

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-21-002**

PANEL: Pamela Reilly, Chairperson

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was represented by Jack Burke-Gaffney.

HEARING DATE: July 29, 2021

ISSUE(S): Whether the Commission will grant the Appellant an extension of time to file his Notice of Appeal.

RELEVANT SECTIONS: Section 174(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL, IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

Background:

On November 8, 2017, the Appellant was the driver of a vehicle that was T-boned on the passenger side by a third party (the "MVA"). Medical records described various MVA related injuries including a potential loss of right eye vision.

At the time of the MVA, the Appellant worked as a [text deleted]. After rehabilitation efforts, and pursuant to its legislation, MPIC conducted a Transferable Skills Analysis and determined that the Appellant had residual capacity for employment as a Customer Service Clerk. Labour Market Studies confirmed this employment was available in the Appellant's geographical area.

The Appellant's case manager provided him with a decision advising that his income from the determined employment was effective starting March 6, 2020 and would terminate March 6, 2021, after the one year job search period. The Appellant filed an Application for Review within the 60 day time period. This review resulted in MPICs Internal Review Decision dated May 20, 2020 (the "IRD"), which upheld the case manager decision. The final page of the IRD sets out the statutory Appeal Rights and the 90 day appeal period in which to file an appeal to the Commission.

On January 6, 2021, the Commission received the Appellant's Notice of Appeal, dated January 4, 2021. Handwriting on page one of the Notice of Appeal stated, "Filed late due to COVID19 issues." MPIC did not consent to the late filing and a hearing was set to determine whether the Commission should grant the Appellant an extension of time to appeal the IRD.

Issue:

Should the Commission exercise its discretion and grant the Appellant an extension of time to file his Notice of Appeal?

Decision:

The panel finds that the Appellant filed his Notice of Appeal outside of the 90 day statutory time limit and has not provided a reasonable explanation for the late filing. The panel declines to exercise its discretion to extend the time to appeal.

Appellant direct testimony:

The Appellant opened his testimony by stating that there had been "a bit of a misunderstanding in many regards to a lot of things". He said that notwithstanding the Notice of Appeal received by the Commission on January 6, 2021 (the "January 2021 NOA"), he has always filed "in a very timely fashion" and stated, "I did file that appeal." He did not know the exact date but said, "I do know that I filed it in a timely fashion right after I was given that last notice by MPI. And that was when certain strange things started to happen." He testified, as follows:

I can remember filing it like yesterday. I put the reasons. I remember what I put down. I lost the vision in my right eye and many other things.

But I did file it. And then I was notified by the commission that I could not go ahead with that filing until I was signed off on the first filing - - I needed to negate the first filing.”

The Appellant said that he “was sent many emails”, and then received “a paper” in the mail about ‘signing off’ on a first filing. He said he signed and returned this paper, but then never heard back from the commission.

The Appellant said he “had to fight this fight”. As an example, he described a scenario in which he had mailed his original tax return to MPIC, but it got lost or misplaced. He spoke of the efforts to which he subsequently went to request that the tax preparation business deliver his tax return electronically, in order to meet MPICs deadline. He emphasized that he “jumped through hoops” to provide his tax return on time and the delayed delivery was not his fault. He said, “Now it’s the same thing with this”, explaining, as follows:

I filed it [Notice of Appeal] in a timely fashion and I put everything in there that I could. And I didn’t hear from anybody. So, I filed it again - - I better find it here. At the end I said, ‘help’. Yeah, ‘please help’.

In response to panel questions, the Appellant confirmed that he was now referring to the January 2021 NOA in the Indexed File, saying that he completed it using black marker. He said, luckily he had the Notice of Appeal form on his phone and was able to print it out so he could complete it again. When asked by the panel to clarify that he was testifying to filing a prior NOA with the Commission (the “first NOA”), the Appellant replied, “that was about 10 days after my notice from MPI saying that my benefits would be cut off. I’m not sure when I received it” [the May 20, 2020 IRD].

He referred to another “strange thing” happening subsequent to mailing in the first NOA. He testified that he spoke with a male individual on the phone who confirmed receipt of the NOA. The Appellant said, “then somebody started to send me emails saying I had to sign away the first appeal” and that he “can’t move ahead” until he’d signed off. He testified that he eventually received a letter in the mail and “did sign off.” He repeated that he had “done everything, as much as possible, in a very timely fashion” and denied that he had waited almost a year before filing his NOA.

Cross-examination of Appellant by MPIC:

MPIC Counsel noted that one reason for review, listed in the Appellant's Application for Review ("AFR") of the IRD, named a loss of sight in one eye. Based upon his testimony that he remembered listing loss of vision as a reason for appeal, Counsel suggested that the Appellant had confused his AFR with his NOA. The Appellant denied that he had confused the two forms stating that the AFR form clearly referred to "Manitoba Public Insurance." When MPIC Counsel then noted that in his January 2021 NOA he did not repeat 'vision loss' as a reason for appealing the IRD, the Appellant agreed saying, "Yeah, I didn't know what to write in there."

When asked why he had not produced copies of the emails exchanged with the Commission, one of which purportedly acknowledged receipt of his first NOA, the Appellant replied, "I have many, many emails that can corroborate that. I had no idea that I needed to submit evidence." He added, "I am not a lawyer. I was not instructed to do anything else."

In reviewing the January 2021 NOA, Counsel asked the Appellant why he wrote "I realize this is late...", if he had in fact filed his first NOA on time. The Appellant replied, as follows:

Because I knew this one was late...but I was pleading for help because I didn't know. I hadn't heard anything from the commission. And by this time things are very stressful, and I felt under extreme stress and duress. I don't know what to say, and you can see that. I'm an articulate person. I'm not a genius, but I'm not an idiot. I just didn't know what to say...I didn't know where my first one was...

When asked if he kept a copy of the first NOA, the Appellant said that, like his tax return, he did not keep a copy. He reiterated that he filed the NOA within 10 days of receipt of the May 20, 2020 IRD.

In response to a question about whether his first NOA also said 'please help' in black marker the Appellant replied, "No, I used a pen and I was very precise in the information I gave." He specifically recalled making sure the first NOA went to the correct address and remembered the word "Finance" on the form because that word did not initially make sense to him. When asked again why he did not say in his January 2021 NOA

that he had filed a prior NOA on time, the Appellant repeated that he was under extreme duress, facing eviction, facing hydro being cut off, had not slept in 1 ½ weeks, and was dealing with a noisy downstairs neighbour about whom he had contacted the police. Counsel referred the Appellant to his February 11, 2021 email, included in the Indexed Fila as part of the evidence. The text of this email contains messages in two parts. The first part appears to be an email message addressed to the Commission from the Appellant and shows the date, as well as the Appellant's email address and the Commission's email address. The second sentence reads, "I have contacted MPI with the following email, to which I was immediately denied." The Appellant's name appears at the conclusion of the message. The text in the second part of the email is in a different, smaller font, and commences with "[text deleted] and Management of MPI." There are no email addresses or dates included with this second text, which concludes with the Appellant's name. In response to Counsel's question, the Appellant confirmed that he had no issues sending and receiving email.

The Appellant then reviewed the text in the second part of the email (presumably sent to MPI) which states, among other things, "As you know, my income replacement is due to expire by March 6, as determined by last year 2020 in February". The text mentions the COVID19 pandemic and the unforeseen consequences affecting job availability and job losses. The text also speaks to the Appellant's deteriorating health due to his injuries and then asks "MPI to understand my dilemma and frustration at how code red months have affected me, and that these code red months be added to my income replacement payments..."

The Appellant testified that this text shows the extreme duress and "mountain of stressful things" that he was experiencing. He further testified that, "It didn't make sense to me that somehow my initial appeal somehow vanishes, even though I've got a guy saying 'you have to sign off on the first one.'" (The panel notes that there is no mention in this email about a lost NOA or having to 'sign off' another appeal.)

The Appellant could not recall exactly when he received the May 20, 2020 IRD but conceded that it would have been, at least, sometime in June 2020. The Appellant admitted that he "absolutely understood" that he had 90 days in which to file his appeal

of the IRD. He agreed that he did not believe COVID19 affected mail delivery. He testified that after filing his first NOA he followed up with the Commission by phone “but mainly emails”.

The Appellant agreed that he had previously completed some training for the [text deleted] and [text deleted], as well as completed [text deleted] instruction. He enjoyed instructing youth through a [university] [text deleted] program, and he has been a [text deleted]. Until 2015, the Appellant worked as a [text deleted].

Throughout 2020, the Appellant agreed that he had the capacity to send and receive emails using a neighbour’s Wi-Fi, and had phone capability through the internet on his computer. The Appellant agreed that he was not at all confused about the appeal process to the Commission.

In response to panel questions, the Appellant confirmed that he received and read the Commission’s letter dated February 4, 2021, which advised the parties that a hearing would be set. The letter included the Commission’s “Guidelines for Hearings”, which the Appellant also admitted to reading shortly after receiving the letter in the mail.

Appellant closing submissions:

In closing, the Appellant reiterated that he was very careful and had filed everything in a timely fashion. He said that he found it “extremely odd” that in his entire [text deleted] years, his tax return to MPIC was the first item that got lost in the mail. He submitted that he sent the first NOA to the Commission within 10 days of receiving the IRD. He described his January 6th NOA as an indication of him being “absolutely freaked out about life.” Referring to the January 6th NOA, the Appellant then stated, “It’s of note that when I filled this out I had COVID.” In response to panel questions, he made clear that he had contracted COVID19.

MPIC closing submissions:

MPIC Counsel submitted that section 174 of the MPIC Act is applicable, and that the onus is on the Appellant to show that an extension of time is appropriate. Counsel referred to the IRD dated May 20, 2020, which includes bold and underlined information about the 90 day appeal process, and also advises an appellant that assistance is

available through the Claimant Adviser Office. The January 6, 2021 NOA was filed 231 days later.

Counsel reviewed the Appellant's background and submitted that he was sophisticated, educated and articulate. The Appellant admitted that he had no confusion about the 90 day filing requirement. Counsel pointed out inconsistencies between the Appellant's written material and his testimony. Counsel submitted that the Appellant's statement on his January 2021 NOA that he knew the notice was late, was not consistent with his testimony that he had filed a prior NOA in a timely fashion.

Counsel pointed out that the Appellant did not file any corroborating documentation, such as copies of the first NOA or the alleged emails exchanged with the Commission. He submitted that the Appellant knew or ought to have known of his ability to file additional evidence, because this is set out in the Commission Guidelines for Hearings, which the Appellant received and read in February 2021.

MPIC Counsel submitted that the Appellant probably received the May 20, 2020 IRD shortly after the review office mailed the decision to the Appellant. Counsel further submitted that the NOA received by the Commission on January 6, 2021 is, in fact, the only NOA filed by the Appellant.

Counsel reviewed prior Commission decisions that considered s. 174 and the factors relevant to the determination of whether or not the Commission should exercise discretion to extend the time to file an appeal. These factors are, as follows:

1. The actual length of delay beyond the 90-day statutory time period;
2. The reasons for the delay;
3. Whether the delay has caused prejudice;
4. Whether a waiver of the time period has been granted;
5. Any other relevant factor.

Dealing with prejudice, Counsel submitted that the lengthy 141 day delay beyond the 90 day filing period created inherent prejudice. Focusing on the length of delay and the reasons for delay, Counsel reiterated that a 141 day delay is significant. He noted that

the NOA is a relatively simple form to complete, thereby implying that 90 days is sufficient time for completion and filing. Counsel submitted that other Commission decisions have denied extensions where the delay was only 44 days.

The Appellant's January NOA cited his inability to attend doctor appointments due to COVID as a reason for appeal, and the Appellant's February 11, 2021 email spoke of frustration about how the COVID "code red months" had affected him. Counsel submitted that in prior cases, the Commission has found that neither frustration over the process, nor waiting to obtain medical evidence are acceptable reasons to delay filing.

Counsel emphasized that the Appellant stated in his NOA that he "filed late due to COVID19 issues". Conversely, the Appellant testified that his NOA was filed on time, which meant that, apparently, COVID19 was not the reason for filing a late appeal. The Appellant then testified that he had COVID19 when he completed the January 2021 NOA, however, he provided no medical evidence to corroborate that assertion.

Counsel concluded that the Appellant admitted that he understood the appeal process, yet provided no credible, valid reason for the delay. Therefore, since MPIC has not granted a waiver, the Commission should deny the request to extend time.

Legislation:

The applicable section of the MPIC Act is as follows:

Appeal from review decision

174(1) A claimant may, within 90 days after receiving notice of a review decision by the corporation, or within such further time as the commission may allow, appeal the review decision to the commission.

Discussion:

Credibility and reliability

The panel considers a number of factors when assessing an appellant's credibility and reliability. These factors involve the appellant's demeanor, the appellant's recollection of events and the consistency with which an appellant recounts those events. The panel considers whether testimony is corroborated by documents, and whether it appears exaggerated or embellished, as such testimony tends to reduce credibility. Any one or

more of these factors may be more or less relevant depending upon the case. Fundamentally, the panel considers whether the testimony has a 'ring of truth'.

There were notable inconsistencies between the Appellant's testimony and his January 2021 NOA. In particular, on the first page of his NOA, he wrote the following:

Filed late due to COVID19 issues.

On the second page, where the Appellant is provided space to state the reasons he does not agree with MPIC's decision, the Appellant wrote:

I have not been able to see doctors due to COVID19. My injuries are worsened, and work is unavailable due to COVID19. I realize this is late, but I'm pleading with you please help! [Emphasis in original]

The Appellant testified that he was not confused by the process and knew about the 90 day time limit. Further, he testified there was a misunderstanding about when he had filed his first NOA. It is therefore inexplicable why he would write the words, "filed late due to COVID19 issues". The reasonable person would correct that misunderstanding, deny any late filing, and point out that a prior appeal had been filed on time, especially if he had received a written receipt of the first NOA, as alleged.

When asked why he did not write that he had already filed a NOA on time, the Appellant testified that he "didn't know what to write in there." Conversely, the Appellant testified that he 'was very precise', remembered filing the first NOA 'like it was yesterday', and particularly remembered writing that he lost vision in his right eye. The Appellant's description of his clear memory conflicts with his testimony that he did not know what to write, and also conflicts with the different reasons he wrote in his January 2021 NOA.

The Appellant was questioned about his February 11, 2021 email to the Commission, which states, "I have contacted MPI with the following email, to which I was immediately denied." The following paragraph of text starts with the name of his case manager, but does not contain any email address or date information. And, although the Appellant testified that MPI 'denied' his request, that denial is not included.

In the purported email to MPI, the Appellant points out that his income replacement is due to expire on March 6 (2021). He states that due to the COVID19 pandemic he has been unable to find employment in the job sector determined by MPI. The email speaks of the Appellant's inability to see his various health professionals and states, as follows:

... so I am asking MPI to understand my dilemma and frustration at how code red months have affected me, and that these code red months be added to my income replacement payments. As well, I will need some time to get health professionals to conduct the tests they ordered due to my injuries as Manitoba hopefully slowly re-opens.

The panel notes that the Manitoba Government implemented the "critical" or "code red" tier response to the pandemic, in November 2020. The Appellant did not explain why he would be following up with MPIC and not the Commission, if he had in fact filed an appeal to the Commission in or about June 2020.

Further, this email includes various references to how the COVID19 pandemic and code red closures impacted the Appellant's life, but does not mention that he contracted COVID19, as he testified. That testimony was particularly startling considering that when he testified to the many events that caused him "extreme duress" around the filing of his January NOA, he did not include COVID19 infection as a stressor.

The panel also considered the February 4, 2021 letter from the Commission, which the Appellant admitted to reading. The last paragraph on the first page of that letter reads, as follows:

If part of the delay in filing your Notice of Appeal includes a medical reason, you may consider submitting a medical report to support your reason(s). Any report must be submitted not later than 30 days prior to the hearing date. The Commission will pay the cost of this report (to a maximum of \$373), but there are certain conditions: ...

The panel also finds it inconsistent that the Appellant would provide the February 11, 2021 email, but not the very important email from the Commission that allegedly confirmed receipt of his first NOA. Nor did the Appellant provide the letter that requested he 'sign off' of another appeal. The Appellant's explanation that he did not realize he should file his own corroborating, documentary evidence seems unlikely considering the Commission's February 4, 2021 letter, which included the Commission "Guidelines for

Hearing”, explaining how to file “New Evidence”. The absence of this corroborating documentation leads the panel to draw an adverse inference about the credibility of the Appellant’s testimony.

As discussed, the Appellant allegedly exchanged many emails with the Commission, including an email that acknowledged receipt of his first NOA. Nonetheless, after allegedly knowing he had filed a timely NOA and then waiting months without a response, the Appellant said that he filed another NOA, on which he declared knowing that it was late. The reasonable person who had filed a timely NOA would re-establish contact with the Commission and request information on the status of the appeal, or an explanation for the lack of action.

Findings:

The panel finds that the Appellant’s testimony was not internally consistent nor was it consistent with the documents. The panel considered the Appellant’s explanation that he was under extreme stress and duress and finds this does not satisfactorily explain why, if he apparently suspected that his first NOA was lost in the mail, he would not simply state this. This explanation also does not reconcile with the Appellant’s testimony that he understood the process, was not confused, is educated, and is very precise and very careful. Nor does it explain the many material inconsistencies in the testimony and documents.

The Appellant’s testimony tended to be exaggerated and became more embellished as the hearing progressed. Considering the inconsistent, exaggerated and embellished testimony, the panel finds that the Appellant’s reasons for delay were not credible and do not have the ring of truth.

The Appellant admits he received the May 20, 2020 IRD. The panel noted the date stamp on the January 4, 2021 NOA confirming receipt by the Commission on January 6, 2021. The Appellant’s Application for Review dated April 23, 2020 was date stamped as received at MPIC on April 27, 2020. The Appellant testified that his mail has never gone missing and, impliedly, is reliable and received on a timely basis. He agreed the

pandemic did not affect mail delivery. The panel finds that the Appellant probably received the May 20, 2020 IRD, at most, 7 days later; that is, May 27, 2020.

The IRD clearly sets out the Appellant's Appeal Rights and the Appellant admitted that he understood he had 90 days to file. Ninety days after receipt on May 27, 2020 would put the filing deadline at August 25, 2020. The panel finds that the January 2021 NOA was filed at least 134 days past the 90 day filing deadline.

The Commission considered the following factors in deciding whether to exercise discretion and grant and extension of time:

1. The actual length of the delay;
2. The reasons for the delay;
3. Whether there had been prejudice caused by the delay;
4. Whether there has been any waiver respecting the delay;
5. Any other relevant factors that lead to a just outcome.

The panel agrees with MPIC Counsel's submission that the most relevant factors are the length of delay and the reasons given for the delay. The panel finds that the 134 day delay is excessive, and that the Appellant did not provide a credible reason for the delay.

Disposition:

Accordingly, the panel will not exercise its discretion to extend the statutory time limit for filing an appeal of the May 20, 2020 Internal Review Decision.

Dated at Winnipeg this 18th day of August, 2021.

PAMELA REILLY