

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-12-167

PANEL: Mr. Mel Myers, Q.C., Chairperson

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

HEARING DATE: August 14, 2013

ISSUE(S): 1. Whether the Appellant has abandoned his appeal.
2. Whether the Appellant is entitled for a permanent impairment award to right knee contusion and numbness.

RELEVANT SECTIONS: Sections 184.1(1) and 184.1(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC: 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 October 29, 2012 by the Claimant Adviser Office on behalf of [the Appellant] in respect of an Internal Review Decision dated October 5, 2012 denying the Appellant an entitlement to a permanent impairment award. The Notice of Appeal contained the Appellant's address in [text deleted], MB. On November 14, 2012 the Claimant Adviser Officer advised the Commission that they were no longer representing the Appellant.

On April 18, 2013 the Automobile Injury Mediation Office (“AIM”) advised the Commission that the Appellant had not completed his application for mediation and as a result AIM was closing its file on this matter. The appeal was referred back to the Commission.

On May 1, 2013 the Commission prepared an Index of the relevant documents in this appeal. An Appeals Officer of the Commission attempted to contact the Appellant on May 7 and 14, 2013 by telephone and left messages to confirm the Appellant’s address. The Appeals Officer sent the Index by Xpresspost to the Appellant’s address listed on his Notice of Appeal.

On May 17, 2013 the Appeals Officer sent a letter to the Appellant at his address listed on his Notice of Appeal. In this letter, the Appeals Officer indicated that the Appellant was to contact the Commission by June 14, 2013 and if he did not do so, the appeal would be discussed with a Commissioner in order to determine whether an abandonment hearing was necessary. This letter was not returned to the Commission.

On June 18, 2013, MPIC’s legal counsel who had conduct of this matter requested whether an Index had been prepared by the Commission for this appeal. The Appeals Officer left a message on the Appellant’s cell phone (as listed on the Appellant’s Notice of Appeal) requesting that he call her for the purpose of determining if there were any other documents to add to the Index. The Appeals Officer did not receive a response to this telephone message. As a result, the Appeals Officer contacted MPIC’s legal counsel and advised that the Commission would send her an Index of the relevant documents in the appeal; as well, the Commission would consider whether an abandonment hearing would take place if no response was received from the Appellant.

On June 19, 2013, the Appeals Officer attempted to contact the Appellant by conducting a 411 telephone search but determined there was no [text deleted] listed and a check of the white pages of the phone book disclosed a [text deleted] with no address listed. The Appeals Officer called that listed number and also contacted the Appellant at the home phone number as listed on the Notice of Appeal but did not receive a response.

On June 19, 2013 the Appeals Officer consulted with a Commissioner and was advised to set this appeal down for an appeal hearing and to forward a copy of the Index together with the Notice of Hearing by regular mail to the Appellant's address as listed on the Appellant's Notice of Appeal attached hereto and marked as Exhibit "A". 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 by Xpresspost to the Appellant. The Xpresspost required a receipt signature.

On July 22, 2013 the Notice of Hearing was returned to the Commission with a note on the envelope "Return to Sender – Deceased".

On July 23, 2013 the Commission contacted the Appellant's home phone number and the person who answered the phone advised that the Appellant died on April 11, 2013. The person identified herself as the Appellant's fiancée. She further advised that the Appellant had no executor and that no obituary notice was placed in the local newspaper. She also said that the Appellant was cremated and there was a private family mass (with no interment). The Commission sent a letter to the Appellant's fiancée on July 23, 2013 confirming her discussion with the Commission (attached as Exhibit "B").

On August 1, 2013 the Commission received an undated letter from the Appellant's fiancée that stated:

"I'm sorry I don't have anymore death certificate (sic) of [the Appellant] – I had only proof of death from his doctor. If you really need one you can ask the funeral home where he was cremated ph. [text deleted].

Furthermore no one will be pursuing this case cause (sic) his family don't even know anything about this case. You can close this appeal anytime you want." (Underlining added).

Attached hereto as Exhibit "C" is a copy of the Physician's Statement dated April 29, 2013 which indicates that the Appellant died on April 11, 2013.

On August 14, 2013 the appeal hearing commenced at 9:30 a.m. Nobody appeared on behalf of the Appellant and Ms Danielle Robinson appeared on behalf of MPIC.

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 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.

MPIC's legal counsel further submitted that since the Appellant had been properly served with a Notice of Hearing by mail, pursuant to these provisions of the MPIC Act, that 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 permanent impairment benefits that the Appellant received.

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, 2004 CarswellMan 287 (Man. C.A.). In that case the Applicant 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, Madam Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99, 2004 CarswellMan 300 (Man. C.A.) and stated:

I also agree with Freedman J.A. in *Elias*, at para. 8, that the appropriate criteria to be considered are those set out in *Bohemier v. CIBC Mortgages Inc.* (2001), 160 Man. R. (2d) 39, 2001 MBCA 161 (Man. C.A.), and 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.

The Commission notes that the Claimant Adviser Office had filed the Notice of Appeal on behalf of the Appellant and had indicated that the Appellant wished to proceed to mediation. The Claimant Adviser subsequently withdrew its representation of the Appellant's appeal. As well, although the Appellant had indicated that he wanted to proceed with mediation, he did not

complete the necessary documentation to refer the appeal to mediation. As a result, AIM closed the Appellant's file and referred the matter back to the Commission to proceed with the appeal.

The Commission attempted on a number of occasions to contact the Appellant by telephone and by mail at the address listed on the Notice of Appeal. The Appellant did not respond to any telephone calls or correspondence. The Commission eventually learned that the Appellant had passed away on April 11, 2013. The Appellant's fiancée provided the Commission with an undated letter enclosing the Physician's Statement indicating that the Appellant had passed away on April 11, 2013.

The Commission finds:

1. On the balance of probabilities, that the Appellant did not demonstrate a continuous intention to prosecute the appeal from the time the appeal was filed with the Commission on October 29, 2012.
2. Due to the unfortunate death of the Appellant on April 11, 2013 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 vs. Asper* (supra), that the Appellant has abandoned his appeal. As a result, the appeal is dismissed and MPIC's Internal Review Decision of October 5, 2012 is confirmed.

Dated at Winnipeg this 23rd day of August, 2013.

MEL MYERS, Q.C.