

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-17-134**

PANEL: Ms Jacqueline Freedman

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

HEARING DATE: October 17, 2019

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

RELEVANT SECTIONS: Sections 182.1 and 184.1 of The Manitoba Public Insurance Corporation Act (“MPIC Act”)

Reasons For Decision

Background:

The Appellant, [text deleted], was a pedestrian walking down a sidewalk who was hit by a motor vehicle on December 4, 2016 (the “MVA”). As a result of the MVA he sustained an injury to his left shoulder, and he sought benefits pursuant to the Personal Injury Protection Plan (“PIPP”) provisions of the MPIC Act. He initially declined to seek personal care assistance (“PCA”). However, approximately seven months after the MVA, he sought retroactive PCA benefits, starting from the date of the MVA and going forward.

On July 28, 2017, the Appellant's case manager issued a decision which stated that since MPIC was not afforded the opportunity to assess the Appellant's PCA needs shortly after the MVA, there was no entitlement to retroactive PCA. Further, since the Appellant advised that he did not incur any expenses for help with PCA duties since the MVA, and because PCA is based on reimbursement of expenses, he was not entitled to any reimbursement.

An Internal Review decision was issued dated October 10, 2017, which upheld the case manager's decision. The decision also stated that, after a review of the medical information, there were no documented medical concerns regarding the Appellant's ability to function beyond a shoulder injury which may have required PCA help.

The Appellant filed an appeal of the Internal Review decision with the Commission, on November 10, 2017. The Commission asked him to provide reasons for his appeal, which he did, in a document dated November 28, 2017. Those reasons were written by the Appellant in [text deleted]. The Appellant subsequently attended at the Commission to meet with the Appeals Officer and a [text deleted] interpreter. His reasons for appeal were translated into English in his presence, with his participation and consent, on December 14, 2017.

A lengthy case management process then ensued in the Appellant's appeal.

Several attempts were made by the Commission to contact the Appellant subsequent to the December 14, 2017, meeting, but they were unsuccessful. On July 31, 2019, a Case Conference was held. Although the Appellant was provided with Notice of the Case Conference, he did not attend. Several attempts were made by the Commission to contact the Appellant subsequent to that Case Conference, but they were also unsuccessful.

The Commission then wrote to the parties on August 2, 2019, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission. Therefore, the Commission would schedule a hearing, to determine whether the Appellant had failed to diligently pursue his appeal, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss his appeal.

Issue:

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

Decision:

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

Procedural Matters:

The Commission's records indicate that when he filed his Notice of Appeal, the Appellant was initially self-represented. Subsequently, the Claimant Adviser Office (CAO) became the representative for the Appellant.

On April 9, 2018, the CAO advised the Commission that they would no longer be representing the Appellant. On April 11, 2018, the Appeals Officer emailed the Appellant and asked him to contact her to set up a meeting to discuss his appeal, but no response was received. On May 8, 2018, the Appeals Officer attempted to phone the Appellant, but the phone number provided by the Appellant was out of service. By letter dated May 8, 2018, the Appeals Officer wrote to the

Appellant and asked him to contact her to set up a meeting to discuss his appeal, but no response was received.

On June 1, 2018, the Appeals Officer again emailed the Appellant and asked him to contact her to discuss his appeal, but no response was received. On July 12, 2018, the Appeals Officer attempted to phone the Appellant, but the phone number provided by the Appellant was out of service.

The Commission's records indicate that in July, 2018, the Appeals Officer contacted MPIC to determine whether MPIC had alternate contact information for the Appellant. MPIC provided an alternate phone number for the Appellant. The Appeals Officer phoned the Appellant at the alternate phone number provided by MPIC on July 12, 2018, and left a message for the Appellant to contact the Commission. No response was received. In October, 2018, MPIC provided the following alternate address for the Appellant: [address #2]. The Commission then wrote to the Appellant at that address and asked him to contact the Commission to discuss his appeal. No response was received.

By letter dated February 7, 2019, the Commission sent to the parties their respective copies of the indexed file in this appeal. The letter states at the end that "It is required that you notify us in writing of any changes to your contact information". The Appellant's copy of the letter, together with his indexed file, was sent to him by courier to the address originally provided by him in his Notice of Appeal, [address #1]. The package containing the letter and indexed file sent to the Appellant by courier was accepted and signed for on February 11, 2019. The courier, Mid-Canada Courier, provided to the Commission a copy of the way-bill from that date showing the signature of the recipient of the item.

The Commission's records indicate that in April, 2019, the Appeals Officer contacted MPIC once more to determine whether MPIC had any further alternate contact information for the Appellant. MPIC provided two alternate phone numbers for the Appellant, and confirmed that the Appellant's address on his Notice of Appeal appeared to be his most recent address. On April 11, 2019, the Appeals Officer attempted to contact the Appellant at the two alternate phone numbers provided by MPIC; however, they were no longer numbers at which he was able to be reached.

By letter dated April 12, 2019, the Appeals Officer wrote to the Appellant and confirmed that the indexed file was delivered to him. She asked the Appellant to contact her by May 2, 2019, to discuss his appeal. A Notice of Withdrawal was enclosed with that letter, but the Appellant did not complete and return the Notice of Withdrawal. No response was received from the Appellant.

In May, 2019, the Commission determined that a Case Conference would be required. Commission staff further attempted to contact the Appellant by email to schedule the Case Conference date, but no response was received. All phone numbers on the Commission's file for the Appellant were not in service at that time, or alternatively, were no longer a number at which he could be reached. Accordingly, the Commission preemptorily set a Case Conference for July 31, 2019.

A Notice of Hearing for the July 31, 2019, Case Conference was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on his Notice of Appeal. The Canada Post Xpresspost package was returned to the Commission unclaimed. The Notice of Hearing sent to the Appellant by regular mail to was not returned to the Commission.

Counsel for MPIC attended the Case Conference on July 31, 2019, but the Appellant did not attend. In accordance with the Commission's practice, after waiting 15 minutes, the Case Conference proceeded in his absence.

Following the Case Conference, on August 2, 2019, the Commission wrote to the parties, advising that the Appellant had not provided any further documentation or been in contact with the Commission. Therefore, a hearing would be scheduled to determine whether the Appellant had failed to diligently pursue his appeal, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss his appeal.

Commission staff further attempted to contact the Appellant by email to schedule the Hearing date, but no response was received. All phone numbers on the Commission's file for the Appellant were not in service at that time, or alternatively, were no longer a number at which he could be reached. Accordingly, the Commission preemptorily set the Hearing for October 17, 2019.

A Notice of Hearing for the October 17, 2019 Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on his Notice of Appeal. An acknowledgement of receipt of the Canada Post Xpresspost was signed by "[the Appellant]" on August 13, 2019. 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 his 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 his absence.

Relevant Legislation:

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.

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.

Submissions for MPIC:

Counsel for MPIC noted that the issue in this Hearing is whether the Appellant has failed to pursue his appeal diligently within the meaning of section 182.1 of the MPIC Act and whether the Commission should dismiss his appeal.

The Appellant filed his Notice of Appeal on November 10, 2017, and provided his address and telephone number in the document. When the Commission was advised that the CAO was no longer representing the Appellant, the Commission wrote to the Appellant at that address, and asked the Appellant to contact the Commission, but he did not do so. He also failed to respond to the Commission's email of June 1, 2018, and the Commission's letter of October 17, 2018.

Although the Appellant did accept delivery of the indexed file sent to him by the Commission in February, 2019, he subsequently failed to respond to numerous attempts by the Commission to contact him, including attempts made by email, letter and telephone. Due to the lack of response from the Appellant, a Case Conference was scheduled for July 31, 2019. The Appellant did not

respond to the Commission's efforts to reach him to schedule that Case Conference, nor did he attend the Case Conference. Accordingly, this Hearing was scheduled.

Counsel submitted that, aside from accepting delivery of the indexed file, the Appellant has taken no steps to advance his appeal or to respond to the Commission since April, 2018, when he became self-represented. This clearly represents a failure to diligently pursue his appeal, and his appeal should be dismissed.

Section 182.1 of the MPIC Act requires that the Commission give the Appellant the opportunity to be heard. Counsel noted that notice of the Hearing was provided to the Appellant at the address that he provided to the Commission, and all aspects of section 182.1 were complied with.

Counsel referred to the decision of the Commission in AC-13-143, which also dealt with section 182.1 of the MPIC Act. He noted that in that case, counsel outlined a proposed three-step test to be applied under subsection 182.1(1), and he discussed its application here:

1. did the Appellant fail to diligently pursue the appeal - as discussed above, he did fail to pursue the appeal;
2. did the Appellant have an excuse for the failure - he did not provide any excuse; and
3. are there any other factors that should be considered - there are no other factors to consider here.

Counsel submitted that clearly, the Appellant failed to diligently pursue his appeal and the Commission should exercise its discretion to dismiss his appeal.

Discussion:

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

Service of the Notice of Hearing

Notice of Hearing for the October 17, 2019 Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address on his Notice of Appeal. As indicated above, the Notice of Hearing sent by Xpresspost to the Appellant was accepted and signed for on August 13, 2019. On October 3, 2019, Canada Post provided to the Commission a copy of the scanned signature of the recipient of the item, showing that the Xpresspost was signed for by “[THE APPELLANT]” on August 13, 2019.

We find that the Appellant was properly served with the Notice of Hearing by personal service pursuant to section 184.1 of the MPIC Act.

Opportunity to be Heard

As noted by counsel for MPIC, 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, he had been given proper notice of the hearing. We find that he had been given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of his 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 his appeal, and, if so, whether the Commission should dismiss his appeal.

Did the Appellant Fail to Diligently Pursue his Appeal

It is MPIC's position that the Appellant has failed to diligently pursue his appeal, that he has not provided an excuse for his failure, and that the Commission should exercise its discretion to dismiss his appeal.

In this case, the Appellant's last active participation in his appeal was on December 14, 2017, when he attended a meeting at the Commission with the Appeals Officer and an interpreter to review the reasons for his appeal. Since that date, twenty-two months ago, he has taken no active steps to pursue his appeal. In February, 2019, the Appellant did accept delivery of the indexed file in his appeal, but in my view this was a passive, rather than an active, step taken by him. In AC-13-143, the Commission noted that "diligence" was defined to mean "careful and persistent application or effort". Signing to accept a delivery, without more, would not meet this definition.

The Commission held a Case Conference, in July, 2019, to afford the Appellant the opportunity to appear and be heard, but the Appellant did not attend the Case Conference. The Commission made numerous attempts to contact the Appellant, but the Appellant did not respond to any of those attempts.

After the Appellant's failure to attend the July 31, 2019, Case Conference, the present hearing was then scheduled. As noted above, the Appellant did not attend the present hearing, nor did he provide any written submissions, although he was provided the opportunity to do so. He did not

provide any explanation for his failure to appear or for his failure to respond to the Commission's attempts to contact him.

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 his appeal.

Disposition:

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

Dated at Winnipeg this 13th day of November, 2019.

JACQUELINE FREEDMAN