finds that the Appellant has abandoned his appeal and that the current appeal should be dismissed.

Dated at Winnipeg this 20th day of November, 2013.

LAURA DIAMOND

DR. SHARON MACDONALD

LES MARKS