

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-12-069**

PANEL: Ms Laura Diamond, Chairperson
Ms Linda Newton
Ms Bobbi Ethier

APPEARANCES: The Appellant, [text deleted] was represented by Mr. Phil Lancaster, of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATE: December 18, 2012 with written submissions March 4, 2013

ISSUE(S): Whether the Commission should extend the time in which the claimant may file his notice of appeal.

RELEVANT SECTIONS: Section 174(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 is requesting an extension of time in order to file a Notice of Appeal from a decision of the Internal Review Officer dated February 3, 2011.

The Appellant was injured in a motor vehicle accident on July 25, 2009 and as a result of these injuries became entitled to Personal Injury Protection Plan ("PIPP") benefits in accordance with the MPIC Act. However, the Appellant was denied benefits in relation to a right shoulder condition which was diagnosed in March 2010, nine months following the accident date. The case manager for MPIC concluded that it was improbable that the Appellant's right shoulder

complaint resulted from an injury that was causally related to the motor vehicle accident and this decision was upheld by an Internal Review Officer for MPIC on February 3, 2011.

The Appellant filed a Notice of Appeal from this decision of the Internal Review Officer on April 24, 2012, approximately 11 months beyond the 90 day time period set out in the MPIC Act for the filing of appeals.

In support of his request for an extension of time for the filing of his appeal, the Appellant provided reasons for the late filing, supported by medical information from his doctor. He indicated that he suffers from depression and has been diagnosed with a post-traumatic stress disorder, which contributed to the late filing.

However, MPIC was of the view that the Appellant's ability to seek treatment and manage his affairs demonstrated an ability to function at the basic level necessary to file a Notice of Appeal and submitted that the application for additional time to file the appeal should be denied.

A hearing was subsequently convened in order to determine whether the Appellant had a reasonable excuse for his failure to appeal the Internal Review Decision dated February 3, 2011 to the Commission within the 90 day time limit set out in Section 174 of the MPIC Act.

Evidence for the Appellant:

At the hearing, the Appellant described the motor vehicle accident and his injuries. He described his attempts to return to work, at least on a part time basis. Persistent difficulties with his shoulder were ultimately diagnosed as stemming from a rotator cuff injury. On April 16, 2012,

the Appellant was set down for surgery on the right rotator cuff with [Appellant's Orthopaedic Surgeon].

The Appellant described his issues with pain, as well as depression resulting from his inability to overcome his pain or make a living. He described his difficulty with functioning on a day-to-day basis, his need for medication and his diagnosis of post-traumatic stress and anxiety, treated by [Appellant's Doctor].

The Appellant also provided a medical report and chart notes from [Appellant's Doctor] who indicated on July 13, 2012 that:

“[The Appellant] suffered depression and anxiety during the period of February 3, 2011 to April 24, 2012, by history. [The Appellant] was very slow with mentation and psychomotor retardation. He suffered from nightmares and flashbacks about the M.V.A. that occurred in 2009.

He wasn't able to work, but he had to survive and tried hard to make a living.

I was away from January 1, 2011 to July 2011.”

[Appellant's Doctor's] chart notes showed multiple entries regarding prescriptions for pain and anxiety as well as counselling for anxiety disorder and “PTSD”. There were also notations regarding chronic shoulder pain and surgery.

The Appellant explained that he was having a great deal of difficulty in managing his pain and his life, and so attended [Appellant's Doctor] on a regular basis, every 2 to 3 weeks. On cross-examination, he acknowledged that [Appellant's Doctor] had been away between January and July 2011, and that he had worked through 2011. However, the Appellant explained that his post-traumatic stress disorder and anxiety never went away and that he discussed the issue with [Appellant's Doctor] several times, and is still suffering from it now.

Submission for the Appellant:

Counsel for the Appellant provided a written submission. He indicated that an MRI dated January 20, 2012, confirmed that the Appellant had a serious medical condition relating to his shoulder and that on April 16, 2012 [Appellant's Orthopaedic Surgeon] set this down for surgery. [Appellant's Doctor's] notes confirmed that the Appellant was suffering from depression, anxiety and post-traumatic stress disorder following the accident and throughout the period from February 3, 2011 through April 24, 2012, when the Notice of Appeal was filed.

Counsel reviewed factors applied by the Commission when considering a request for an extension of time, and quoted from AICAC's decision in *[text deleted] AC-07-013*.

“[T]he Commission in exercising its discretionary power to extend the time for appealing the Internal Review decision, pursuant to Section 174 of the MIC Act, considered the following factors:

1. the length of the delay;
2. the conduct of the Appellant and/or the Appellant's solicitor;
3. the reasons for the delay;
4. whether there has been any prejudice resulting from the delay;
5. whether there was any waiver by the Appellant in respect of the Appellant's right to have the Internal Review Officer's decision reviewed by the Commission;
6. any other factors which argue to the justice of the proceedings.”

Counsel for the Appellant admitted that the delay in this appeal was substantial and was due to the Appellant.

However, he noted the reasons for the delay stemmed from the Appellant living in severe, constant pain which required him to rely on very powerful medications in order to cope at all. The Appellant was only able to work on a part-time basis and relied upon the support and treatment of his family physician to do so.

The Appellant testified that the constant pain, and the problems it presents in the conduct of normal daily life, had led him to depression and a sense of hopelessness. This was diagnosed by his doctor as depression, post-traumatic stress disorder and anxiety, and included slowness with mentation and psychomotor retardation.

Although the potential for prejudice to MPIC did exist, in that they had not had the opportunity to case manage the matter since the delivery of the Internal Review Decision, counsel noted that the symptoms had been persistently pursued by the Appellant and that the required treatment had been obtained. Thus, any prejudice should not be considered to be sufficient to deny the Appellant his right of appeal.

There had not been any waiver by the Appellant and the Appellant had continued to attend his physician regularly to obtain pain relief medication, diagnosis and further treatment, as well as treatment for his anxiety disorder and PTSD.

All of these factors combined should lead the Commission to allow the Appellant's request for an extension of time in which to file his Notice of Appeal.

Evidence and Submission for MPIC:

Counsel for MPIC provided a written submission with accompanying authorities on March 4, 2013.

Counsel for MPIC also reviewed the factors which had been considered by the Commission as relevant in considering a request for an extension of time. She also submitted and reviewed several decisions of the Commission dealing with the issue, including *[text deleted]* [2004] M.A.I.C.A.C.D. No 17, *[text deleted]* AC-09-19, B.R. [2007] M.A.I.C.A.C.D. No 31, *[text deleted]* [2005] M.A.I.C.A.C.D. No 40, *[text deleted]* [2006] M.A.I.C.A.C.D. No 22, *[text deleted]* [2008] M.A.I.C.A.C.D. No 80, *[text deleted]* [2009] M.A.I.C.A.C.D. No 34, *[text deleted]* [2008] M.A.I.C.A.C.D. No 53.

These decisions included examples of cases where the Commission had considered Appellants who had a psychological diagnosis but still found that they did not have a reasonable excuse for missing deadlines. Other cases showed examples of Appellants who were frustrated with MPIC or submitted a loss of hope as an excuse for a failure to meet time limits. These were not found to be reasonable excuses for missing deadlines. The Appellant's submission that he was waiting for an MRI appointment was not a reasonable excuse to fail to meet time limits, as it had been set out in previous AICAC decisions that waiting for medical information in order to proceed with an Appeal was not a reasonable excuse.

Counsel for MPIC noted that the Appellant continued to work throughout the relevant period, and that there was no medical information on the file between January and June 2011, because [Appellant's Doctor] had been away. Thus, it was not clear how [Appellant's Doctor] would have known that the Appellant had suffered from depression and anxiety between January and July 2011.

Counsel submitted that if the Appellant was well enough to work and attend for treatment during the relevant period, he should be considered well enough to file a Notice of Appeal. Further, MPIC had suffered significant prejudice because of lost case management opportunities. Accordingly, there were no factors that argue to extending the time limit and the request for an extension should be denied.

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.

Upon a consideration of the totality of the evidence before it, both oral and documentary, and upon consideration of the relevant factors surrounding the delay, the Commission finds that the Appellant has provided a reasonable excuse for his failure to appeal the Internal Review Decision dated February 3, 2011 to the Commission within the 90 day time limit set out in Section 174 of the MPIC Act.

The panel recognizes that the delay of eleven months in filing the notice of appeal was lengthy and may have deprived MPIC of some case management opportunities.

However, the Appellant did continue to pursue and engage in treatment throughout this period. The perseverance of the Appellant and his doctor ultimately led to the correct diagnosis and treatment of his condition.

The Appellant's evidence, supported by his doctor's chart notes and reports, provided a credible account of his experience and symptoms, both physical and psychological, following the motor vehicle accident. He described chronic pain, as well as depression, anxiety and post-traumatic stress. These were noted and treated by his family doctor, who provided counselling sessions and medication, as well as a specialist referral.

All of these factors taken together paint a picture of an Appellant struggling with his pain such that even day to day activities were difficult and possibly overwhelming for him. He pursued treatment for both his physical pain and the psychological issues of chronic pain, depression, anxiety disorder and post-traumatic stress with his family doctor, who provided him with counselling and medication while continuing to seek further diagnostics in regard to the physical pain.

Although his doctor's absence for a lengthy period in 2011 made proper care and treatment even more challenging for the Appellant, he nonetheless continued to pursue such care, going back to see his family physician upon his return. When the Appellant finally obtained a diagnosis he was then able to move forward with his treatment.

The panel finds that the Appellant's evidence, supported by that of his doctor, provides a reasonable explanation for the Appellant's failure to file his appeal within the time limits set out in the MPIC Act.

Accordingly, by the authority of Section 174 of the MPIC Act, the Commission will extend the time limit within which the Appellant may appeal the Internal Review Decision dated February 3, 2011 to the Commission.

Dated at Winnipeg this 9th day of April, 2013.

LAURA DIAMOND

LINDA NEWTON

BOBBI ETHIER