

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-12-011**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, the [text deleted], was not present at the appeal hearing;
Mr. Phil Lancaster from the Claimant Adviser Office (“CAO”) was present at the appeal hearing;
Manitoba Public Insurance Corporation (‘MPIC’) was represented by Ms Cynthia Lau.

HEARING DATE: August 29, 2013

ISSUE(S):

1. Whether the Appellant has abandoned his appeal;
2. Entitlement to Personal Injury Protection Plan benefits in relation to the loosening of the left hip arthroplasty;
3. Entitlement to further physiotherapy treatments.

RELEVANT SECTIONS: Sections 184.1(1) and 184.1(2) 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 on January 31, 2012 by the Claimant Adviser Office on behalf of [the Appellant] [text deleted] in respect of an Internal Review Decision dated December 30, 2011 denying the Appellant an entitlement to further physiotherapy treatments and Personal Injury Protection Plan (“PIPP”) benefits in relation to the loosening of his left hip arthroplasty. The Notice of Appeal contained the Appellant’s address in [text deleted], Manitoba. A copy of the Notice of Appeal is attached hereto as Exhibit “A”.

On March 19, 2013, the Claimant Adviser Officer advised the Commission that the Appellant had passed away. The Claimant Adviser indicated that he had spoken with the Appellant's sister who requested that the CAO close the appeal file. The Claimant Adviser requested a confirmation that the sister was the Executor of the Estate with authority to sign a Notice of Withdrawal form.

On April 16, 2013, the Claimant Adviser Officer advised that the Appellant's sister had indicated that she was not the Executor of the Estate and there did not appear to be a will. She advised that she did not want to be involved in the matter. Accordingly, the Claimant Adviser Officer sent a letter to the Executor of the Appellant's Estate, care of the Appellant's last known address, also in [text deleted].

On May 13, 2013, the Claimant Adviser Officer advised that the letter he had sent to the Executor of the Estate, at the Appellant's last known address, had been picked up and signed for by [text deleted], but that his office had not been contacted to discuss the matter, as had been requested in the letter.

The Claimant Adviser Officer then advised that on May 15, 2013, he had telephoned the Appellant's sister again, and that she had not replied to the message left. Although she had previously advised the Claimant Adviser Officer that she believed the Appellant's niece might be the Executor of the Estate, she did not provide any contact information for the niece, who she also indicated did not wish to be involved in the matter either.

On June 11, 2013, the Commission's Appeals Officer conducted a search of the Provincial Court Registry and confirmed that the Estate of the Appellant had not been probated. The Appeals

Officer attempted to obtain contact information for the sister from the Claimant Adviser Office and also conducted a Canada 411 telephone search for her name, but was unable to locate or make contact with the sister.

On June 14, 2013, the Chief Commissioner sent a letter (via regular mail and Xpresspost) addressed to the Executor of the Appellant's Estate, care of the Appellant's last known address in [text deleted] (attached as Exhibit "B"). The letter requested the Executor to contact the Commission within one month to discuss the appeal. The letter indicated that if no response was received, the Commission would take the necessary steps to proceed in a determination of whether the appeal had been abandoned. A Notice of Withdrawal form was also included.

On July 16, 2013, the Commission received the original letter sent to the Executor of the Estate via Xpresspost, returned and marked "Unclaimed".

On July 17, 2013, the Commission received the original letter sent to the Executor of the Estate via regular mail, returned and marked "Moved/Unknown".

The Commission then set the matter down for a hearing. On August 8, 2013 a Notice of Hearing was sent by regular mail to the Appellant's address as listed on the Appellant's Notice of Appeal, as well as the Appellant's last known address. A copy of the Notice of Hearing is attached hereto and marked as Exhibit "C". This Notice of Appeal indicated that the purpose of the hearing was to determine whether the appeal had been abandoned and was sent to the Appellant by regular mail and Xpresspost. Copies were also sent to counsel for MPIC and the Claimant Adviser Office.

The Notice of Hearing sent to the Appellant's address as listed on the Notice of Appeal was returned "Moved/Unknown" and the Notice of Hearing sent to the last known address of the Appellant in [text deleted], was returned marked "RTS".

The hearing was convened on August 29, 2013. No representative for the Appellant's Estate appeared. Counsel for MPIC and the Claimant Adviser Officer were present.

The Claimant Adviser Officer indicated that the last contact he had with the Appellant was on December 14, 2012, when the Appellant indicated that he was sick but intending to continue his appeal. The Claimant Adviser Officer then had difficulty getting in touch with the Appellant, due to his illness and then learned of his death. He attempted to contact the Appellant's sister, as has been described above, but was not able to obtain any instructions from anyone representing the Estate. He confirmed that he was appearing at the appeal hearing to assist the Commission, but that he was not representing the Appellant, as he no longer had any instructions in that regard.

Service of Notice of Hearing:

At the commencement of the hearing, MPIC's legal counsel submitted that the Appellant had been properly served with a Notice of Hearing pursuant to Section 184.1(1)(b) and 184.1(2) of the MPIC Act, which provide 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.

MPIC's legal counsel further submitted that since the Appellant had been properly served with a Notice of Hearing by mail, 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 the balance of probabilities, had established that MPIC had not properly assessed the benefits to which the Appellant was entitled.

The Commission finds that the Notice of Hearing was properly served pursuant to Section 184.1(1)(b) and 184.1(2) of the MPIC Act.

Abandonment of the Appeal:

MPIC's legal counsel referred the Commission to a decision by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115 (Man. C.A.). In that case the Appellant 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, Madame Justice Steele referred to the decision of Freedman J.A. in *Elias v. Wells* 2004 MBCA 99 (Man. C.A.) and referred to the appropriate criteria to be considered:

1. There must have been a continuous intention to prosecute the appeal from the documents in question should have been properly filed.
2. There must be a reasonable explanation for the failure to file the documents.

3. There must be arguable grounds of appeal.

The Commission notes that the Claimant Adviser Office had filed the Notice of Appeal on behalf of the Appellant but, following the passing of the Appellant, was unable to secure instructions from the Appellant's Estate.

Both the Claimant Adviser Officer and the Commission attempted on a number of occasions to contact the Appellant's family members and potential representatives of his Estate, both the Appellant's sister and niece, but they do not appear to have been interested in prosecuting the appeal and no reasonable explanation was provided for the delay in prosecution of the appeal.

Counsel for MPIC also addressed the relevant medical evidence and arguments in connection with the appeal, submitting that there was no objective medical evidence to support that the loosening of the Appellant's left hip arthroplasty was causally connected to the motor vehicle accident or that there was an ongoing medical requirement for further physiotherapy treatment arising from the accident.

The Commission finds that:

1. On a balance of probabilities, the Appellant and his Estate did not demonstrate a continuous intention to prosecute the appeal from the time the appeal was filed with the Commission.
2. Due to the unfortunate death of the Appellant, he was prevented from pursuing his appeal.
3. The Commission accepts the submission of MPIC's legal counsel that there were no arguable grounds in respect of the Appellant's appeal.

The Commission finds that MPIC's legal counsel has satisfied the Commission, pursuant to the principles set out in *Fegol v. Asper* (supra), that the Appellant has abandoned his appeal. As a result, the appeal is dismissed and MPIC's Internal Review decision of December 30, 2011 is confirmed.

Dated at Winnipeg this 26th day of September, 2013.

LAURA DIAMOND