

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-234**

PANEL: Ms Karin Linnebach, Chairperson
Mr. Neil Margolis
Ms Susan Sookram

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Greg Jowett of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Robertson.

HEARING DATE: June 27, 2016

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 APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

Background:

The Appellant, [text deleted], was injured in a motor vehicle accident ("MVA") on August 3, 2009. On February 11, 2013, the Appellant's case manager issued a decision regarding entitlement to Personal Injury Protection Plan ("PIPP") benefits related to nasal injury and surgeries. The case manager determined that the medical information did not establish a cause and effect relationship between the MVA and the Appellant's nasal injury and surgeries.

The Appellant sought a review of this decision within the 60 day time limit under the MPIC Act and on August 12, 2013, an Internal Review Officer from MPIC dismissed his application for review and upheld the case manager's decision. The Internal Review Decision stated in part:

“Based on the information available and, on the balance of probability, there is insufficient evidence to causally relate the nose injury and surgeries to the accident. I am confirming the case manager's decision of February 11, 2013.”

The Internal Review Decision further stated:

“RIGHT OF APPEAL

If you are unsatisfied with this decision, you have ninety (90) days within which to appeal in writing to the Automobile Injury Compensation Appeal Commission, which Commission can be reached at:

301 – 428 Portage Avenue
Winnipeg, MB
R3C 0E2

Telephone Number: 204-945-4155

Fax Number: 948-2402

Toll Free: 1-800-282-8069

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, you can contact:

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

Telephone Number: 204-945-7413 or 204-945-7442

Fax Number: 948-3157

Toll Free: 1-800-282-8069, Ext. 7413

The Claimant Adviser Office operates independently of both MPI 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 was received by the Appellant in early 2014. Rather, on or about August 8, 2014, the Appellant provided a letter to MPIC indicating that he wished to appeal the Internal Review Decision of August 12, 2013. The Appellant did not file his Notice of Appeal with the Commission until January 15, 2016.

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 issue which requires determination is whether the Commission will grant such an extension of time to the Appellant in order to allow him to file a Notice of Appeal in respect of the decision of the Internal Review Officer dated August 12, 2013.

Decision:

For the reasons set out below, the Commission will not exercise its discretion to grant an extension of time for the Appellant to file a Notice of Appeal.

Evidence for the Appellant:

The Appellant testified at the hearing into his request for an extension of the 90 day period. He described the MVA of August 3, 2009. He stated that at the time of the MVA he had separated from his wife and was living in his truck, waiting to receive the money from the sale of his house. He stated that the box of his truck was set up with furniture so he could live in it.

On the day of the MVA, the Appellant had the back doors of his truck open. It was rainy and windy and when he went to shut the doors, he slipped and fell backwards, striking his face on the curb. The Appellant stated he didn't know how long he lay on the ground before getting up.

Once he gathered his senses, he crawled back to his truck. Blood was pouring out of his forehead and nose, his glasses had fallen off, and his eye was out of its socket, requiring him to push it back in. He had lots of water in the truck and remembers using lots of towels to try to control the bleeding.

The Appellant stated that he was in shock and it took him a few hours before he started to look for his glasses. He realized that he needed to go to the hospital and thought he could drive to where his wife was staying so she could take him to the hospital. Due to his injuries, he wasn't able to drive the distance to reach his wife, so his wife picked him up and then took him to the [hospital] Emergency Department where his injuries were initially treated.

The Appellant stated that, while his nose appeared more crooked and was clearly injured in the MVA, his biggest concern initially was his eye injury. The Appellant indicated that he doesn't remember when he first attended to his family doctor, [text deleted], regarding his nose. Once [Appellant's doctor] saw how bad his nose was, he was referred to a specialist, [text deleted], for treatment on his nose. The Appellant was advised that surgery was required and surgery took place on April 21, 2010. The Appellant indicated that it was day surgery and that it went well. However, approximately two and a half weeks after the surgery, the Appellant blew his nose and heard a crack. He stated he had to see [Appellant's ear, nose and throat specialist] again because "the nose had snapped out of place". [Appellant's ear, nose and throat specialist] then advised the Appellant that a second surgery was required.

The Appellant stated that after the second surgery, his nose is still crooked, he still has problems breathing, and a third surgery is required. "Lack of money and timing" has kept him from pursuing the third surgery.

The Appellant indicated that before the MVA, he was working as a [text deleted] and was very busy doing work for various companies. He stated that, because of the numerous medical appointments and surgeries, he was unable to work for periods of time. As a result of not consistently working, the Appellant lost a lot of his work contacts. He couldn't work after his first surgery and after the second surgery, his financial situation became especially dire. Until he got a payment from MPIC, everything was a mess.

The Appellant stated he has been mostly homeless since the MVA. He couldn't live in his truck anymore as the weather got cold so his friend let him stay in his house. While he stayed at this house between 2009 and 2011, he did not like the neighbourhood and indicated this added to his stress levels. He stated that he was homeless in the fall of 2011. In 2012, he decided to live in a converted truck.

His financial situation worsened again towards 2013 and this continued until he got a job at [text deleted] in the winter of 2013. He stated that this was his first full time job since the MVA. Around the same time, he won money in a lottery. With being back to work and winning the money, he was able to begin paying off his debts and buy a used truck. Unfortunately, the work with [text deleted] only lasted 4-5 months and the Appellant was again unemployed by the summer of 2013.

With the help of his son, the Appellant was able to find some work in [text deleted], Alberta. Except for some weeks around Christmas 2013, the Appellant lived with his son in [Alberta] until sometime in the spring of 2014. He then went back to [Alberta] for some work, returning to Manitoba in January or February 2015. In early March 2015, he went up north to work for [text

deleted] on the [text deleted] project. He sprained his ankle while working for [text deleted] and ultimately returned from [text deleted] on July 6, 2015 after which he returned to [Alberta]. He returned to [Manitoba] in the fall of 2015. He filed his Notice of Appeal with the Commission on January 15, 2016.

The Appellant described his physical and mental conditions since the MVA. He indicated that he has been very depressed and stressed since the MVA. He stated that he started having problems sleeping in January 2010. He is taking medications for depression, is being treated for Graves' Disease and has undergone investigations for skin cancer. As well, the Appellant has had ongoing difficulties as a result of the MVA and estimated that he attended 80-90 medical appointments in the two years following the MVA. Besides still having problems with his nose, the Appellant's left eye has been sensitive since the MVA and he continues to have problems with his vision.

The Appellant stated that even thinking about the MVA and the years thereafter is very difficult for him. He finds it difficult to remember when events happened. He remembers attending for a review hearing at the Internal Review Office on May 28, 2013. The Appellant was not sure if or when he received a copy of the Internal Review Decision, stating that he "probably saw the letter at some point". He remembers receiving something from MPIC, after which he called them.

The Appellant expressed some concern about the Internal Review Decision being sent to a [text deleted] address as he considered an address on [text deleted] as his "legal address". The Appellant's friend lives at the [text deleted] address; the Appellant has never lived at this address. The Appellant stated that his friend would never have accepted registered mail on his behalf. He stated that his [text deleted] and [text deleted] mail got thrown in bags for him.

The Appellant stated that he wrote his letter of appeal and dropped it off at MPIC. He wasn't sure if he knew about AICAC at the time. He stated that his case manager advised him he needed to file a formal letter of appeal. He thought that the letter he addressed to MPIC was good enough. He wasn't aware that he was required to complete a "special form". At some point, he attended to the Commission's office and believes he may have been provided the proper form.

The Appellant did not file the Notice of Appeal at that time because he was ready to go up to [text deleted] and he had to go right away or his position would be filled by someone else. He also stated that he couldn't address it while his finances were horrible and his life was unstable. He didn't address it right after he returned from [text deleted] because he was "fully stressed" and frustrated due to concerns about his workplace ankle injury and his related workers compensation claim. He also stated that at that point his stress and frustrations were "not really MPI's fault anymore".

When asked to identify the biggest obstacles to filing the Notice of Appeal with the Commission, the Appellant stated the lack of focus, starving, having no money, despair, depression and feelings of helplessness.

Evidence for MPIC:

MPIC did not call any witnesses; however, counsel for MPIC did cross-examine the Appellant.

On cross-examination, the Appellant stated he didn't remember when he received the case manager's decision. He stated that whenever he receives correspondence from MPIC regarding his nose his "brain does somersaults" and "I just flip out". He again stated that the case

manager's decision was sent to [text deleted] and that wasn't his legal address. He did not remember reading that he only had 60 days within which to appeal the case manager's decision to the Internal Review Office.

The Appellant indicated that he did not remember when he obtained and completed the Application for Review of the case manager's decision. He then stated that he must have known about the time limit. He guessed he was probably around [text deleted] long enough to see it and complete it. He stated that he knew he was going to start working at [text deleted] at that time and, as a result, his stress levels were levelling out and he was able to deal with it.

The Appellant acknowledged that the Internal Review Decision was in a shopping bag full of mail that he received in early 2014 from his wife, who was living at the [text deleted] address. However, he stated that he wasn't sure when he actually read the Internal Review Decision because the bag of mail contained 400-500 pieces of correspondence. He read the decision in 2014 while he was living with his son in [Alberta]. When he did read the Internal Review Decision, the Appellant did not read the "Right of Appeal" section on pages 8 and 9 because he only got 2 or 3 pages into the decision.

The Appellant stated that the Internal Review Decision was sent non-registered mail and that he shouldn't be liable for MPIC not sending it registered mail. The Appellant confirmed that he received the decision in a bag of mail from his wife.

The Appellant did not remember receiving a letter from MPIC dated September 5, 2014, which acknowledged receipt of his August 8, 2014 letter of appeal and provided the contact information for the Commission. The Appellant acknowledged that this letter was sent to the [text deleted]

address and his friend was still collecting his mail at this address. The Appellant acknowledged that despite being sent this letter, he did not attend to the Commission's office until January or February 2015. The Appellant indicated that he thought he received a telephone call from somebody at the Commission regarding his appeal but didn't know when that occurred. He stated that someone called "to remind me to get this done". He stated that while he did not remember what happened when he attended to the Commission office, he thinks he received a Notice of Appeal form. He had the intention of submitting pictures as attachments but he could not find his paperwork. He guessed he probably went up to work for [text deleted] and then lost his records. He thought one of the Commission's staff also phoned the Claimant Advisor Office on his behalf and told him to attend to their office because the Notice of Appeal form was already late.

Submission for the Appellant:

Counsel for the Appellant submitted that the main criteria to consider in this case are the actual length of the delay and the reasons provided. There is no evidence of waiver and prejudice. Counsel submitted that the Appellant's particular circumstances provide reasons which support the Commission exercising its discretion to extend the time to appeal.

Counsel submitted that the Appellant has had a great deal of personal and medical problems since the MVA in 2009. He has suffered from depression, anxiety, stress, physical injuries from the MVA, and other physical conditions unrelated to the MVA. The Appellant also had significant financial struggles and periods of homelessness. Counsel submitted the Appellant described "no minor struggle" and that, as a whole, his circumstances and conditions were and continue to be significantly disabling in terms of the Appellant "being able to get things done".

Counsel submitted that the Appellant spent a lot of time in Alberta since the Internal Review Decision. When the Appellant was living in Alberta, “he left Manitoba in Manitoba”, coping with and focussing on his life in Alberta. The Appellant’s evidence was that he received bags of mail and could only “deal with them” as he was able. He had mental health challenges which, on many days, kept him from getting out of bed. Counsel acknowledged that the Appellant was able to appeal the case manager’s decision in a timely manner and participate in the Internal Review hearing. However, counsel submitted that this didn’t mean that he was capable of completing the Notice of Appeal. The Appellant suffered from “highs and lows” and during the lows he struggled with dealing with his affairs.

The Appellant was able to write a letter of appeal in August 2014. While this wasn’t the right way to deal with the appeal, the Appellant didn’t know better at the time so he dealt with it when and how he could. When the Appellant was provided the Notice of Appeal form, he felt he needed to add diagrams and notes and this was too much for the Appellant to handle at the time. He needed to go to work at [text deleted] and so he went. When he returned to [text deleted], he was having significant struggles, dealing with his Graves’ Disease, a cancer scare and his injured ankle. He also continued to struggle with seeing out of his left eye.

Counsel submitted that the Appellant did his best to push his appeal forward and has done his best to explain himself.

Section 174 of the MPIC Act states that a claimant may appeal a review decision to the Commission within 90 days after receiving notice of a review decision or within such further time as the Commission may allow. While the Appellant did not appeal within the 90 days,

counsel submitted that the Commission was created with the discretion to make allowances for circumstances and extend the time under which the Appellant can appeal.

Counsel also relied upon section 6 of *The Interpretation Act* which states that every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects. Counsel also pointed to section 15 of *The Interpretation Act*, which states that the word “may” is permissive and empowering. Counsel submitted that the Commission must consider both section 6 and 15 of *The Interpretation Act* when considering whether to exercise its unfettered discretion under section 174 of the MPIC Act.

Submission for MPIC:

Counsel for MPIC did not disagree with the legal principles as outlined by counsel for the Appellant. However, counsel submitted that, in terms of the liberal interpretation of the MPIC Act and the application of discretion in section 174 of the MPIC Act, the best guidelines are the previous decisions of the Commission. Counsel relied on Commission decision AC-15-039, a 2015 decision where the delay was lengthy and the Appellant relied on personal circumstances and depression as reasons for the delay. In decision AC-15-039, the Commission denied the Appellant’s request to extend the time to appeal notwithstanding the personal circumstances and reasons provided.

Counsel agreed with counsel for the Appellant that the actual length of the delay and the reasons provided are the main factors in this case. Counsel submitted that the actual length of delay in this case is significant. The 90 day appeal period expired in early November 2013 and it was not

until January 2016 that the Appellant completed the Notice of Appeal form; this is a delay of more than 2 years.

Counsel submitted that the reasons as presented by the Appellant are that he was unable to file the Notice of Appeal in a timely manner because he was incapacitated by medical issues and time away from [text deleted] for work. Counsel noted that the Internal Review Decision expressly includes a specific section addressing the Appellant's right to appeal. It includes contact information for both the Commission and the Claimant Advisor Office. Counsel noted that the time since the accident has been a difficult time in the Appellant's life. However, despite these hardships, the Appellant was able to read the case manager's decision, see the section addressing how to appeal, get the form and submit the form within the 60 day timeframe under the MPIC Act.

After the Internal Review Hearing, the Appellant left for work in [text deleted], Alberta. His evidence was that he did not receive his mail until Christmas of 2013 and didn't view it until early 2014. The Appellant admitted on cross examination that he did not review the entire Internal Review Decision. He read about 3 pages and stopped reading because he was upset that his appeal was unsuccessful. Counsel submitted that it cannot be considered a reasonable course of action to not read the entire decision letter including the appeal options. He simply chose not to completely read the decision.

Counsel submitted that the Appellant's handling of his mail was also not entirely reasonable. The Appellant was capable of working and moving across the country and it would have been reasonable for him to have someone collect his mail and send it to him on a more regular basis.

Counsel submitted that when the Appellant submitted his letter of appeal to MPIC, he provided pictures and diagrams showing how his nose was damaged. This letter of appeal was more extensive and detailed than completing a Notice of Appeal. Given the Appellant was able to prepare that level of summary, it was reasonable for the Appellant to be able to review the Internal Review Decision and follow up with the Internal Review Officer so that his Notice of Appeal could be filed. However, there is no indication that the Appellant took any steps in furthering his appeal after he sent in the letter of appeal.

Counsel submitted that the Appellant acknowledged visiting the Commission's office in early 2015. The Appellant believed he received a Notice of Appeal form at that time but then lost it. The Appellant could not recall whether he was provided pamphlets when attending at the Commission and whether he was informed about the Claimant Advisor Office when he first attended. Counsel submitted that he expected the Commission would have provided this information as assisting appellants with appeals is the reason that the Claimant Advisor Office exists and is the reason the Commission's front desk has pamphlets available.

Counsel submitted that overall, the Appellant's reasons for delay do not constitute a reasonable excuse. Rather the evidence shows that the Appellant chose to prioritize other matters in his life. The steps to file an appeal are not onerous; the Notice of Appeal form is a one page form. The Appellant did not seek out resources to help him navigate. The resources are there; the Appellant simply didn't access them.

While length of delay and the reasons provided are the main factors in this case, counsel also submitted that there has been some prejudice to MPIC simply due to the passage of time. Counsel noted also that the Appellant's family doctor has since passed away.

Counsel submitted that the onus is on the Appellant to satisfy the Commission that an extension should be granted. Counsel submitted that the Appellant has not met his onus and the request to extend the time to appeal should be denied.

Reasons for Decision:

Subsection 174(1) of the MPIC Act provides as follows:

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.

In this case, the Appellant's Notice of Appeal was not received by the Commission within 90 days after he received the Internal Review Decision dated August 12, 2013. Accordingly, he has asked the Commission to exercise its discretion to allow an extension of time to file the Notice of Appeal, which was received by the Commission on January 15, 2016.

In considering whether to exercise its discretion under Subsection 174(1) of the MPIC Act, the Commission may consider various relevant factors, such as:

1. the actual length of the delay compared to the 90 day time period set out in Section 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 has been any waiver respecting the delay; and,
5. any other factors which argue to the justice of the proceeding.

The panel has 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 subsection 174(1) of the MPIC Act.

As noted above, there are several factors to be considered by the Commission in the exercise of its discretion. These factors are referenced in previous Commission decisions, including decision AC-15-039 that was relied upon by counsel for MPIC. However, the parties have acknowledged the main criteria to consider in this case are the length of the delay and the reasons for the delay.

The Appellant wrote a letter of appeal with accompanying pictures and diagrams that was received by MPIC on August 8, 2014. This August 8, 2014 letter of appeal was forwarded by MPIC to the Commission on September 5, 2014. The Appellant acknowledged he was made aware that he was required to complete a Notice of Appeal form before his appeal could be processed by the Commission. It took the Appellant until January 15, 2016 to complete and submit the form. While the panel is troubled with the length of time and the reasons provided for this delay, the panel may have been prepared to accept the August 8, 2014 letter of appeal as the date the Appellant showed his intention to appeal and therefore stopped the clock for the purposes of calculating the timeline to appeal. However, the panel finds that the Appellant's August 8, 2014 letter of appeal was itself not filed in a timely manner and that the Appellant failed to provide a reasonable excuse for this several month delay.

The panel accepts that the Appellant has had a number of difficult challenges since he separated from his wife and made the decision to live in his truck. These include a number of medical conditions that have impacted on the Appellant's ability to find employment. However, the panel finds that the Appellant's reliance on his personal circumstances and medical conditions do not provide a reasonable excuse for his failure to file his Notice of Appeal with the Commission on a timely basis. The panel notes that the Appellant provided no medical documentation indicating that any of his medical conditions prevented him from filing the Notice of Appeal in a timely manner.

At the time the Appellant received the Internal Review Decision, he was living with his son and working in [text deleted], Alberta. The Appellant indicated that he received 400-500 pieces of mail in early 2014 and therefore likely didn't read the Internal Review Decision when he first received it. The panel finds that it was not reasonable for the Appellant, knowing that the Internal Review Decision was pending, not to make efforts to locate the Internal Review Decision in his bag of mail. Further, the panel finds that when the Appellant finally read the Internal Review Decision, he was so upset with the decision that he did not read it to the end. The panel finds that it was not reasonable for the Appellant not to have read the full decision. Had he made the effort to read the full Internal Review Decision, he would have read pages 8 and 9, which outline his right of appeal, the timeline under which to appeal, the contact information for the Commission, and the contact information for the Claimant Advisor Officer. It was not until August 8, 2014, some eight months after having received the Internal Review Decision, that the Appellant wrote his letter of appeal to MPIC. This was clearly beyond the 90 day time limit.

Counsel for the Appellant submitted that when the Appellant moved to [text deleted], Alberta he left Manitoba in Manitoba and coped with his life there. The panel does not find this to be a reasonable excuse for failing to appeal the Internal Review Decision in a timely manner.

The Appellant took issue with the Internal Review Decision being sent to his [text deleted] address because “it wasn’t his legal address”. However, the panel notes that the Appellant listed the [text deleted] address as his address on his Application for Review of the case manager’s decision. There is no indication that he advised MPIC at any point that the Internal Review Decision should be sent to a different address.

Based on the foregoing, the Commission finds that the Appellant has not provided a reasonable excuse for his failure to appeal the Internal Review decision within the 90-day limit set out in section 174 of the MPIC Act. Accordingly, the Commission will not extend the time limit within which the Appellant may appeal the Internal Review decision dated August 12, 2013 to the Commission.

Dated at Winnipeg this 4th day of August, 2016.

KARIN LINNEBACH

NEIL MARGOLIS

SUSAN SOOKRAM