

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-146**

PANEL: Karin Linnebach, Chairperson
Leona Barrett
Linda Newton

APPEARANCES: The Appellant, [text deleted], was self-represented;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ashley Korsunsky.

HEARING DATE: May 23, 2019 and December 5, 2019

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

RELEVANT SECTIONS: Section 182.1(1) of The Manitoba Public Insurance
Corporation Act (the 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

Issue and Determination:

The only issue before the Commission at this hearing was whether the Commission should dismiss all or part of the Appellant's appeal on the ground that the Appellant had failed to diligently pursue his appeal.

Following a review of the documentary evidence, the testimony of the Appellant and the submissions of the parties, the Commission has concluded that the Appellant has failed to diligently pursue his appeal and dismisses his appeal.

Background:

The Appellant was injured in motor vehicle accidents (MVAs) on May 8, 2009 and August 26, 2010. An MPIC case manager issued decisions on June 11, 2013, June 14, 2013, June 27, 2013 and July 8, 2013. The Appellant disagreed with these decisions and completed an Application for Review on July 17, 2013. On March 3, 2014, an MPIC Internal Review Officer issued an Internal Review Decision denying the Appellant's Application for Review and upholding the case manager's decisions. The Appellant filed a Notice of Appeal on March 10, 2014.

The Appellant was originally represented by the Claimant Adviser Office (the CAO). On May 8, 2015, the Commission was advised that the CAO was no longer representing the Appellant with respect to his appeal. On June 15, 2015, the Appellant advised the Commission that he was considering hiring legal counsel to represent him on his appeal. On July 3, 2015, the Appellant confirmed with the Commission that he wished to hire legal counsel and requested further time to do so. On December 9, 2015, the Commission wrote to the Appellant, inquiring whether he had retained a lawyer and requested that he contact the Commission. The Appellant did not respond.

The first case conference was held on March 2, 2016. The Appellant was present and again indicated that he wished to pursue obtaining legal counsel. Discussion was had about documents for the appeal. The Appellant was asked to notify the Commission if he retains legal counsel. The next case conference was scheduled for June 7, 2016.

The Appellant attended the June 7, 2016 case conference. A reporting letter was sent to the parties dated June 16, 2016, which outlined the discussion held at the case conference. The issues under appeal and documents for the appeal hearing were reviewed. The Appellant again indicated he may wish to obtain legal counsel. The next case conference was scheduled for September 20, 2016.

The Appellant attended the September 20, 2016 case conference and a reporting letter was sent to the parties dated September 27, 2016.

The next case conference occurred on January 26, 2017 and the Appellant attended. A reporting letter was sent to the parties dated February 1, 2017. A copy of the Commission's Guidelines for Hearing was sent to the Appellant.

A case conference was scheduled for July 5, 2017. The Appellant did not attend. The Commission was able to reach the Appellant by telephone. He advised that he did not attend the case conference because he had forgotten about it and that he was not prepared to proceed by teleconference. Although the Appellant agreed that the Commission could call him back within a few minutes for the purpose of scheduling the next case conference, the Appellant did not answer the phone as arranged.

The next case conference took place on September 28, 2017. Despite receiving the notice of the case conference, the Appellant did not attend. The case conference proceeded in his absence. After the case conference had concluded, the Appellant's girlfriend contacted the Commission to advise that she and the Appellant were in a motorcycle accident on July 30, 2017 and that was

why the Appellant was unable to attend the case conference. The Appellant's girlfriend had intended to participate in the case conference on his behalf.

A reporting letter was sent to the parties dated October 4, 2017. The Appellant was advised that he had not authorized his girlfriend to represent him and therefore she cannot attend case conferences on his behalf. The Commission enclosed a form which the Appellant could complete if he wished his girlfriend to be appointed as his representative. The Commission also noted that the appeal had been subject to several delays. Accordingly, the Appellant was required to submit all of his medical documentation by November 1, 2017.

The Appellant did not provide any medical reports by the November 1, 2017 deadline. On November 9, 2017, the Appellant telephoned the Commission and advised that he was not sure if he wished to appoint his girlfriend as his representative and indicated he was considering hiring legal counsel. On November 28, 2017, the Appellant advised the Commission that it was still his intention to obtain a report from his chiropractor. By letter dated December 13, 2017, the Appellant was advised that he had until February 1, 2018 to submit the report from his chiropractor. The Appellant was also contacted by telephone on December 20, 2017 to advise of same.

By letter dated February 7, 2018, the Appellant was advised that as the Commission had not received a response from the Appellant, the Commission assumed the Appellant was no longer seeking a report from his chiropractor. Accordingly, MPIC was requested to seek its final review with Health Case Services (HCS), after which the matter would be scheduled for a case conference so a hearing date could be set. The parties were asked to consider whether they would have witnesses testify at the hearing.

On September 4, 2018, the Commission wrote to the Appellant enclosing the HCS report. The Appellant was advised that a case conference would be scheduled for the purpose of setting a hearing date. The September 4, 2018 letter with enclosures was sent to the Appellant by Xpresspost. On September 26, 2018, the package to the Appellant was returned to the Commission as “unclaimed”. As a result, the Commission attempted to contact the Appellant by telephone, but the telephone number provided to the Commission was no longer in service.

The Commission was able to find an alternate phone number for the Appellant. The Commission contacted the Appellant at that telephone number on September 27, 2018 to schedule the case conference. The Appellant answered the telephone, but indicated he was busy and asked that the Commission contact him later in the day. The Commission tried to contact the Appellant five times between September 27, 2018 and October 1, 2018. As the Appellant did not answer those calls and had not contacted the Commission, a case conference was scheduled for January 9, 2019. Documents, including the HCS report, were also sent to the Appellant.

On January 7, 2019, the Commission attempted to contact the Appellant to remind him of the case conference. The Commission was unable to leave a message.

The Appellant did not attend the January 9, 2019 case conference. As a result, the Commission determined it would schedule a hearing to consider whether the Appellant has failed to diligently pursue his appeal and therefore whether the Appellant’s appeal should be dismissed. Letters were sent to the Appellant dated January 10, 2019 and January 17, 2019 advising him of same.

On February 12, 2019, the Appellant contacted the Commission and indicated that he wished to pursue his appeal. MPIC advised that it was MPIC’s position that the Appellant has failed to

diligently pursue his appeal. Accordingly, the matter was set for hearing to determine whether or not the Appellant has failed to diligently pursue his appeal.

Order of Proceedings:

At the commencement of the hearing on May 23, 2019, the Appellant arrived without any of his documents for the hearing. He stated that his girlfriend had his documents and he didn't know where she put them. As a result, the hearing was adjourned so copies of the documents could be provided to the Appellant. He was also given time to read the documents. However, the hearing was unable to continue at that time and the matter was further adjourned to December 5, 2019. The hearing proceeded as scheduled on December 5, 2019.

The Appellant Evidence and Submission:

The Appellant stated that he requested a report many times from his chiropractor, but his chiropractor did not complete the report. Once the February 1, 2018 deadline passed, he did not continue trying to obtain a report from his chiropractor.

The Appellant stated that he has had domestic issues, which have been "quite a big part" of why he hasn't gotten much done on his appeal. He claimed the Commission's staff asked him to have his girlfriend represent him and she was supposed to attend the January 9, 2019 case conference on his behalf. He thought he signed a form appointing his girlfriend as his representative. With the "domestic issues" he was having with his girlfriend, it wasn't a surprise to him that his girlfriend didn't show up and represent him. He submitted that she has sabotaged him.

He stated that his domestic situation was intolerable and that he separated with his girlfriend on October 2019. He claimed his girlfriend caused him to be arrested and that he was incarcerated for a period of time. He refused to provide the dates that he was incarcerated.

He doesn't have any money to hire legal counsel for his appeal because he is paying for a criminal lawyer. He has no one who can assist him with his appeal and he can't even find all his documents. In response to the question about why he cannot represent himself on his appeal, the Appellant stated that he is not good in dealing with these type of issues and that representing himself is not a "good idea".

The Appellant stated that he feels he needs to hire legal counsel, but stated that he is now financially strapped. He will hire legal counsel as soon as he financially able. He was not able to provide an estimate as to when that would be because he is in the "biggest rut" in his life. The Appellant spoke about issues relating to the merits of his appeal, such as about wanting to be retrained by MPIC.

MPIC's Submission:

Counsel submitted that the only issue before the panel is whether the appeal should be dismissed because the Appellant has failed to diligently pursue the appeal. Counsel referred to the Commission's decision of AC-14-115, which outlines what one considers when adjudicating whether an appellant failed to diligently pursue the appeal. This concerns whether an appellant has provided reasonable excuses or adequate reasons for absences or omissions and does not require a consideration of the merits of the appellant's appeal.

Counsel submitted that a review of the totality of the history of the Appellant's appeal shows the Appellant has failed to provide reasonable excuses and therefore failed to diligently pursue his appeal. The Appellant failed to provide evidence, discuss the scheduling of case conferences and attend case conferences. Counsel submitted the Appellant has made no real effort to advance his appeal since January 2017, nearly three years ago.

Despite advising the Commission for over a year that he would obtain a report from his chiropractor, no report was ever provided. In January 2017, the questions that could be posed to his chiropractor were reviewed in the case conference. Eventually a deadline was set for November 2017 for the Appellant to obtain a report. On November 9, 2017, the Appellant said he would attend to his chiropractor to get an update on the status of the report. A further extension was granted by the Commission. No report was ever provided. Further, the Appellant never updated the Commission on the status of the report.

The Appellant also refused to pursue his appeal by refusing to set dates for case conferences. On July 5, 2017, the Appellant did not attend the case conference. When reached by telephone, he indicated that he had forgotten about the case conference and agreed that the Commission could call him back to schedule the next case conference. When the Commission called him back a few minutes later, the Appellant didn't pick up the telephone.

The Commission attempted to contact the Appellant by telephone when correspondence was returned to the Commission marked "unclaimed". The Appellant's telephone was no longer in service. Commission staff searched through the Appellant's file trying to find an alternate phone number for the Appellant. An alternate phone number was found and the Appellant answered when he was called at this number. However, the Appellant advised Commission staff that he

was busy in a meeting and asked to be called back later. When the Commission staff person called back later, an individual answered, advised that the Appellant was not home, confirmed that this was the Appellant's cell phone and asked that they call back later. Commission staff did in fact call the Appellant later that day and subsequent days. The Appellant failed to return the call even though he knew the Commission was trying to reach him. The Appellant has failed to provide any reasonable explanation as to why he failed to contact the Commission even though he knew they were trying to contact him about his appeal.

A letter was sent to the Appellant on October 2, 2018. There is no indication that the Appellant did not receive this letter. A case conference was scheduled for January 9, 2019. The notice of case conference was not returned to the Commission. Nonetheless, the Appellant did not attend the January 9, 2019 case conference and provided no reasonable explanation as to why he failed to attend.

Following the January 9, 2019 case conference, letters were sent to the Appellant dated January 10, 2019 and January 17, 2019, indicating that a failure to pursue hearing would be scheduled. Despite receiving these letters, the Appellant did not respond for over a month at which time he left a message stating that he wished to pursue his appeal. This was the first time the Commission heard from the Appellant since September 2018.

Counsel reviewed s. 182.1(1) of the MPIC Act and submitted that the word "diligently" qualifies the word pursue. Counsel submitted that the analysis is not about the Appellant's intention, but rather his actions. Counsel referred to the definition of diligence and diligent in the 2nd edition of the Oxford Canadian Dictionary. Diligence is defined as careful and persistent application of effort; diligent is defined as careful and steady in application to one's work or duties and

showing care and effort. Counsel submitted that the Appellant's actions have either been absent or quite far from diligent.

The Appellant has failed to provide a reasonable explanation for missing the case conferences. He forgot on July 5, 2017. He provided no reason for not attending on September 28, 2017. He wasn't sure why he didn't attend on January 9, 2019. While he claimed he thought his girlfriend would be dealing with it, he was the one who was speaking directly with Commission staff. The evidence shows that the Appellant never completed the form appointing his girlfriend to represent him. This is consistent with his call to the Commission on November 9, 2017, where he stated that he wasn't sure if he would appoint his girlfriend to represent him.

Considering his actions to date, there is no assurance that the Appellant will actually pursue his appeal. He's acknowledged he doesn't like dealing with this. At the same time that he states that he needs representation, he states that he does not have sufficient funds for representation.

Counsel referred Commission decision AC-14-115. In that case, the appellant failed to provide evidence, failed to attend case conferences and failed to provide medical reports. Considering the documents before it, the Commission found that the appellant's health was not a reasonable excuse for her failure to pursue the appeal. Even though the appellant provided some medical evidence as an explanation of her actions, the appeal was still dismissed.

Counsel referred to decision number 2007-02651 of the B.C. Workers' Compensation Appeal Tribunal (the WCAT). Issues before the WCAT included whether the worker had provided adequate reasons for his failure to attend a WCAT hearing and whether the worker's appeal should be dismissed. Counsel referred to the lists of examples of adequate reasons and

inadequate reasons for failing to attend a hearing. Counsel submitted that the Appellant has failed to provide adequate reasons for his actions to date.

Counsel submitted the Appellant has failed to diligently pursue his appeal and that it is insufficient for him to state that he now intends to pursue his appeal. As the Appellant has failed to diligently pursue his appeal, the Commission should dismiss his appeal.

The Appellant's Reply Submission:

The Appellant reiterated that he cannot afford a lawyer right now. He's currently on a fixed income. He was diligent in trying to get the report from his chiropractor. He can't force his chiropractor to provide a report.

The Appellant submitted he's been diligent overall. He's tried to do what he can and it is very hard for him. Now he has no choice but to handle his appeal himself and he will be more than diligent pursuing it. He's not asking for more than he deserves. His life was ripped apart by the MVAs. He wants to be retrained, compensated for his medications and reimbursed for the chiropractic treatments he underwent. He submitted he is not asking for anything out of line. He made the wrong choice to have his girlfriend deal with this. He submitted he's gone over and above in his attempts to get what he deserves from MPIC. This is not fair and that is why he needs a lawyer.

Findings and Analysis:

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

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 182.1 of the MPIC Act does not require a consideration of the merits of the appeal. Subsection 182.1(1) requires that the Commission be of the opinion that the Appellant has failed to diligently pursue the appeal.

The evidence shows that the Appellant failed to return the Commission's telephone calls on several occasions and missed case conferences without a reasonable explanation. On July 5, 2017 the Appellant failed to attend a case conference because he forgot. We do not find that to be a reasonable excuse. Further, when the Commission staff called him to schedule the case conference as arranged, he didn't answer the telephone.

The Appellant did not attend the September 28, 2017 case conference. His girlfriend called the Commission and said that they had been in an MVA two months earlier and that the Appellant was in pain. The Appellant had not notified the Commission that he would not be attending the case conference.

The Commission's September 4, 2018 letter with enclosed documents were returned to the Commission on September 26, 2018 marked "unclaimed". The Appellant has provided no explanation as to why these documents were "unclaimed" by him. Commission staff were unable to reach him by telephone on September 26, 2018 because his telephone number was no longer in service. The Appellant did not provide the Commission with an alternate telephone number. Commission staff searched through the documents provided by MPIC to locate an alternate phone number. While the Commission was able to reach the Appellant at this alternate number, he asked to be called back later in the day. Despite Commission staff calling him back as requested and making several further attempts to reach him, the Appellant did not answer his phone and did not return the Commission's calls. A reasonable appellant would have tried to reach out to the Commission in these circumstances. The Appellant did not dispute that he was aware the Commission was trying to reach him.

The Appellant failed to attend the January 9, 2019 case conference. He stated that he thought his girlfriend was representing him and would attend the January 9, 2019 case conference on his behalf. We do not accept this as a reasonable explanation for his failure to attend the case conference. The notice of hearing was sent to the Appellant and there is no evidence that he didn't receive it. There is no evidence before us that the Appellant completed an authorization to appoint his girlfriend as his representative despite being provided an Authorization for Representation form in October 2017. Rather, the Appellant advised Commission staff by telephone on November 9, 2017 that he was not sure if he would appoint his girlfriend as his representative and again advised that he was considering hiring a lawyer. There is no evidence that he advised the Commission that his girlfriend would attend the January 9, 2019 case conference. Had he communicated this to the Commission, he would have been told that he needed to complete the authorization form. There is no evidence that he took any steps to find

out whether his girlfriend had in fact attended the case conference. Rather, the Appellant did not contact the Commission until a month after the case conference and only after he was advised the Commission would schedule a hearing to determine whether he has failed to diligently pursue his appeal.

The Appellant had very little contact with the Commission after July 2017 and no contact with the Commission between September 27, 2018 and February 12, 2019. The Appellant waited a month to contact the Commission after he was advised a hearing would be held on whether or not he has failed to diligently pursue his appeal. Between the time that the matter was scheduled for hearing and the first day of the hearing on May 23, 2019, there is no evidence the Appellant made any attempts to further his appeal. Rather, he attended the May 23, 2019 hearing without any documents.

The Appellant has stated that his “domestic difficulties” have prevented him from pursuing his appeal. The panel does not accept this as a reasonable excuse for his lack of contact and participation. We agree with the WCAT that “important personal activities” such as divorce are not adequate reasons for failing to pursue an appeal.

The Appellant indicated that as a result of his domestic difficulties he was charged criminally and was incarcerated. The panel would have considered whether the time of incarceration impacted his ability to pursue his appeal. However, the Appellant refused to indicate when he was incarcerated and for how long. We don’t know if it was one night or several months. Accordingly, the panel does not find his incarceration to be a reasonable explanation for his lack of contact and participation.

The Appellant stated that he needs to hire a lawyer to represent him because representing himself is not a good idea. We can take note that most appellants do not have legal counsel representing them at Commission hearings. While many appellants are represented by the CAO, there are other appellants who represent themselves at Commission hearings. The Appellant was provided with the Commission's Guidelines for Hearings. There is no evidence that the Appellant has a medical condition that impacts his ability to prepare for and complete a hearing. Rather, the Appellant acted on his own behalf in this hearing and was able to give evidence, answer questions and provide submissions.

While he suggested that he will now pursue his appeal as he has no choice, he then stated that he needs to hire a lawyer. The Appellant first advised the Commission in June of 2015 that he was considering hiring legal counsel. He still has not done so even when advised of this hearing in January 2019. He stated he had to hire a criminal lawyer and does not have the funds to hire legal counsel for his appeal. A reasonable appellant, not having the funds to retain legal counsel, would respond to the Commission, follow-up when asked and attend case conferences as scheduled.

We agree with counsel for MPIC that the use of the word "diligently" in s. 182.1(1) of the MPIC Act requires an appellant to show care and effort in pursuing an appeal. Based on the foregoing, the panel finds that the Appellant has failed to show reasonable care and effort in pursuing in his appeal.

Conclusion

Upon a consideration of the totality of the evidence and submissions, and upon consideration of the relevant legislation, the Commission is of the opinion 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 19th day of March, 2020.

KARIN LINNEBACH

LEONA BARRETT

LINDA NEWTON