

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-19-151**

COMMISSIONER: Jacqueline Freedman

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

HEARING DATE: September 7, 2022

ISSUE: Whether the Appellant failed to diligently pursue his 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”).

Reasons For Decision

Background:

The Appellant was the driver of a vehicle which was struck from behind while stopped on October 18, 2018 (the “MVA”). As a result of the MVA the Appellant sustained injuries, and he received benefits pursuant to the Personal Injury Protection Plan provisions of the MPIC Act, including Income Replacement Indemnity (“IRI”) benefits.

On March 12, 2019, the case manager issued a decision that ended the Appellant’s entitlement to IRI benefits. An Internal Review Decision (“IRD”) was issued dated June 9, 2019, which confirmed the case manager’s decision.

The Appellant filed an appeal of the IRD with the Commission on October 22, 2019. A case management process then ensued in the Appellant's appeal.

An initial Case Conference was held on January 14, 2021, to discuss the status of the appeal. At that time, the Appellant indicated that he was still interested in pursuing his appeal before the Commission. A further Case Conference was scheduled for April 14, 2021; however, the Appellant did not participate. Further details of the case management process are described below.

Ultimately, the Commission wrote to the parties on June 21, 2022, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission for a lengthy period of time. Therefore, the Commission would schedule a hearing, to determine whether the Appellant had failed to diligently pursue his appeal, and, if so, whether the Commission should dismiss his appeal.

Issue:

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

Decision:

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

Procedural Matters:

A Case Conference was held in this matter on January 14, 2021, to discuss the status of the appeal. Both parties attended via teleconference. As noted above, at the Case Conference, the Appellant

indicated that he was still interested in pursuing his appeal before the Commission. A discussion was held regarding the difficulty Commission staff had encountered in delivering the Appellant's copy of the indexed file to him. The Appellant advised that he had been having some trouble with his address in the last few years, since it had been changed from a post office box address. It was agreed that Commission staff would re-send the indexed file to him, via Canada Post Xpresspost. The Appellant indicated that he had been receiving emails from the Commission, so it was agreed that Commission staff would notify him by telephone and email when the package has been sent, and provide the Canada Post tracking number. The Appellant undertook to follow up with Canada Post to pick up his package (and he subsequently confirmed to the Commission by email that he did pick it up). The parties also agreed to hold a follow-up Case Conference on April 14, 2021, at 9:30 a.m., also by teleconference.

Notice for the April 14, 2021 Case Conference was sent to the parties via email on January 15, 2021. The Commission also sent a copy of the Notice of Case Conference to the Appellant via Canada Post Xpresspost on January 15, 2021 (together with the indexed file). As noted above, the Appellant confirmed receipt of the Canada Post Xpresspost package to the Commission, by email dated January 20, 2021. A Case Conference reminder was also sent to both parties by email on April 12, 2021. The Case Conference commenced at 9:30 a.m. as scheduled, with the Commissioner and counsel for MPIC on the teleconference line. The Appellant did not attend. A grace period was afforded the Appellant, but he did not join the teleconference. At 9:40 a.m., the Case Conference proceeded in his absence.

By letter dated April 14, 2021, the Commission wrote to the parties following the Case Conference held on that day. The letter noted that Appellant would be given until May 14, 2021, to advise the Commission whether he wished to obtain any further medical reports. If so, the letter further noted

that he would be given a reasonable amount of time to submit these. In the absence of contact from the Appellant by the deadline, MPIC would then proceed to refer the materials on the indexed file to its Health Care Services team for a review and report. The Commission sent copies of the April 14, 2021, letter to the Appellant by regular mail and by Canada Post Xpresspost (neither were returned to the Commission).

The deadline of May 14, 2021, passed and the Commission did not receive a response from the Appellant. The Commission wrote to the parties by letter dated May 18, 2021, noting that the Appellant had not advised whether he wished to obtain any further medical reports by May 14, 2021. As such, MPIC would proceed to refer the indexed file to Health Care Services for a report.

MPIC submitted the Health Care Services report dated June 18, 2021 to the Commission on July 5, 2021 and a copy was provided to the Appellant.

On August 9, 2021, the Commission provided the Appellant with a Request to Set Hearing form to complete and return by August 30, 2021. No response was received.

By letter from the Commission dated September 6, 2021, the parties were advised that the Commission had determined that a further Case Conference would be scheduled to discuss whether the appeal was ready to be set down for hearing. The Commission attempted to contact the Appellant on several occasions to arrange a Case Conference date; however, the Appellant did not provide a response.

The Commission advised the Appellant by letter dated January 25, 2022, that in some cases where an Appellant does not take active steps to pursue their appeal, the Commission does have the power

to consider whether to dismiss the appeal under subsection 182.1(1) of the MPIC Act. In the letter, the Appellant was given two dates to choose from, and asked to advise the Commission by February 8, 2022, as to which date would be suitable. Failing his notification to the Commission, the letter indicated that a peremptory date of March 2, 2022, at 9:30 a.m. would be set for the next Case Conference. The Commission sent the January 25, 2022, letter to the parties via email. Copies were also sent to the Appellant by regular mail and Canada Post Xpresspost (the Xpresspost copy was returned to the Commission unclaimed).

Notice for the March 2, 2022 Case Conference was sent to the parties by the Commission via email on February 10, 2022. The Commission also sent copies of the Notice of Case Conference to the Appellant via regular mail and Canada Post Xpresspost on February 10, 2022 (the Xpresspost copy was returned to the Commission unclaimed). In addition, the Commission sent a Case Conference reminder to both parties by email on March 1, 2022. The Case Conference commenced at 9:30 a.m. as scheduled, with the Commissioner and counsel for MPIC on the teleconference line. The Appellant did not attend. A grace period was afforded the Appellant, but he did not join the teleconference. At 9:45 a.m., the Case Conference proceeded in his absence.

By letter dated March 2, 2022, the Commission wrote to the parties following the Case Conference held on that day. The letter noted that this matter would now be dealt with through the Commission's process for cases where the Appellant may have failed to diligently pursue an appeal. The letter enclosed a Notice of Withdrawal form, in case the Appellant no longer wished to pursue his appeal. The Appellant was advised that if the completed Notice of Withdrawal form was not received within 3 weeks from the date of the letter, the appeal would be held in abeyance for 3 months. The Appellant was further advised that if he did not contact the Commission in the next 3 months to take steps to pursue his appeal or to provide an explanation as to why he was

unable to do so, this matter would be scheduled for hearing to determine whether he had failed to diligently pursue his appeal and if so, whether the Commission would dismiss the appeal. The Commission sent the March 2, 2022, letter to the parties via email and regular mail.

On March 22, 2022, the Commission wrote to the Appellant and noted that he had not submitted a Notice of Withdrawal form to the Commission within the allotted 3 weeks. Therefore, the Commission would hold his appeal in abeyance for 3 months.

As noted above, the Commission wrote to the parties on June 21, 2022, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission. Therefore, the Commission would schedule a hearing, to determine whether the Appellant had failed to diligently pursue his appeal, and, if so, whether the Commission should dismiss his appeal. In the letter, the Appellant was given three dates to choose from, and asked to advise the Commission by July 5, 2022, as to which date would be suitable. Failing his notification to the Commission, the letter indicated that a peremptory date of September 7, 2022, at 9:30 a.m. would be set for the present hearing. The Commission sent the June 21, 2022, letter to the parties via email. Copies were also sent to the Appellant by regular mail and Canada Post Xpresspost on June 24, 2022. Also on that date, in a separate package, the Commission sent to the Appellant by Canada Post Xpresspost the indexed file for use at the present hearing. Canada Post records indicate that the June 21, 2022, letter sent to the Appellant by Xpresspost was accepted and signed for on June 27, 2022. Canada Post records also indicate that the indexed file sent to the Appellant by Xpresspost was accepted and signed for on June 30, 2022.

A Notice of Hearing for the September 7, 2022, hearing was sent to the Appellant by Canada Post Xpresspost (on July 8, 2022) and regular mail (on July 7, 2022), to the address provided by him in

his Notice of Appeal. The Notice of Hearing sent to the Appellant by Canada Post Xpresspost was returned to the Commission unclaimed. The Notice of Hearing sent to the Appellant by regular mail was not returned to the Commission. The Notice of Hearing was also sent to the Appellant by email (on July 7, 2022).

The Notice of Hearing provided instructions to the parties for their attendance at the teleconference hearing, including a telephone number to join the hearing remotely by telephone. 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 his appeal, and that the parties would have the opportunity to make submissions on this issue. It further indicated that their submissions could be made orally or in writing. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and dismiss the appeal, adjourn the hearing to a new time and date, or take such other steps as it deemed appropriate.

The present hearing commenced by teleconference as scheduled on September 7, 2022 at 9:30 a.m. Counsel for MPIC was in attendance on the teleconference line. The Appellant was not on the line. In accordance with the Commission's practice, a grace period of 15 minutes was provided for the Appellant to join the hearing. When the Appellant did not attend or join the teleconference line by 9:45 a.m., the hearing proceeded in his absence. The Commission heard submissions from counsel for MPIC. The Appellant did not subsequently contact the Commission to explain his absence or to request an adjournment of the hearing.

Relevant Legislation:

Section 182.1 of the MPIC Act provides that the Commission may dismiss an appeal in certain circumstances, 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, 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 his appeal diligently within the meaning of section 182.1 of the MPIC Act and whether the Commission should dismiss the appeal.

Counsel reviewed the relevant facts. The Notice of Appeal, which was filed by the Appellant with the Commission on October 22, 2019, provides the Appellant's home address, telephone number and email address. The Commission was successfully in contact with the Appellant by phone and email prior to the first Case Conference. The Appellant participated by teleconference in the first Case Conference, held on January 14, 2021. He indicated that he had been having some trouble with his mailing address. However, he committed to picking up the indexed file from Canada Post if the Commission would re-send it to him, and he subsequently confirmed that he did do so. However, the Appellant failed to attend the second Case Conference held on April 14, 2021, even though Notice of that Case Conference was sent to him by email, and a copy was also included with the package that he retrieved from Canada Post.

It does not appear that the Appellant responded to any communications from the Commission since picking up the package from Canada Post in January, 2021, nearly 20 months ago. This failure to respond is despite the Commission having sent the Appellant multiple letters by mail and by Canada Post Xpresspost that he failed to pick up. Counsel submitted that the Appellant has taken no steps to advance his appeal since January, 2021, which represents a failure to diligently pursue his appeal.

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

He referred to the documentary evidence in the indexed file for the present hearing, which identified that the Notice of Hearing sent by email and regular mail to the Appellant had not been returned to the Commission. Counsel submitted that the Appellant had been properly served with the Notice of Hearing pursuant to section 184.1 of the MPIC Act.

Counsel noted that subsection 182.1(2) of the MPIC Act requires that the Appellant be given the opportunity to be heard. He pointed out that the opportunity was the present hearing, which the Appellant elected not to attend. Counsel submitted that this requirement had been met.

Regarding whether the Appellant failed to diligently pursue his appeal, counsel noted that section 182.1 of the MPIC Act has been considered in a number of past decisions, which reference a three-step test to be applied under subsection 182.1(1), as follows:

1. whether the Appellant failed to diligently pursue the appeal;
2. whether the Appellant had an explanation for the failure; and
3. whether there are any other factors that should be considered, which may go to the justice of the proceedings.

Here, the Appellant has failed to diligently pursue his appeal. He has not taken any steps to pursue his appeal since the first Case Conference on January 14, 2021, and has not communicated with the Commission since that time. He has not provided any explanation for his failure to pursue his appeal.

Counsel submitted that there are no other factors that that have been identified which go to the justice of the proceedings. 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 his appeal, and, if so, whether the Commission should dismiss his appeal.

Service of the Notice of Hearing

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 provided by the Appellant in his Notice of Appeal. As indicated above, on July 7, 2022, the Notice of Hearing was sent to the Appellant by regular mail to the address provided by on him on his Notice of Appeal. The Notice of Hearing sent by regular mail was not returned to the Commission. Under subsection 184.1(2) of the MPIC Act, the Appellant was deemed to have received the Notice of Hearing sent by mail five days after mailing.

The Commission therefore finds that the Appellant was properly served with the Notice of Hearing by regular mail pursuant to section 184.1 of the MPIC Act.

Opportunity to be Heard

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 noted above, the Appellant accepted and signed for the Commission's letter of June 21, 2022, which advised that, failing notification from the Appellant, a peremptory date of September 7, 2022 would be set for the present hearing. In that letter, the Appellant was advised that this hearing would be held to determine whether he had failed to diligently pursue his appeal, and, if so, whether

the Commission should dismiss his appeal. 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 or on the teleconference line, he had been given ample and proper notice of the hearing. The Commission finds that the Appellant had been given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of his appeal, within the meaning of subsection 182.1(2) of the MPIC Act. Therefore, the Commission has the jurisdiction to consider whether the Appellant failed to diligently pursue his appeal, and, if so, whether the Commission should dismiss his appeal.

Did the Appellant Fail to Diligently Pursue his Appeal

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

The onus is on the Appellant to show that he has diligently pursued his appeal and that the appeal should not be dismissed. The Appellant's last active participation in his appeal was in late January, 2021, almost 20 months ago, when he participated by teleconference in the first Case Conference on January 14, 2021, and then one week later notified the Commission by email that he had picked up his package from Canada Post. In AC-13-143, the Commission noted that "diligence" was defined to mean "careful and persistent application or effort". The Appellant's conduct of his appeal following the first Case Conference would not meet this definition.

The Appellant failed to participate in the second Case Conference on April 14, 2021, despite having agreed to the date in advance, and despite having confirmed that he received the package that contained the Notice of Case Conference. Further, the Appellant failed to participate in the third Case Conference on March 2, 2022. The Commission then wrote several letters to the Appellant and advised him of the consequences of failing to actively pursue his appeal. However, the Appellant did not respond to the Commission's letters and attempts to contact him, or take any further steps to pursue his appeal in response to the Commission's letters.

As noted above, the Appellant did not attend the present hearing, nor did he provide any written submissions, although he was provided with notice of the hearing and the opportunity to do so. He did not provide any explanation for his failure to appear or for his failure to respond to the Commission's attempts to contact him.

Conclusion

Upon a consideration of the totality of the evidence and submissions, and upon a consideration of the relevant legislation, the Commission finds that the Appellant has failed to diligently pursue his appeal 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 28th day of September, 2022.

JACQUELINE FREEDMAN