Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the APPELLANT]
AICAC File No.: AC-13-146

PANEL:	**Laura Diamond, Chairperson** **Janet Frohlich** **Lorna Turnbull**
APPEARANCES:	**The Appellant, [text deleted], was represented by Helen Delaney from the Worker Advisor Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Steve Scarfone.**
HEARING DATE:	**November 5, 2019**
ISSUE(S):	**Was a binding agreement reached between the parties.**
RELEVANT SECTIONS:	**Section 174.2(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act').**

Reasons For Decision

Background:

The Appellant was injured in a motor vehicle accident (MVA) on January 9, 2010. She reported injuries to her neck, back, right hand, pinky and ring fingers, headaches and dizziness. She also complained of swelling to her right ankle. As a result of her injuries she attended for physiotherapy and was not able to return to her employment as a respite worker. She received Personal Injury Protection Plan (PIPP) benefits from MPIC but on November 14, 2012, her case manager wrote to her terminating these benefits for knowingly providing the corporation with false or inaccurate information with respect to the extent of her injuries and functional abilities.

In addition, the case manager advised that she would be responsible for reimbursing MPIC for the excess payment of benefits she received as a result.

The Appellant sought an internal review of this decision. On August 14, 2013 an Internal Review Officer (IRO) for MPIC upheld the case manager's decision. The Appellant filed a Notice of Appeal (NOA) with this Commission on December 3, 2013, indicating that she would be represented at the hearing of her appeal by the Claimant Adviser Office (CAO). The Appellant elected to participate in mediation through the Automobile Injury Mediation office. The file was returned from mediation to the Commission when mediation was completed and the Appellant indicated her intention to proceed with the appeal.

Case Conferences:

Through its case management process, the Commission held several case conferences to discuss the status of the appeal and review evidentiary matters. At that time, the Appellant was represented first by Virginia Hnytka and then by Janelle Pariseau for the CAO. MPIC was represented by legal counsel Terry Kumka.

In the summer of 2017, the Commission was advised by MPIC and the CAO that they were discussing the possibility of resolving the Appellant's appeal. In July 2017, the Commission was advised that MPIC had provided a settlement agreement to the CAO. In the fall of 2017, the CAO advised that although they provided this document to the Appellant by mail, they had been unable to reach her and the document had not been signed.

A case conference was held on December 5, 2017 to clarify the status of the appeal resolution agreement. The Appellant was not present and was represented by her then CAO, Chad Panting

and Rebekah Powell the director of the CAO. They described difficulties in communicating with the Appellant. Steve Scarfone, subsequent for MPIC, took the position that notwithstanding that the documentation of the agreement had not been signed, an enforceable settlement agreement had been reached between the parties. The parties were given some time to determine their positions in light of the matters raised.

Subsequent to that case conference, the CAO determined that they could no longer represent the Appellant and formally withdrew their representation of her in April 2018.

The Commission held another case conference on November 27, 2018, to discuss the Appellant's representation as well as the status of the appeal. Steve Scarfone appeared representing MPIC and Sean Boyd, from the Legal Services Branch represented the Director of the CAO, who observed the proceedings on a "watching brief". Although she was given notice of the case conference, the Appellant (who at that point was self-represented) did not attend. The Commission was advised that the Appellant had been in touch with the Worker Advisor Office to discuss representation, but that no decision had yet been made in that regard.

The Commission reviewed the issue of whether a settlement agreement had been reached between the parties and which court or tribunal has the jurisdiction to determine that question. Legislation and jurisprudence were reviewed. Counsel for CAO took no position, and counsel for MPIC submitted that the Commission would be the appropriate venue for a hearing to determine this question. The Deputy Chief Commissioner agreed and it was determined that the Commission had the jurisdiction to hold a hearing into the question of whether a settlement agreement had been reached between the parties. It was also determined that the onus at the hearing on that question would be on MPIC to establish, on a balance of probabilities, that a

settlement agreement had been reached between MPIC and the Appellant and that the CAO had the authority to enter into such an agreement on behalf of the Appellant.

Potential evidence to establish whether a settlement agreement had been reached was discussed. Potential witnesses for the hearing were also discussed, and Mr. Scarfone indicated that he would testify or provide a sworn affidavit statement. The Deputy Chief Commissioner advised that in this event, MPIC would need to be represented by a different lawyer at the hearing. The possibility of the Appellant's former CAO representative, Chad Panting, potentially being called as a witness was discussed, as well as the possibility that the Appellant would want to testify at the hearing.

Counsel for the CAO took no position as whether a settlement agreement had been reached.

The parties were advised that if MPIC was successful at the hearing, then the settlement agreement would be binding on the Appellant and her appeal at the Commission would be dismissed. If MPIC was unsuccessful, then the Appellant's appeal would proceed to the Commission and, in that case, the Commission would proceed to address evidentiary issues that had been identified some time ago during the case management process.

Following the case conference, the Commission wrote to the Appellant, Steve Scarfone and Sean Boyd, confirming the possibility that if, in the course of the hearing, there is evidence that the CAO may have exceeded its authority with respect to a settlement agreement, the settlement agreement might nevertheless be binding on the Appellant, and that, the Appellant may have other remedies to pursue, which would be beyond the scope of the hearing and beyond the jurisdiction of the Commission.

The Commission noted that it would also expect the parties to provide legal authorities at the hearing in regard to the question of whether a settlement agreement had been reached which would likely deal with the law of agency and the authority of an agent to bind a principal.

The Commission advised that, given the complexity of the matter, it would like to hear from the Appellant regarding the questions identified and regarding whether she had obtained new representation, and so another case conference would be scheduled.

On January 15, 2019, the Commission was advised that the Appellant would be represented by Helen Delaney of the Worker Advisor Office. A copy of the Commission's letter of November 29, 2018 summarizing the matters discussed at the case conference of November 27, 2018 was provided to Helen Delaney.

A further case conference was held on July 3, 2019. Steve Scarfone attended on behalf of MPIC and the Appellant attended, together with her representative, Helen Delaney. The Director of CAO, also attended the case conference, on a watching brief.

The Appellant confirmed that she did not intend to sign the settlement documents and disputed that there was a binding agreement between the parties. Helen Delaney indicated that she had reviewed the Commission's letter of November 29, 2018 and agreed with MPIC's position and the Commission's determination that it has jurisdiction and is the proper venue to hold a hearing into the issue of whether a settlement agreement had been reached between the parties.

The details of the hearing were reviewed with Ms. Delaney.

The parties agreed that the issue to be decided at the hearing was:

> Was a binding settlement agreement reached between the parties?

It was agreed that this issue could be broken down into two sub- issues, as follows:

> 1. Was a settlement agreement reached between MPIC and the Appellant; and
>
> 2. Did the CAO have the apparent authority to enter into that agreement on behalf of the Appellant.

The onus at the hearing would be on MPIC to establish the foregoing, on a balance of probabilities.

The Commission once again confirmed that if the evidence shows that the CAO may have exceeded its actual authority with respect to a settlement agreement, it may be possible that the settlement agreement is nevertheless binding on the Appellant. However, the Appellant may then have other remedies to pursue in that case, which would be beyond the scope of the hearing and beyond the jurisdiction of the Commission. It was agreed that if MPIC was successful at the hearing, then the settlement agreement would be binding on the Appellant and her appeal at the Commission would be dismissed. If MPIC was unsuccessful at the hearing, then the Appellant's appeal would proceed at the Commission in due course.

The parties indicated that the Appellant would be the only witness to testify at the hearing. Both parties indicated that they would be filing documentary evidence, including settlement documents, emails and letters and that the Appeals Officer would prepare an indexed file of these documents for use at the hearing, to be provided to the parties for review. The parties were advised to be prepared to provide the Commission with legal authorities to support their

respective positions and both indicated that they would be providing written submissions in this regard. The indexed file was provided to the parties and the dispute was scheduled for hearing before a panel of the Commission.

Evidence:

Documentary Evidence

Prior to the hearing, the panel and the parties were provided with documentation relating to the history of the appeal. This included hearing documents such as the Application for Compensation, case manager's decision, Application for Review, Internal Review Decision and the Notice of Appeal.

A Notice and Consent form authorizing the CAO to represent the Appellant, and including the collection, obtaining and disclosing personal health information, was also provided. The rest of the documents consisted mainly of email exchanges between the counsel for MPIC, CAO representative, and the Commission. The Notice and Consent form authorized the CAO to assist the Appellant in appealing the review decision to the Commission and authorized CAO to investigate and contain personal information in this regard as well as to disclose it for purposes connected to her claim. CAO was authorized to collect this information in order to:

- advise me about the meaning and effect of the provisions of *the Manitoba Public Insurance Corporation Act* and the Regulations and decisions made under that Act,
- carry out an investigation or inspection, including obtaining an expert opinion, about my claim, and
- communicate with and appear before the AICAC on my behalf.

The first email exchanges provided were from July 2016. The first email is from Terry Kumka, legal counsel to MPIC, and Janelle Pariseau, at that time the Appellant's advisor from the Claimant Adviser Office. It sets out terms of a possible settlement agreement to resolve the dispute in the Appellant's appeal.

Another group of emails from December 2016 sets out correspondence between Janelle Pariseau and the Appellant regarding the terms of another settlement offer which the Appellant ultimately advised she would not accept.

Due to personnel changes at the CAO, MPIC was advised by letter dated April 15, 2017, the Appellant had been reassigned to a new claimant adviser, Chad Panting. In addition, emails showed that new legal counsel Steve Scarfone, was also assigned for MPIC.

With new representatives assigned to the appeal, the Commission set out to schedule a case conference hearing to review the matter. In discussing dates for this, Steve Scarfone and Chad Panting also began to exchange some comments, again by email, for possible ways to resolve the appeal. Steve Scarfone proposed some terms and Chad Panting indicated that he would schedule a meeting to discuss it with the Appellant. However, he also noted that the Appellant was pregnant and dealing with anxiety/stress which could pose a health risk to the fetus. An email from Steve Scarfone to Chad Panting dated June 19, 2017 stated:

> Sounds good, hopefully she agrees to our proposal given her pregnancy. The reality is, and I'm sure you and Rebekah have thought of this, if she plans to make an assignment in bankruptcy, not much difference if it's the full amount that MPI is seeking to recover or half that amount, she will be relieved of either amount if she gets an absolute discharge. So she might be thinking why not go through with the appeal and perhaps get her benefits reinstated. That is where her pregnancy may become a factor in deciding (along with, of course, the advice your office provides on her chances of winning the appeal).

> I look forward to hearing from you.

Chad Panting's response to this came on June 21, 2017:

> I just finished my meeting with [the Appellant]. She agrees. I think the sooner we can have a MOA for her to sign the better. If you're in agreement, perhaps we should inform the Commission of the development so that we can Adjourn the June 30th deadline so that we can spend the week formalizing an Agreement and settling this appeal.
>
> [The Appellant] had one question I couldn't answer, perhaps you can assist me. The [text deleted] told her she'll lose her license if she goes into bankruptcy because the bankruptcy involves a debt to MPI. It doesn't sound like correct advice [the Appellant] received from the [text deleted]. Do you agree or will her driver's license indeed be effected (sic)?
>
> I apologize in advance because I have to leave early today[…]
>
> I look forward to hearing from you.

There does not appear to be an email response from Steve Scarfone to Chad Panting in this regard. The indexed file contains a handwritten MPIC legal file note dated June 23, 2017. It refers to a telephone call from "CAO re: [the Appellant]" and "Chad asking about her D/L when she files for bankruptcy". The note says "referred him to SCC decision in Maloney and the 407 Highway cases. MPIC can't withhold her D/L, her debt would be extinguished."

Also on June 23, 2017, Chad Panting wrote to inform the Commission that the CAO, the Claimant and MPIC legal counsel were in the midst of very productive discussions to resolve the Appellant's appeal. The parties had agreed, he indicated, to a "tentative settlement agreement" and therefore counsel was requesting, with the consent of both, an adjournment of the deadline for submission regarding evidentiary documentation which was due at the Commission. He indicated that both parties felt the upcoming week would be best spent drafting, negotiating, and formalizing the Memorandum of Agreement in order to resolve this appeal in a timely manner.

Subsequent emails show the parties in contact and discussing the Memorandum of Agreement ("MON") and Notice of Withdrawal ("NOW"). Chad Panting wrote to Steve Scarfone on June 28, 2017, indicating that he wanted to touch base about the Memorandum of Agreement and thus, Notice of Withdrawal, indicating that the Appellant is a challenging person to get a hold of, so scheduling a time for her to come into the city to sign the documents would require some heads up. He indicated that the sooner they had the matter signed and sealed the better; he did not want to lose momentum he had with the Appellant about the proposed agreement.

A series of emails between Steve Scarfone and colleagues at MPIC show attempts to arrange signing of the documentation. An email from Steve Scarfone to Chad Panting dated July 4, 2017 indicated the ARO (or Memorandum of Agreement) was attached and that he expected to have it signed tomorrow and would then send it over for the Appellant's signature.

On July 5, 2017, Chad Panting indicated that the earliest he would be able to have the Appellant attend the CAO for signature was Monday July 10. He undertook to advise the Commission's Appeals Officer that she could expect to receive a Notice of Withdrawal by Monday afternoon.

Copies of the documentation (with MPIC's signature) were then mailed to Chad Panting on July 5, 2017. Steve Scarfone followed up with an email asking for updates on July 17, 2017.

During an absence of Chad Panting from the workplace, the Director of the CAO at that time, Rebekah Powell, contacted Steve Scarfone to advise him there was nothing imminent. Steve Scarfone attempted to continue to follow up with Chad Panting on August 2 and September 15, 2017. On September 21, 2017, Rebekah Powell advised Steve Scarfone that Chad Panting could not respond as he was on medical leave.

Steve Scarfone then began to inquire of Rebekah Powell regarding the status of the signed documentation he was waiting for. An email from Rebekah Powell dated October 19, 2017 indicated that the Appellant's health prevented her from meeting with the CAO or dealing with the matter and that she intended to ask for an adjournment of the case conference which had been scheduled at the Commission on October 24, 2017. Steve Scarfone however, noted that he did not believe an adjournment would be necessary, "as this matter was settled back in June and MPI is now waiting on the return of the Appeal Resolution Agreement which was sent to the CAO on July 4, 2017." In an email to Rebekah Powell dated October 23, 2017, replying to her question of whether he felt a case conference was required, Steve Scarfone indicated that "I didn't even have tomorrow's CC in my calendar… Removed it along with all the timelines we had agreed to when we were there on May 24, 2017."

A series of redacted emails between the Appellant and Chad Panting from the Claimant Adviser Office between November 22 and December 4, 2017 were also provided. The Appellant expressed some difficulty in opening the documents on her computer and also stated:

> You also know how stressful this case is to me and how on the fence I am about signing an agreement and or going to a hearing. You know I want this done but is very hard for me to relive and go over but that something about signing the agreement doesn't feel right to me and I don't trust MPI. I have expressed to you my battle with what to do and the challenge I feel for it.

On December 4, 2017, Chad Panting emailed Steve Scarfone to advise:

> If you are available to meet briefly before the scheduled CCH time it might be useful for us to have a quick chat. I know this matter didn't progress as we had originally planned so I feel I owe you a quick explanation how this all unfolded and where the claimant is at. I'm not sure at the moment if the CAO will be continuing to provide representation for [the Appellant].

Testimony of the Appellant

The Appellant was the only witness to testify at the hearing.

She testified that she did not give the CAO authority to make a deal on her behalf. She indicated that she gave Chad Panting permission only to discuss and negotiate a deal but that she did not give him authority to accept a deal. She confirmed that MPIC never directly approached her with the settlement offer, and that this came only through the CAO. She never gave Chad Panting permission to accept an offer and did not make an agreement with MPIC. She indicated that although the CAO had emailed MPIC saying that she agreed to the settlement offer, she was not fully comfortable at that time with accepting and finalizing the agreement offered.

On cross-examination, the Appellant was asked to consider the representation agreement she signed in favor of the CAO in 2014. She indicated that she would have read it and that her understanding was that CAO was there to assist her but not represent her fully. She was asked to address the particular wording of the document and indicated that it was her understanding that they were there to assist her in her appeal.

On cross-examination, the Appellant insisted that she had never given the CAO authority to accept a deal. She gave permission to discuss the settlement agreement but did not give the authority to accept it. She understood that counsel might negotiate something in advance of coming to an actual hearing and that offers had been discussed contemplating the termination of her benefits and repayment, with MPIC seeking to recover approximately $25,000 from her. She agreed that at one point there had been an offer to waive half of that amount.

Counsel for MPIC went through and reviewed several emails in the indexed file with the Appellant. She admitted that she did consider accepting the offer, in order to have the matter done with, but that she never really felt comfortable with it. When the offer was made available to her again, through Chad Panting, the Appellant continued communicating with him by email,

in person, and once on the phone. In June 2017, they tried to set up a meeting, which was difficult because she had a high-risk pregnancy at the time. However, she did go into the CAO office on approximately June 21 to discuss the settlement proposal. She recalls meeting with Chad Panting although she does not have notes of the meeting. She recalls that she was pregnant, anxious, stressed and pacing. She told Chad Panting that the deal didn't feel right but she wanted her life back. She left the document unsigned and went into the washroom crying, telling him that she felt pressure from her representative. She then left in tears, without authorizing the settlement. She maintained that she never said yes to him that she would accept this deal.

Counsel asked why she referred to leaving the matter unsigned if she could not recall having a document in front of her. She indicated that she recalled pacing and going to the washroom, telling the CAO that she felt uncomfortable with the offer. She believed that in the general context it was not finalized, as it would need her signature on it.

Counsel asked the Appellant about the indication in Chad Panting's email that "she agrees". He suggested this means she agreed to the settlement proposal. The Appellant indicated that, absolutely not, this is not what it meant. To her it meant that Chad Panting could keep negotiating.

When asked about Chad Panting indicating that she may attend at his office on July 10 to sign the documentation, the Appellant agreed that he did want her to come in to sign the documents, but by then she was on bed rest, eight months pregnant with a high-risk pregnancy and so she could not guarantee that she was able to go in that day. She didn't recall a point where she sat and read the settlement agreement documents at a meeting where it was put in front of her, but

indicated that it was possible that they may have been emailed to her. She also recalled Chad Panting offering to come to her house to sign the agreements but she rejected that offer.

Counsel asked several questions regarding the events following her child's birth, but the Appellant's memory was less clear, as she indicated that she was struggling after the birth, taking care of her child and breast-feeding. She continued to experience anxiety in regard to her MPIC case.

The Appellant confirmed, in response to questions from counsel for MPIC, that prior to the last case conference at the Commission in this appeal, she had never met him and that she had never met Terry Kumka. Rather she had dealt exclusively with the CAO on this file.

In response to a question from the panel about how she viewed her relationship with CAO pursuant to the representation agreement, the Appellant indicated that she viewed CAO kind of like a middle person who were there to get her heard as she had a bad rapport with MPIC. She knew that they were not lawyers but that they were there to assist her, get her heard, negotiate and bring things back. She maintained that she always believed she would have the final say.

Submissions and discussion:

Section 174.2(2) of the MPIC Act provides:

> **Claimant adviser may assist**
>
> 174.2(2) A claimant adviser may assist a claimant in appealing a review decision to the commission by
>
> (a) advising him or her about the meaning and effect of the provisions of this Act, the regulations and decisions made under this Act;

(b) carrying out an investigation or inspection, including obtaining an expert opinion, respecting his or her claim; and

(c) communicating with or appearing before the commission on his or her behalf.

Onus:

The parties have agreed that the onus is on MPIC to establish, on a balance of probabilities that there is a binding settlement between the parties.

Issue:

The question for this panel is whether, in spite of the Appellant's ultimate rejection of this settlement, there was nonetheless a binding settlement between the parties.

Positions of the Parties:

MPIC's position was that the Appellant agreed to a settlement in June, but later reneged. In the alternative, counsel argued that if the panel accepts the Appellant's version of the facts that she did not agree, her representative indicated that she did agree, and MPIC can rely upon that.

The Appellant took the position that she never agreed to the settlement and that the CAO was not authorized to agree to it on her behalf.

Actual Authority - Settlement Agreement

Position of MPIC

Counsel for MPIC submitted that a binding settlement agreement was reached and that the CAO had actual authority to enter into this agreement. He maintained that any reference to the commitment of the terms of the agreement to writing (in the MOA and NOW) **did not** mean that

the parties had failed to reach a binding settlement during negotiations. The essential terms of agreement had been reached. He relied upon the decision in *Norwich Union Life Insurance Company (Canada) v. MGM Insurance Group Inc.,* 2003 MBQB 282, where the court was satisfied that the parties had reached an agreement on all essential terms (pursuant to Queen's Bench Rule 49.09), and all that remained was to document that settlement agreement.

MPIC's written submission urged the Commission to apply the following criteria:

1. *The parties must have had a mutual intention to create legal relations;*
2. *The agreement must contain consideration;*
3. *The terms of the agreement must be sufficiently certain;*
4. *There must be matching offer and acceptance on all terms of the agreement; and*
5. *Other requirements may apply in special circumstances.*

Counsel submitted that a signed document is not necessary for there to be a contract. Written agreements are only important for enforcing the settlement. All of the terms were sufficiently certain; there were no further discussions or negotiations and no disagreement following expressly stated acceptance. Based on these criteria, a binding agreement exists.

It was submitted that real or actual authority can be either expressed or implied.

He referred to the description of real or actual authority set out by the court in *1642190 Alberta Ltd. v. Paragon Industries Ltd.,* 2014 MBQB 35, at paragraph 30.

> *"Actual authority is created through a consensual agreement between a principal and an agent. The scope of that authority can be determined through the application of ordinary principles of construction of contracts, the usages of trade or the course of business between the parties."* (Paragraph 31)

Counsel submitted that although there may be no express authority for CAO to negotiate on behalf of the principal under section 174.2(2) of the MPIC Act, it is within the regular course of business for the CAO to negotiate settlement agreements with MPIC. More importantly, the conduct of the CAO representative, through his email correspondence, implied that he had the actual authority to negotiate and settle the appeal on behalf of the Appellant.

Position of the Appellant

Counsel for the Appellant argued that an agreement had not yet been reached, as the parties still contemplated the preparation and execution of an agreement in final form. She relied upon the decision of *Tether v. Tether*, [2008] S.J. No. 621 where the court stated:

> *"The effect of the decisions is that where the offer or acceptance is clearly expressed to be subject to the terms of a formal agreement to be prepared by the lawyers, in the absence of circumstances showing a contrary intention, the agreement remains inchoate, provisional, and the subject of ongoing negotiation until actual execution of the formal document by the parties, notwithstanding lawyers having previously agreed on terms.*
>
> *In summary, there can be three distinct lines of inquiry. Firstly, was there a "meeting of the minds", or* consensus at idem, *that was manifest to the reasonable observer. Secondly, was there consensus on all the essential terms of the agreement, for if a material term is not resolved, and is left vague and imprecise, without the tools to refine it, the agreement is illusory and the parties are simply asking the court to make an agreement for them. Thirdly, did the parties make their agreement conditional upon, and subject to, execution of a formal document."* (paragraphs 61 and 62)

The decision in *Tether* indicates that for there to be a binding agreement one must consider:

1) whether there was a meeting of the minds;

2) whether there was consensus on all essential terms and;

3) whether the parties made the agreement conditional upon or subject to the execution of formal documents.

Counsel for the Appellant submitted that, on the evidence before the panel, it was clear that there was no meeting of the mind or consensus as the Appellant had not authorized the CAO to accept this settlement.

The Appellant testified that she did not see eye to eye with Mr. Panting and had made no representation at all to MPIC, never having dealt with them directly. She said she gave CAO authority to negotiate but never gave them permission to accept or decide. She understood that CAO acted as more of a mediator to help her be heard by MPIC.

She described her meeting with Mr. Panting as being for the purpose of discussing everything in person, recalling how difficult it was for her to even attend, due to her advanced high risk pregnancy. She felt pressure and stress and recalled considering the settlement agreement but rejecting it, leaving the meeting without signing anything.

It was submitted that this was the only evidence heard by the panel and that it strongly confirms that the Appellant was never comfortable with MPIC's offer, the CAO was not authorized to accept it and no agreement had ever been reached on that basis.

Discussion

MPIC takes the position that whether or not the agreement was reduced to writing, the CAO was authorized to agree to the settlement offer and a settlement agreement was entered into.

The Appellant says that the CAO was not authorized to accept the offer and that her refusal to sign the documents confirmed her position that no settlement agreement was reached.

In submitting that a binding agreement had been reached, counsel for MPIC relies primarily upon the email sent by Mr. Chad Panting to him on June 21, 2017 which states:

> *"Hi Steve,*
>
> *I just finished my meeting with [the Appellant]. She agrees. I think the sooner we can have a MOA for her to sign the better. If you are in agreement, perhaps we should inform the Commission of the development so that we can Adjourn the June 30th deadline so that we can spend the week formalizing on Agreement and settling this appeal.*
>
> *[The Appellant] had one question I couldn't answer, perhaps you can assist me. The [text deleted] told her she'd lose her license if she goes into bankruptcy because the bankruptcy involves a debt to MPI. It doesn't sound like correct advice [the Appellant] received from the [text deleted]. Do you agree or will her driver's license indeed be effected?*

Subsequent emails back and forth between Mr. Scarfone and Mr. Panting discuss arrangements for the Appellant and MPIC to sign the appropriate documentation (MOA, NOW) sometimes referring to this as a tentative settlement agreement and at other times as a matter which had settled.

MPIC submits that Mr. Panting intended these words to settle the matter and that any reference to the written terms should be considered as part of the separate question of the execution of the agreement, separate and distinct from the formation of the contract which has already been completed.

Mr. Panting was not called to testify and Mr. Scarfone, who continued to represent MPIC as counsel in this dispute, was not able to testify as a witness in the matter. As a result, no evidence was heard in this regard beyond the exchange of emails in the documents on file.

The email, when considered as a whole, may be capable of different interpretations. Clearly, by using the words “she agrees”, Mr. Panting led MPIC to conclude that the terms of settlement were agreeable to the Appellant. But in considering the whole paragraph, we also note that the next sentence includes a reference to the preparation of the Agreement to settle this appeal, while the rest of the email then goes on to raise questions for discussion regarding bankruptcy and the status of her driver’s license.

The panel agrees that express authority to negotiate settlement agreements is not contained in the MPIC Act or the representation agreement. Section 174.2 (2) of the MPIC Act does not set out statutory authority for the CAO to negotiate on behalf of appellants. Nor does the representation agreement executed by the Appellant in favour of the CAO set out such authority. However, we also agree that it is common and standard practice for the CAO to negotiate settlement agreements, both at mediation and appeals at the Commission.

The Appellant’s testimony was clear that while she had given the CAO actual authority to negotiate on her behalf, she did not give them the authority to conclude a settlement without her concurrence. This evidence was not shaken in spite of vigorous cross-examination. The panel did not hear any contradictory evidence to establish that the CAO representative was specifically authorized to agree to this settlement. MPIC did not call any evidence regarding the express authority given to the CAO by the Appellant, relying instead upon the documentary evidence, including the representation agreement and email exchanges.

Mr. Panting was not called to testify and the Appellant’s counsel argued that his email was not clear, and could be interpreted to indicate there were still material terms between the parties which required further discussion and review.

Without testimony from Mr. Panting, we are unable to make a finding regarding the intention behind this wording.

Therefore, in the absence of testimony to the contrary, and given the lack of explicit authority in Section 174 and the representation agreement, we have given greater weight to the testimony of the Appellant and find that the Appellant did not authorize the CAO to bind her in this regard.

Based upon the documentary evidence and testimony before us, we have concluded that MPIC has failed to establish that the CAO had actual authority to conclude this settlement agreement. The panel is unable to conclude, based upon the limited information and evidence before us, that MPIC's offer was accepted and authorized by the Appellant and that a binding settlement was reached.

However, MPIC has submitted that it relied upon Mr. Panting's representation and his authority as CAO to bind the Appellant to this agreement.

Agency – Apparent or Ostensible Authority:

In addressing MPIC's suggestion that the Appellant is bound to the settlement agreement by an indication from the CAO to MPIC that she had agreed to it, the panel has gone on to consider MPIC's alternative position that even if the CAO did not have actual authority to settle this agreement and exceeded his authority, he was cloaked in the apparent authority to do so.

Position of MPIC

Counsel for MPIC submitted that as the agent of the Appellant, the CAO had both the actual and apparent (or ostensible) authority to bind her to the settlement agreement with MPIC.

He submitted that even without actual authority, a third party to the agency relationship between the CAO and Appellant can rely upon the doctrine of apparent or ostensible authority. When an agent exceeds his authority, the doctrine of estoppel may apply to bind the principal.

The written submission for MPIC set out the following description of this type of authority:

> *""Apparent or ostensible authority forms a relationship of agency by the application of the doctrine of estoppel. Fill-More Seeds Inc. v. Johnson, 2004 SKQB 525 at 26 refers to Fridman's Law of Agency at p. 111 to explain that the law will operate to:*
>
> > *"... protect third parties who may have acted on the reasonable inference that a relationship of principal and agent existed between the parties. Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that the person relies upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person suffering some kind of detriment. Applied to agency, this means that a person who by words or conduct has allowed another to appear to the outside world to be his agent, and with the result that third parties deal with him as his agents, cannot afterwards repudiate this apparent authority."*
>
> *When an agent exceeds his authority, the doctrine of estoppel may apply to bind the principal. MPIC takes the position that the CAO was operating with the requisite authority to bind [the Appellant]. In the alternative, if the Commission finds that the CAO exceeded their authority in agreeing to the settlement, the doctrine of estoppel would prevent any repudiation of such agreement. [the Appellant] did not object to the CAO acting on her behalf and the CAO indicated that she had agreed with the settlement proposed by MPI.""*

MPIC submits that even if the CAO did exceed his authority, the doctrine of agency by estoppel should apply to bind the Appellant.

Position of the Appellant

Counsel for the Appellant submitted that the evidence confirms that she did not represent to MPIC, expressly or though her conduct, that the CAO had authority to enter into the agreement. Neither the MPIC Act nor the representation agreement set out such authority for CAO to enter

into an agreement on her behalf. The CAO was her representative but did not have the power to act as an agent or a lawyer, and for Mr. Panting to say that she "did agree" to the terms when, as the evidence shows, she did not, this would not be a proper representation. It was submitted, therefore, that the CAO had neither the actual or the apparent authority to bind the Appellant to this agreement.

Discussion

Given our finding that the CAO lacked the express authority to accept this settlement, the panel has reviewed the comments of the court in *Fill-More Seeds Inc. v. Johnson*, supra, at the end of paragraph 26:

> *"...Agency by estoppel, or agency by apparent authority, is not so much concerned with the creation of an agency relationship as with the extension. Where an agency relationship exists, having been created by agreement between the parties, but is limited by the principal in a certain way, or for a certain purpose estoppel may apply. If the agent exceeds his authority, the doctrine of estoppel may operate to bind the principal…"*

In Manitoba, the court in *Man-Shield Construction Inc.* [2015] MJ No. 182 reviewed *Fridman*'s description of agency by estoppel, at paragraph 41.

> *"Fridman states that an agency by estoppel, in which the agent is said to have ostensible or apparent authority to act for the principal even though there is no actual agency, requires the following:*
>
> *(i) a representation by the principal to the third party that the agent has authority to act on his or her behalf;*
>
> *(ii) a reliance on the representation by the third party; and*
>
> *(iii) an alteration by the third party resulting from the reliance.*

The court then examined whether *objectively*, based on the communications and conduct of the parties, there was a mutual intention to create a settlement agreement.

Accordingly, if the CAO did represent to MPIC, in excess of his authority, that the parties had reached a binding settlement agreement, the panel must decide whether the Appellant is estopped from repudiating or denying this unauthorized agreement, in order to protect MPIC as a third party who has acted to its detriment, by relying upon the reasonable inference that the CAO was operating with the requisite authority to bind the Appellant to the settlement.

The *Fridman* text and the decisions referred to above approach apparent or ostensible authority as a principle of agency by estoppel, an equitable remedy. In considering whether to apply the principles of agency by estoppel to enforce a settlement agreement in this case, the panel has reviewed several of the considerations set out by the courts in the *Fill-More Seeds Inc.*, *Paragon Industries Ltd* and *Man-Shield Construction Inc.* decisions.

For MPIC to establish a case of apparent authority through the equitable principle of agency by estoppel, the panel must consider whether enforcing a promise to settle the appeal will avoid injustice to MPIC as a third party who was unaware that the CAO may have exceeded his authority and should be protected by the principle of agency by estoppel.

Relevant Principles:

Representation by the Principal

MPIC submitted that:

> *"…More importantly, the conduct of the CAO, through their correspondence, implied that they had the actual authority to negotiate and settle the appeal on behalf of [the Appellant]."*

For such authority to be implied from conduct, the conduct reviewed should include conduct of the principal, the Appellant, and not only the conduct of her agent, the CAO.

The court in *Man-Shield Construction Inc.*, supra, referred, at paragraph 41, to the *Fridman* text in describing the first requirement as a representation by the principal.

> *Fridman describes the first requirement of a representation by the principal as follows at pp. 114-15:*
>
> > *First there must be some statement or conduct* ***on the part of the principal*** *which can amount to a representation that the agent has authority to act on his behalf in the way he is acting…* ***the relevant representation must come from the principal: it cannot come from the agent himself.*** *Ostensible authority is created by representation by the principal to the third party that the agent has the relevant authority;… Such statement or conduct must be clear and unequivocal. Hence if the conduct by the principal is capable of being interpreted in a way which does not accord with the granting of authority to an agent no estoppel can arise…"*

In examining whether there has been a representation which caused or allowed MPIC to believe that an agreement exists, the panel has reviewed the conduct of the principal, the Appellant.

As noted by the court *1642190 Alberta Ltd. v. Paragon Industries Ltd.*, supra, at paragraph 38.

> *"The most common form of representation giving rise to apparent authority is by conduct. Where the principal permits the agent to act in some way in the conduct of its business and in so doing represents to third parties that the agent has the authority to enter, on behalf of the principal, the usual kinds of contracts as would be expected of an agent in that position, the agent can be found to have apparent authority."*

The court in *Fill-More Seeds*, supra, adopted *Fridman* in noting that:

> *"…Applied to agency, this means that a person who by words or conduct has allowed another to appear to the outside world to be his agent, and with the result that third parties deal with him as his agents, cannot afterwards repudiate this apparent authority."*(see paragraph 26)

According to counsel for MPIC, the engagement of the CAO by the Appellant was enough to represent to MPIC that the CAO had complete authority to act on her behalf, even though the Appellant submitted that the representation agreement form and Section 174.2(2) of the MPIC

Act do not refer to negotiation.

The panel has examined the actions and statements of the principal in this appeal, as distinct from those of her agent. The Appellant had no further contact with and made no further representations to MPIC, after executing the representation agreement authorizing the CAO to represent her at the Commission.

The panel must examine whether it was reasonable to conclude here that an appellant who has engaged the CAO but is not in contact with MPIC and is not present at negotiations or party to email correspondence, could have any control over the actions of a CAO who chooses to exceed his authority in these exchanges.

We accept the Appellant's uncontradicted testimony that she did not authorize and was not even aware of Mr. Panting's email to Mr. Scarfone. She testified that she does not recall the emails which followed, as she had been on bed rest at the time.

Although the CAO may have represented to MPIC that he had the authority to conclude the settlement agreement, we find that the Appellant herself did not make representations which would support such an inference.

Detrimental Reliance

Another essential element in finding apparent authority is detrimental reliance on the part of MPIC. The representation must cause the third party to act upon it to his or her detriment, so the panel has examined the actions of MPIC in this regard.

> *"… Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that the person relies upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person suffering some kind of detriment."* (*Fill-More Seeds Inc.,* supra, paragraph 26)

The panel finds that MPIC has not established detrimental reliance to this extent. MPIC did not make specific reference to what prejudice it might suffer, although we can speculate that the conclusion of a settlement agreement would allow it to avoid further negotiations and proceedings before the Commission. There was no evidence provided or arguments advanced by MPIC which described or referred to the specific prejudice MPIC might suffer in this regard, such as possible interest payments or loss of case management opportunities.

We find that MPIC has not met the onus upon it of showing that it relied to its detriment upon a representation such that the panel should grant the extraordinary, discretionary remedy of equitable estoppel.

Reasonable Inference

The panel has also examined whether MPIC acted upon a reasonable inference in relying upon the CAO's authority to conclude the proposed settlement agreement.

> *"…For agency by estoppel to arise special requirements must be fulfilled and different policies underlie the action of the law in recognising and enforcing an agency relationship were none was previously agreed upon between the parties. In these instances, the law is concerned to protect third parties who may have acted on the reasonable inference that a relationship of principal and agent existed between the parties."* (*Fill-More Seeds Inc.,* supra, paragraph 26)

As noted, the case law emphasizes the importance of considering the overall conduct of the parties in the matter, in the ordinary course of business in the field. The standard is objective, and

based upon whether a reasonable person or bystander would perceive that there is an agreement in place.

> *Fridman, in The Law Of Contract in Canada states this:*
>
> > *Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of an objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. ...*
>
> *The opinion offered by the husband's lawyer that an agreement had been reached does not satisfy the test. Subjective belief in the existence of an agreement is not what matters.*" (*Tether*, supra, paragraphs 54-56)

The panel can understand how counsel for MPIC, looking at the matter subjectively, believed that an agreement had then been concluded. But the appropriate test is not a subjective one.

In *Apotex Inc. v. Allergen Inc.* [2016] FCA 155, the Federal Court of Appeal stated:

> *"Accordingly, evidence into the actual state of mind or subjective intention of the parties is irrelevant... Where the parties are exchanging written communications, intentions are to be measured by an objective reading of the language chosen by the parties to reflect their agreement..."*
>
> *...*
>
> *"The whole course of the parties' negotiations must be considered and an objective test must be applied..."* (paragraphs 48 and 50)

In *Man-Shield Construction Inc.*, the court considered whether it was reasonable of Renaissance to conclude that the son had authority to bind the father to a settlement agreement. In finding that the father had not cloaked the son with settlement authority and that the parties had not

established that there was a representation of authority to settle through some statement or conduct on the part of the father, the court stated:

> *"Furthermore, based on all the evidence, including that of the Man-Shield parties, I find it improbable that Tom would have cloaked Brad with settlement authority because of Tom's approach and involvement respecting the project and the construction litigation. Tom regularly conducted himself in a manner that indicated that he, not Brad, had authority with respect to the project and the construction litigation…"* (paragraph 59)

Although we have concluded that, through the ordinary course of business, CAO was authorized to negotiate such settlement agreements, it is also the practice of the Commission to defer the closing of an appeal file until it has received confirmation from the parties that a settlement agreement or MOA has been signed by the appellant and MPIC and that a NOW signed by the appellant has been received by the Commission.

The panel has also reviewed evidence of the conduct of the Appellant in previous negotiations with other representatives for both the CAO and MPIC in considering whether MPIC's reliance on the wording of the CAO's email was reasonable in the circumstances. The evidence of the Appellant's past conduct in negotiations for this appeal showed that the Appellant had previously rejected such settlement offers, even when recommended to her by the CAO.

Overall, the panel does not find that it was reasonable, on an objective standard, for MPIC to conclude that it had an enforceable agreement simply on the strength of words in the CAO's email that "she agrees". We find that, given the Appellant's history in this appeal of carefully scrutinizing, and rejecting, past proposed and recommended settlement offers, MPIC's reliance upon this settlement as binding, while simultaneously awaiting and pursuing receipt of a signed MOA and NOW, was not reasonable in the circumstances of this case. MPIC is an experienced and sophisticated insurer with legal representation in these matters, while the other party is an

unsophisticated appellant represented by a public service advocate/advisor and not a practising lawyer. Having considered the overall conduct of the parties in the matter, in the ordinary course of business, on an objective standard, we do not find that it was reasonable to rely upon a binding settlement agreement only on the strength of the CAO's words, that "she agrees".

The remedy sought by MPIC in enforcing a settlement agreement which may have exceeded the CAO's authority is based upon principles of estoppel, an equitable remedy. In determining whether to exercise our discretion to apply this equitable remedy, we have considered all the circumstance of the case, including the representations made by the Appellant, possible detrimental reliance by MPIC, and the reasonableness of MPIC's conclusion that an agreement had been found. We have also considered both MPIC's reliance upon the CAO's representations alongside the prejudice which could arise for the Appellant if she forced to comply with an agreement that she does not want and did not authorize, but that her advocate may have agreed to on her behalf.

Summary:

Based upon the documentary evidence and the testimony reviewed above, the panel finds that:

1) There is insufficient evidence to establish, on a balance of probabilities, that the CAO's words "she agrees" meant that the settlement had been accepted;

2) The Appellant did not expressly authorize the CAO to accept the settlement offer;

3) Notwithstanding the above, MPIC concluded, based on the CAO's email statement "she agrees", that the Appellant had accepted the settlement offer.

The panel has considered the following factors:

a) S. 174.2 (2) of the MPIC Act;

b) the representation agreement between the Appellant and CAO;

c) the ordinary course of business in the field;

d) the testimony of the Appellant that she did not authorize CAO to accept the settlement on her behalf;

e) the lack of testimony from Mr. Panting as to what actual authority the Appellant had given to him in this regard;

f) the lack of evidence of representation by the Appellant to MPIC that CAO had the authority to accept a settlement offer for her;

g) the flow of emails between Mr. Scarfone and Mr. Panting (which at times referred to a settlement agreement and at other times referred to a tentative settlement agreement, as well as potential discussions regarding additional issues, and ongoing attempts to draft and sign documents) and the lack of evidence regarding the background behind the wording in this correspondence;

h) the lack of evidence or submissions from MPIC regarding the element of detrimental reliance;

i) a consideration of the reasonable inference which can be made on the evidence; and

j) the relevant principles to be considered in the application of the discretionary remedy of equitable estoppel.

The panel finds that MPIC has failed to establish that the Appellant gave the CAO actual authority to agree to the terms of settlement. Therefore, based upon the relevant factors noted above, the panel finds that MPIC has failed to establish, on a balance of probabilities, that the terms of a settlement agreement were authorized and concluded between the parties.

The panel also finds that MPIC has failed to establish that a clear and unequivocal representation was made by the Appellant to MPIC which induced it to rely, to its detriment, upon representations from the CAO which may have exceeded his authority. Therefore, the panel will not exercise its discretion to enforce a settlement agreement through the principles of apparent (ostensible) authority, or agency by estoppel.

Accordingly, MPIC's motion to dismiss the Appellant's appeal on the grounds that the matter is the subject of a binding settlement agreement between the parties is dismissed and the merits of the Appeal may proceed before the Commission.

Dated at Winnipeg this 12th day of February, 2020.

LAURA DIAMOND

JANET FROHLICH

DR. LORNA TURNBULL