

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-17-113**

PANEL: **Nikki Kagan, Chair
Jacqueline Freedman
Brian Hunt**

APPEARANCES: **[text deleted] (the “Appellant”) did not attend the hearing;
Manitoba Public Insurance Corporation (“MPIC”) was
represented by Hayley Main.**

HEARING DATE: **April 20, 2022**

ISSUE(S): **Whether the Appellant failed to diligently pursue her appeal
and, if so, whether the appeal should be dismissed.**

RELEVANT SECTIONS: **Sections 182.1 and 184.1 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

Background:

The Appellant was driving her car on March 16, 2016, when she was involved in a motor vehicle accident with another vehicle (the “MVA”). As a result of the MVA she sustained injuries, and she sought benefits pursuant to the Personal Injury Protection Plan provisions of the MPIC Act, including Income Replacement Indemnity (“IRI”) benefits.

At the time of the MVA, the Appellant had been self-employed as a [text deleted] and a [text deleted], and she had a significant annual income. However, she had not purchased extra insurance to cover earnings above the statutory maximum. Accordingly, her entitlement to IRI benefits was subject to the maximum gross yearly employment income (“GYEI”) of \$93,000. On February 6, 2017, the case manager issued a decision which stated that as of August 22, 2016, she was capable of completing 47.5% of her duties as a [text deleted]. Her IRI entitlement for this percentage of duties was greater than the maximum GYEI, and therefore her entitlement to IRI ended as of August 21, 2016.

An Internal Review Decision (“IRD”) was issued dated May 30, 2017, which varied the case manager’s decision slightly, extending the Appellant’s IRI benefits to September 14, 2016, on the basis that the Appellant did not reach 50% work capacity until that date. The IRD also noted that the Appellant indicated to the Internal Review Officer (“IRO”) that her ability to work in 2017 was less than it had been in the summer of 2016. The IRD stated at page 4 that: “I advised that your entitlement to IRI benefits ended, not because of medical clearance for return to work, but due to the fact that your partial return [to] work earnings were calculated in excess of the indexed maximum GYEI”. The IRO suggested that the Appellant should contact the case manager to discuss any reduced work capacity due to medical reasons.

The Appellant filed an appeal of the IRD with the Commission on August 28, 2017. A case management process then ensued in the Appellant’s appeal, which is described below.

On November 29, 2019, the Appellant wrote to the Commission by email, indicating that she no longer wished to proceed with her appeal.

The Commission wrote to the parties on June 1, 2021, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission. Therefore, the Commission would schedule a hearing, to determine whether the Appellant had failed to diligently pursue her appeal, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss her appeal.

Issue:

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

Decision:

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

Procedural Matters:

On June 19, 2019, the Appellant advised the Commission in writing that she had moved, and that her new mailing address was [text deleted].

A Case Conference was held in this matter on August 21, 2019 to discuss the status of the appeal. Both parties attended this Case Conference via teleconference. At that Case Conference, it was noted that the IRD under appeal had not dealt with issues of causation, and so further claims of inability to work due to the MVA could not be the subject of the current appeal. The IRO had advised the Appellant to take any issues of continued or later inability to work as a result of the MVA to her case manager, but she had not done so. The option of returning to an MPIC case manager to have such a later entitlement to IRI assessed was reviewed with the Appellant. In order

to provide time for the Appellant to consider this, as well as other issues, the parties agreed that a second Case Conference would be held on September 19, 2019, at 10:30 a.m., to discuss outstanding matters. A letter dated August 21, 2019, was provided to the parties from the Commission summarizing the discussion at the first Case Conference.

The Notice for the September 19, 2019, Case Conference was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address provided by her to the Commission in writing. An acknowledgement of receipt of the Canada Post Xpresspost delivery was signed by “[the Appellant]” on August 29, 2019. The Notice of Hearing sent to the Appellant by regular mail was not returned to the Commission.

On Friday, September 13, 2019, the Commission received an email request from the Appellant to adjourn the Case Conference scheduled for Thursday, September 19, 2019. She indicated that she had only received the indexed file for the first time one week earlier and she required more time to go through it. In accordance with the Commission’s practice, her request was forwarded to MPIC for their comments. On September 13, 2019, counsel for MPIC responded, opposing the adjournment request. The Commission considered the Appellant’s request along with MPIC’s comments, and determined that the Appellant had had sufficient time (3 weeks) to review the indexed file in preparation for the limited issues to be addressed at the then upcoming Case Conference of September 19, 2019. Those issues were whether the Appellant had obtained representation and whether the Appellant had contacted an MPIC case manager to request an assessment and decision regarding her subsequent alleged reduced work capacity due to medical reasons. Therefore, the Appellant’s adjournment request was denied.

The Commission wrote to the parties on Monday, September 16, 2019, to advise them accordingly and to confirm that the Case Conference would proceed as scheduled at 10:30 a.m. on September 19, 2019. The Appellant was reminded that she had the option to participate by teleconference. The Commission's letter was sent to the parties via email and regular mail. The Appeals Officer also telephoned the Appellant and left a message on her home voice mail indicating that the request for an adjournment had been denied and a letter from the Commission had been sent to her via mail and email.

The second Case Conference was held as scheduled on Thursday, September 19, 2019, at 10:30 a.m. The Appellant did not appear but, as she had participated by teleconference in the first Case Conference, the Commission attempted to contact her by telephone. A voicemail message was left at her residence. The message included the telephone number of the Commission's reception. A message was also left for the Appellant with the receptionist who answered her office telephone number. The Appellant did not contact the Commission. In accordance with the Commission's practice, after waiting 15 minutes, the Case Conference proceeded in her absence.

A letter dated September 19, 2019, was provided to the parties from the Commission summarizing the discussion at the second Case Conference.

A third Case Conference was to be scheduled for early January, 2020. When the Commission's Secretary contacted the Appellant on November 28, 2019, to inquire as to her availability, the Appellant responded by email dated November 29, 2019, as follows:

I have decided not to proceed with this hearing at this time for that period of time as I realize I did not have sufficient insurance. This does not imply I won't request remuneration for future years as my income has been reduced significantly. Thank you

On December 5, 2019, the Commission wrote to the Appellant in response to her email above, noting that she no longer wished to proceed with her appeal. The Commission enclosed a Notice of Withdrawal form for her to complete and provided a self-addressed envelope in order that she could return it to the Commission. The Appellant did not return a completed Notice of Withdrawal form to the Commission.

On May 21, 2020, the Commission wrote to the Appellant. The Commission noted that if a signed Notice of Withdrawal form was not received within three weeks from the date of the letter, the appeal would be held in abeyance for six months. The Commission advised that if the Appellant did not contact the Commission in the next six months to take steps to pursue her appeal or to provide an explanation as to why she was unable to pursue her appeal, the matter would be scheduled for hearing to determine whether she had failed to diligently pursue her appeal and, if so, whether the Commission would dismiss the appeal.

As noted above, the Commission wrote to the parties on June 1, 2021, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission. Therefore, the Commission would schedule a hearing, to determine whether the Appellant had failed to diligently pursue her appeal, within the meaning of subsection 182.1(1) of the MPIC Act, and, if so, whether the Commission should dismiss her appeal.

By email dated June 1, 2021, the Commission sent to the parties the above-noted June 1, 2021, letter and their respective copies of the indexed file in this matter. The Appellant responded to the Commission by email on the same date, which stated: "Thanks for reaching out [text deleted]. I will not be signing off on this case without some form of settlement as I was never ever able to work the same as I did before".

Commission staff subsequently attempted to contact the Appellant by email to schedule the hearing date for this matter. The Appellant did not respond to the Commission's first email dated February 9, 2022. In response to the Commission's second email dated February 14, 2022, the Appellant replied the same date as follows: "Hi [text deleted], I am not sure why you are reaching out to me. I have made it very clear I will not sign anything closing this file as I believe I was treated very unfairly. [...] So unless you are wanting to settle something with me I see no reason to have another meeting". Commission staff replied by email to the Appellant later that day and advised her that if she did not respond to the Commission's scheduling inquiry by February 17, 2022, the hearing date would be set peremptorily. No response was received from the Appellant. Accordingly, the Commission peremptorily set this hearing for April 20, 2022, at 9:30 a.m., to be held by teleconference.

A Notice of Hearing for the April 20, 2022, hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the address provided by her to the Commission in writing. An acknowledgement of receipt of the Canada Post Xpresspost delivery was signed by "[the Appellant]" on March 11, 2022. The Notice of Hearing sent to the Appellant by regular mail was not returned to the Commission.

The Notice of Hearing provided instructions to the parties for their attendance at the teleconference hearing. The Notice further provided that the time and date of the hearing were firm and that postponements would only be granted under extraordinary circumstances. The Notice provided that at the hearing, the Commission would consider whether the Appellant had failed to diligently pursue her appeal, and that the parties would have the opportunity to make submissions on this issue. It further indicated that their submissions could be made orally or in writing. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with

the hearing and dismiss the appeal, adjourn the hearing to a new time and date, or take such other steps as it deemed appropriate.

Counsel for MPIC attended the teleconference hearing on the hearing date, but the Appellant did not attend (i.e. she did not participate in the teleconference hearing). In accordance with the Commission's practice, after waiting 15 minutes, the hearing proceeded in her absence.

Relevant Legislation:

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

Dismissal for failure to pursue appeal

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

Opportunity to be heard

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

Informing parties of decision

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

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

How notices and orders may be given to appellant

184.1(1) Under sections 182, 182.1 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant

(a) personally; or

(b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.

When mailed notice received

184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

Submission for MPIC:

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

Counsel reviewed the appeal documents in this matter, noting that the Appellant had filed her appeal with the Commission at the end of August, 2017, which was over 4 ½ years ago. Since that time, the Appellant has taken only a limited number of steps to move her appeal forward. She had attended the first Case Conference on August 21, 2019, to discuss the status of the appeal. At that Case Conference, as noted in the Commission's letter dated August 21, 2019, the Appellant raised the issue that she did not have a copy of her indexed file. However, it was noted that the Commission's records showed that the indexed file had been sent to her a year earlier. The Appellant indicated that she wanted to consider a few other matters, including contacting the Claimant Adviser Office ("CAO") for representation, and contacting her case manager regarding her claim of inability to work due to the MVA, and accordingly a further Case Conference was set.

As noted above, the second Case Conference was held on September 19, 2019, as scheduled, and MPIC attended. The Appellant did not attend. Although the Commission telephoned the Appellant and left messages, she did not reply. The Commission had not received any indication that the Appellant had retained any representation in regard to her appeal. There was also no indication that the Appellant had made contact with the case manager in regard to her claim of continued inability to work. Accordingly, it was determined that the Commission would try to schedule a further Case Conference.

When the Commission attempted to schedule the third Case Conference, the Appellant replied on November 29, 2019, that “I have decided not to proceed with this hearing at this time”. Despite further correspondence from the Commission, the Appellant did not sign a Notice of Withdrawal. Rather, she indicated that she would not be “signing off”, based on her claim that she was unable to work at her pre-accident level.

In light of the above facts, counsel addressed the specific requirements of sections 184.1 and 182.1, set out above.

Under subsection 184.1(1) of the MPIC Act, notice of a hearing must be given personally or by regular mail by sending the notice to the address in the Appellant’s Notice of Appeal, or to another address provided by the Appellant in writing. Counsel noted that the Notice of Hearing was sent on February 22, 2022, to the Appellant’s address at [text deleted]. This is the address to which the Commission had been sending her correspondence since August, 2019. There is nothing in the indexed file that would suggest that this is not the correct address or that the Appellant did not receive the Notice. Under subsection 184.1(2) of the MPIC Act, the Appellant was deemed to have received the Notice of Hearing five days after mailing, and so she was properly served.

Subsection 182.1(2) of the MPIC Act requires that the Commission give the Appellant the opportunity to be heard. The Notice of Hearing expressly states that the parties will have the opportunity to make submissions at the hearing. Further, in its May 21, 2020, letter, the Commission specifically advised the Appellant that if she did not take steps to pursue her appeal, this hearing would result. Counsel submitted that the Appellant had been given the opportunity to be heard.

Regarding whether the Appellant failed to diligently pursue her appeal, counsel referred to the decision of the Commission in AC-13-143, which also dealt with section 182.1 of the MPIC Act. She submitted that the three-step test outlined in that case is the proper test to be applied under subsection 182.1(1), as follows:

1. did the Appellant fail to diligently pursue the appeal;
2. did the Appellant have a reasonable excuse for the failure; and
3. are there any other factors that should be considered.

Here, the Appellant failed to be diligent, demonstrating a pattern of lack of effort. At the first Case Conference, she said she did not have the indexed file, even though it had been sent to her. The Commission's letter following that Case Conference notes that the Appellant wanted additional time to pursue a few matters, including to consider representation and to contact the case manager. The second Case Conference was held to address those issues. However, the Appellant failed to attend the second Case Conference, and neither the Commission nor MPIC had any information that the Appellant had taken any steps to pursue those matters, such as contact the CAO or the case manager. When the Commission later contacted the Appellant, she specifically said that she had decided not to proceed, which is a very clear indication of her intention not to pursue her appeal.

The Commission subsequently sent the Appellant a series of letters, and she was advised of the consequences of failing to actively pursue her appeal.

The Appellant's last active participation in her appeal was the first Case Conference on August 21, 2019. Her email to the Commission on November 29, 2019, clearly indicated that she did not want to proceed with her appeal. She has otherwise failed to respond to the Commission in any meaningful way.

There is no reasonable excuse for the Appellant's failure to pursue her appeal. She has given a clear indication that she has no intention of moving her appeal forward.

Counsel submitted that there are no other factors that should be considered. Therefore, MPIC submitted that the Appellant's appeal should be dismissed.

Discussion:

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

Service of the Notice of Hearing

The Notice of Hearing for the April 20, 2022, hearing was sent to the Appellant on February 22, 2022, by Canada Post Xpresspost and regular mail, to the address provided by her to the Commission in writing. As indicated above, the Notice of Hearing sent by Xpresspost to the Appellant was accepted and signed for on March 11, 2022. On April 12, 2022, Canada Post

provided to the Commission a copy of the scanned signature of the recipient of the item, showing that the Canada Post Xpresspost was signed for by “[the Appellant]” on March 11, 2022.

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

Opportunity to be Heard

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

Did the Appellant Fail to Diligently Pursue her Appeal

It is MPIC’s position that the Appellant has failed to diligently pursue her appeal, that she has not provided an excuse for her failure, and that the Commission should exercise its discretion to dismiss her appeal under subsection 182.1(1) of the MPIC Act.

In this case, the Appellant's last active participation in her appeal was on August 21, 2019, more than 2 ½ years ago, when she participated by teleconference in the first Case Conference to discuss the status of her appeal. When her request for an adjournment of the second Case Conference was denied, the Commission's letter of September 16, 2019, reminded her of the outstanding matters to be dealt with at the Case Conference (representation and contact with the case manager), and noted that she could participate by teleconference. Notwithstanding this, the Appellant did not participate in the second Case Conference on September 19, 2019, and did not provide the Commission with any information on the outstanding matters in her appeal. On the contrary, on November 29, 2019, the Appellant advised the Commission that "I have decided not to proceed with this hearing at this time for that period of time as I realize I did not have sufficient insurance".

The Commission then wrote several letters to the Appellant and advised her of the consequences of failing to actively pursue her appeal. However, the Appellant did not take further steps to pursue her appeal in response to the Commission's letters; rather, after a lengthy period of non-communication, she wrote two emails to the Commission to advise that she would not be "signing off" unless she received a settlement (which is not something that is within the Commission's jurisdiction). On June 1, 2021, over 1 ½ years after her last email of November 29, 2019, the Appellant wrote to the Commission to advise that "I will not be signing off on this case without some form of settlement". Eight months later, on February 14, 2022, the Appellant wrote once more to the Commission, in response to the Commission's efforts to schedule the present hearing. The Appellant noted again that she was unwilling to sign anything to close her appeal, and stated: "unless you are wanting to settle something with me I see no reason to have another meeting". In AC-13-143, the Commission noted that "diligence" was defined to mean "careful and persistent application or effort". Simply sending emails to express a wish for a settlement does not meet this definition.

The Appellant specifically indicated to the Commission her intention not to proceed with her present appeal. As noted above, the Appellant did not attend the present hearing, nor did she provide any written submissions, although she was provided the opportunity to do so. Since the Appellant has ceased to pursue her appeal, we see no compelling reason to proceed with the appeal.

Conclusion

Upon a consideration of the totality of the evidence and submissions, and upon a consideration of the relevant legislation, the Commission finds that the Appellant has failed to diligently pursue her appeal within the meaning of subsection 182.1(1) of the MPIC Act.

Disposition:

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

Dated at Winnipeg this 13th day of June, 2022.

JACQUELINE FREEDMAN

BRIAN HUNT

NIKKI KAGAN