

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-13-143**

PANEL: Ms Jacqueline Freedman, Chair
Dr. Arnold Kapitz
Dr. Sharon Macdonald

APPEARANCES: The Appellant, [text deleted], did not attend the hearing;
Manitoba Public Insurance Corporation (“MPIC”) was
represented by Mr. Trevor Brown.

HEARING DATE: June 13, 2019

ISSUE(S): Whether the Appellant failed to diligently pursue her appeal.

RELEVANT SECTIONS: Sections 182.1 and 184.1 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 the driver of a vehicle involved in a motor vehicle accident on December 15, 2007 (the “MVA”). She suffered injuries as a result of the MVA and received benefits pursuant to the Personal Injury Protection Plan (“PIPP”) provisions of the MPIC Act, including Income Replacement Indemnity (“IRI”) benefits.

On February 12, 2013, the Appellant's case manager issued a decision which stated that there was no objective evidence precluding the Appellant from working in the employment that had been determined for her (Administrative Officer). Accordingly, her IRI was terminated pursuant to paragraph 110(1)(c) of the MPIC Act, effective as of February 28, 2013. An Internal Review decision was issued dated June 25, 2013, which upheld the case manager's decision.

The Appellant filed an appeal of the Internal Review decision with the Commission, but beyond the 90-day deadline. An extension was granted by the Commission in a decision dated April 16, 2014, and the Appellant was permitted to appeal the Internal Review decision to the Commission.

The Commission's records indicate that subsequent to being granted an extension of time to file her Notice of Appeal, a lengthy case management process ensued in the Appellant's appeal.

On January 17, 2017, the Commission's secretary contacted the Appellant to schedule a case conference. The Commission's secretary recorded that the Appellant indicated that she no longer wished to pursue her appeal. The Commission's secretary also made note that the Appellant was advised that a Notice of Withdrawal would be forwarded to her, for her to sign and return to the Commission.

Although several attempts were made by the Commission to contact the Appellant subsequent to that telephone conversation, they were unsuccessful. The Commission held a case conference, which the Appellant did not attend, and also scheduled a hearing, which was adjourned when the Appellant did not attend.

The Commission then wrote to the parties on January 15, 2019, advising that the Appellant had not provided any further information to the Commission. Therefore, the Commission determined that it would schedule a hearing to determine whether the Appellant had failed to diligently pursue her appeal, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss her appeal.

Issue:

The issue which requires determination in this hearing is whether the Appellant has failed to diligently pursue her appeal and, if so, whether the Commission should dismiss her appeal.

Decision:

For the reasons set out below, the Commission finds that the Appellant has failed to diligently pursue her appeal, and her appeal should be dismissed.

Procedural Matters:

The Commission's records indicate that subsequent to being granted an extension of time to file her Notice of Appeal, the Appellant indicated that she would like to participate in mediation. The Appellant's appeal was then referred to the Automobile Injury Mediation office. Subsequently, the Claimant Adviser Office (CAO) became the representative for the Appellant. On July 16, 2015, the Commission was advised by the mediation office that the Appellant had determined not to proceed with the mediation, and that the matter would be returned to the Commission.

An indexed file was prepared with respect to the Appellant's appeal. A copy was sent to MPIC and to the Appellant's counsel at the CAO. The Commission continued to request updates from

the parties and was advised, on January 13, 2017, that the CAO was no longer representing the Appellant.

As noted above, on January 17, 2017, the Commission's secretary contacted the Appellant to schedule a case conference. The Appellant indicated that she was under the impression that her file was closed, as she had received a letter from CAO stating that they were closing her file. The Commission's secretary noted in the Commission's records that the Appellant advised that she no longer wished to pursue her appeal.

An Appeals Officer wrote to the Appellant on January 18, 2017, and March 3, 2017, confirming that the Appellant had advised that she no longer wanted to pursue her appeal and enclosing a Notice of Withdrawal for her to sign and return to the Commission. In the letter of March 3, 2017, a response was requested by March 27, 2017. The letter also indicated that if no response was received, the Commission would schedule a case conference.

When no response was received, the Commission attempted to contact the Appellant on April 18, 2017, and April 24, 2017, to schedule a case conference date. When the Appellant did not contact the Commission by April 28, 2017, a case conference date was scheduled for June 20, 2017. A Notice of Hearing for the case conference was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on her Notice of Appeal. An acknowledgement of receipt of the Canada Post Xpresspost was signed by "[the Appellant]" on May 4, 2017.

Counsel for MPIC attended the case conference on June 20, 2017, but the Appellant did not. The Commission attempted to contact the Appellant by phone. The Appellant did not answer and her mailbox was full. In accordance with the Commission's practice, after waiting 15 minutes, the case

conference proceeded in her absence. At the case conference, the Commission set a hearing date for September 8, 2017, at 9:30 a.m.

A Notice of Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on her Notice of Appeal. The Canada Post Xpresspost was returned to the Commission unclaimed. The Notice of Hearing sent to the Appellant by regular mail was not returned to the Commission.

Counsel for MPIC attended at the Commission on September 8, 2017, the date scheduled for the hearing, but the Appellant did not attend. The hearing was adjourned.

The Commission's records indicate that the Appeals Officer attempted to reach the Appellant on February 22 and December 18, 2018. Messages were left requesting that she contact the Commission. No response was received.

On January 15, 2019, the Commission wrote to the parties, advising that the Appellant had not provided any further information to the Commission. Therefore, the Commission had determined that a hearing would be scheduled to determine whether the Appellant had failed to diligently pursue her appeal, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss her appeal.

A Notice of Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on her Notice of Appeal. The Canada Post Xpresspost was returned to the Commission unclaimed. The Notice of Hearing sent to the Appellant by regular mail was not returned to the Commission. The Notice of Hearing provided that the time and date of the hearing were firm and

that postponements would only be granted under extraordinary circumstances. The Notice provided that at the hearing, the Commission would consider whether the Appellant had failed to diligently pursue her appeal, and that the parties would have the opportunity to make submissions on this issue. It further indicated that their submissions could be made orally or in writing. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and dismiss the appeal, adjourn the hearing to a new time and date, or take such other steps as it deemed appropriate.

Counsel for MPIC attended at the Commission on the hearing date, but the Appellant did not attend. In accordance with the Commission's practice, after waiting 15 minutes, the hearing proceeded in her absence.

Relevant Legislation:

Section 184.1 of the MPIC Act provides how notices may be given to the Appellant. It provides as follows:

How notices and orders may be given to appellant

184.1(1) Under sections 182, 182.1 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.

Section 182.1 of the MPIC Act provides that the Commission may dismiss an appeal in certain circumstances. It provides as follows:

Dismissal for failure to pursue appeal

182.1(1) Despite subsection 182(1), the commission may dismiss all or part of an appeal at any time if the commission is of the opinion that the appellant has failed to diligently pursue the appeal.

Opportunity to be heard

182.1(2) Before making a decision under subsection (1), the commission must give the appellant the opportunity to make written submissions or otherwise be heard in respect of the dismissal.

Informing parties of decision

182.1(3) The commission must give the appellant and the corporation a copy of the decision made under subsection (1), with written reasons.

Submissions for MPIC:

Counsel for MPIC noted that section 182.1 of the MPIC Act was enacted in 2018. It empowers the Commission to dismiss an appeal when it is of the opinion that the Appellant has failed to diligently pursue it. Counsel proposed that the Commission could adopt a three-step test in reviewing such appeals, as follows:

1. whether the Appellant has failed to diligently pursue his or her appeal, i.e., has there been a delay;
2. if so, does the Appellant have a reasonable excuse or explanation for the delay; and

3. notwithstanding the answers to steps #1 and #2 above, is there any other reason that the appeal should be dismissed or permitted to continue, i.e., a discretionary step which permits the Commission to consider the justice of the proceedings.

The test that MPIC is proposing does not include a review of the merits of the appeal. Counsel provided several reasons supporting MPIC's position that the Commission is not required to consider the merits of the appeal under section 182.1 of the MPIC Act. First, he pointed to the title of the legislation which created the section, the Red Tape Reduction and Government Efficiency Act (the "Red Tape Act"). He submitted that the purpose of the Red Tape Act was to create a streamlined process, to reduce the number of dormant appeals at the Commission. Reviewing the merits of an appeal would take up a lot of time, and that would go counter to the title of the Red Tape Act, which, pursuant to the rules on construction of statutes, can be considered when interpreting the purpose of the legislation.

Another reason counsel relied upon in his submission that the Commission was not required to consider the merits of the appeal relates to the wording of section 182.1 itself. He pointed out that the wording of the section seems to be almost identical to the wording of similar legislation from the B.C. Administrative Tribunals Act. While that legislation does not appear to have been considered by any courts, it has been considered by the Workers' Compensation Appeals Tribunal of British Columbia (WCAT) several times. In its consideration of the B.C. legislation, the WCAT did not ever consider the merits of the appellant's appeal. By using the same wording as is used in B.C., counsel argued, the Manitoba legislature is presumed to have intended that a similar test be applied.

In contrast, counsel referred to the decision of the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115. In that case, the Court of Appeal confirmed the test for determining the appropriate criteria to set aside an appeal which had been deemed to be abandoned, as follows:

1. there must have been a continuous intention to prosecute the appeal;
2. there must be a reasonable explanation for the failure to file the documents [here, the analogy would be to an explanation for the failure to prosecute the appeal]; and
3. there must be arguable grounds of appeal.

Counsel argued that the legislature is deemed to know the law. The fact that subsection 182.1(1) did not include a reference to arguable grounds for appeal is further support for the fact that the merits of the appeal are not required to be addressed when a matter is under consideration pursuant to that subsection.

Related to that, counsel pointed out that the only consideration referred to in subsection 182.1(1) is whether the appellant has failed to diligently pursue his or her appeal. He referred to definitions from the Oxford Canadian Dictionary, second edition, as follows:

Diligence: *n.* 1. careful and persistent application or effort. 2. industriousness.

Diligent: *adj.* 1. careful and steady in application to one's work or duties. 2. showing care and effort.

Counsel argued that it is not enough for an appellant to pursue his or her appeal, the appellant has to be persistent. He noted that MPIC wants the process to be fair, and would not want to deny an appellant to their opportunity to be heard, particularly if the delay were a short one. However, the obligation to pursue an appeal is on the appellant. Counsel noted that the Commission usually makes numerous efforts to contact an appellant; however, he submitted that at a certain point, an appellant will lose their right to pursue their appeal under this section. Counsel noted further that

it was the Commission that determined to have this hearing, and it is up to the Commission to make the determination as to whether the Appellant's appeal should be dismissed. Having said that, counsel submitted that the outcome in this case should be clear.

Applying the first step of the test that MPIC has proposed, counsel noted that mediation in this appeal was completed in 2015. The Appellant failed to attend a case conference in 2017, and also failed to attend a hearing in 2017. As well, she failed to respond to phone messages from the Commission on numerous occasions. Clearly, there has been a delay here and the Appellant failed to pursue her appeal.

Moving to the second step of the test proposed by MPIC, counsel submitted that the Appellant was not present to provide any excuse for her failure to pursue her appeal. Rather, in this case the Appellant said, in January 2017, that she did not want to pursue her appeal.

With respect to the third step, counsel submitted that there are no other factors that the Commission would need to consider. He submitted that the Appellant's appeal should be dismissed.

Discussion:

As indicated above, the issue which requires determination in this hearing is whether the Appellant has failed to diligently pursue her appeal, and, if so, whether the Commission should dismiss her appeal.

Service of the Notice of Hearing

As indicated above, the Notice of Hearing sent to the Appellant by regular mail to the address on her Notice of Appeal was not returned to the Commission. We find that the Appellant was properly served with the Notice of Hearing by regular mail pursuant to section 184.1 of the MPIC Act.

Opportunity to be Heard

Subsection 182.1(2) of the MPIC Act requires that the Commission must give the Appellant the opportunity to make written submissions or otherwise be heard, prior to making a decision under subsection 182.1(1) of the MPIC Act. As indicated above, the Notice of Hearing sent to the Appellant provided that at the hearing, the parties would have the opportunity to make submissions, and their submissions could be made orally or in writing. Although the Appellant was not present at the hearing, she had been given proper notice of the hearing. We find that she had been given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of her appeal, within the meaning of subsection 182.1(2) of the MPIC Act. Therefore, the Commission has jurisdiction to consider whether the Appellant failed to diligently pursue her appeal, and, if so, whether the Commission should dismiss her appeal.

Did the Appellant fail to Diligently Pursue her Appeal

It is MPIC's position that the Appellant has failed to diligently pursue her appeal, that there is no reasonable excuse for her failure, and that the Commission should exercise its discretion to dismiss her appeal. Counsel for MPIC has proposed that the Commission adopt a three-step test for use in appeals brought forward under section 182.1 of the MPIC Act. He has emphasized that the Commission ought not to consider the merits of an appeal in such cases.

We agree with counsel for MPIC that section 182.1 of the MPIC Act does not require a consideration of the merits of an appeal. Section 182.1 was introduced pursuant to the Red Tape Act, legislation which was intended to streamline government operations. In our view, the wording of subsection 182.1(1) is clear and unambiguous, and does not refer to the merits of an appeal. It simply requires that the Commission be of the opinion that “the appellant has failed to diligently pursue the appeal”. If so, the Commission then has the discretion to dismiss all or part of an appeal.

Thus, the only issue for consideration is whether the appellant has failed to diligently pursue the appeal.

In this case, the Appellant determined not to proceed with mediation in July, 2015. On January 17, 2017, the Commission’s secretary contacted the Appellant to schedule a case conference. At that time, the Appellant advised that she no longer wished to pursue her appeal. Nevertheless, the Commission scheduled a case conference, to afford the Appellant the opportunity to appear and be heard. The Appellant did not attend the 2017 case conference, nor did she attend a 2017 hearing. The Commission made several subsequent attempts to contact the Appellant, both by telephone and by letter, but the Appellant did not respond to any of those attempts. The present hearing was then scheduled. As noted above, the Appellant did not attend the present hearing, nor did she provide any written submissions, although she was provided the opportunity to do so. She did not provide any explanation for her failure to appear or for her failure to respond to the Commission’s attempts to contact her. On the contrary, as indicated, the only information that the Commission has from the Appellant is her advice to the Commission’s secretary from January, 2017, that she no longer wished to pursue her appeal. Since the Appellant has clearly ceased to pursue her appeal, we see no compelling reason to proceed with the appeal.

Conclusion

Upon a consideration of the totality of the evidence and submissions, and upon a consideration of the relevant legislation, the Commission finds that the Appellant has failed to diligently pursue her appeal.

Disposition:

Based on the foregoing, the Appellant's appeal is dismissed.

Dated at Winnipeg this 23rd day of July, 2019.

JACQUELINE FREEDMAN

ARNOLD KAPITZ

SHARON MACDONALD