

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]

AICAC File No.: AC-20-005

PANEL: **Laura Diamond, Chairperson**

APPEARANCES: **The Appellant, [Text Deleted], represented herself but did not appear
Manitoba Public Insurance Corporation ('MPIC') was represented by Andrew Robertson.**

HEARING DATE: **November 15, 2022**

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

RELEVANT SECTIONS: **Section 182.1 and 184.1 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

The Appellant was injured in a motor vehicle accident (MVA) on April 29, 2018. She received benefits from MPIC, including physiotherapy treatment and Income Replace Indemnity (IRI) payments. The Appellant returned to post-secondary studies in September of 2018, but continued to report pain and disability in the left knee.

Following knee surgery and a work re-conditioning program, MPIC's health care consultants and case management determined that the Appellant was able to work at a medium strength capacity

and could return to work at the light strength level of her pre-accident employment. This ended her IRI benefits upon discharge from the work conditioning program.

The Appellant filed an Application for Review from the case management decision and on November 18, 2019 an Internal Review Officer (IRO) for MPIC upheld the case management decision.

On January 7, 2020, the Appellant filed a Notice of Appeal (NOA) with the Commission to appeal the Internal Review Decision (IRD) of November 18, 2019. The NOA provided the Appellant's home mail and email addresses, along with 2 telephone numbers.

Noting that a physiotherapy assessment report referred to in the NOA was not provided to the Commission, Commission staff contacted the Appellant by email message, telephone voice message and letter mail, in an attempt to receive a copy of the report. On March 6, 2020, the Appellant replied by phoning the Commission to ask for more information and indicated that she would speak with the physiotherapist to request that the report be provided to the Commission.

Although the physiotherapy report was not provided, the Commission followed the Appellant's request in the NOA for mediation, and forwarded the file to the mediation office.

The matter was not resolved at mediation, and on October 16, 2020 the file was returned to the Commission.

Commission staff prepared an Issue(s) Under Appeal sheet and indexed file containing documentary evidence relevant to the appeal. On November 27, 2020 a copy was provided to the Appellant for review. The Appellant was asked to advise the Commission by January 15,

2021 whether the issues were properly identified and whether she would be seeking or submitting any further written evidence.

No response was received.

On January 21, 2021, Commission staff phoned, left a voice message and emailed the Appellant, asking her to provide her response. Information was also provided regarding the Claimant Adviser Office (CAO) (which can provide representation to appellants free of charge) and regarding medical report entitlement.

No response was received.

On February 23, 2021, the Commission sent a letter to the Appellant advising that it was awaiting her response, as she had been contacted numerous times but had not responded. The Appellant was asked to contact the Commission by March 9, 2021 and if no response was provided, the matter would be discussed with a Commissioner to determine if a Case Conference was necessary to obtain a status update on the appeal.

On March 9, 2021, the Appellant phoned the Commission. She confirmed that she had reviewed the indexed file and wished to obtain a report from her physiotherapist regarding her knee. Commission staff explained the medical report entitlement process, advised the Appellant regarding the CAO office, and provided that contact information.

Staff also advised that they would contact the Appellant again on March 30, 2021 to determine if she wished to retain CAO.

In April of 2021, Commission staff telephoned the Appellant and left a voice message, sent an email message, and sent her 2 letters with information regarding medical report entitlement, providing medical authorization forms and sending the Commission's Guidelines for Hearing. A deadline of July 13, 2021 was set for the Appellant to submit the physiotherapist report.

No response was received.

On July 14, 2021, Commission staff sent a further letter and email message to the Appellant, noting that she had missed the deadline of July 13, 2021 to submit the report from her physiotherapist. The letter advised that the Commission would provide her with one final opportunity, until August 13, 2021, to provide the report or a written request (with reasons) for an extension of time. The letter noted that if she did not respond by August 13, 2021, the Commission would conclude that she has no further documents to submit for inclusion to the indexed file. The appeal would then be reviewed with a Commissioner to schedule a Case Conference (CCH) to discuss setting the appeal for a hearing.

The deadline of August 13, 2021 passed and the Appellant did not provide a response.

When the Appellant did not respond to the Commission's inquiries (by email message, letter and phone) regarding her availability to attend a teleconference CCH, the parties were advised, by letter and Notice of Case Conference (NOCCH) that a CCH had been scheduled for March 20, 2022, to discuss the following:

- Issues under appeal;

- Status of the appeal;
- Commission's hearing procedures;
- Confirmation that all written evidence has been submitted;
- Witnesses, if any, the parties will be calling at the hearing;
- Time required for the hearing; and
- Possibilities for hearing dates.

Case Conference Hearing

The scheduled CCH was held on March 30, 2022, but the Appellant did not attend. After waiting a reasonable amount of time, the CCH proceeded in her absence.

The Chair noted that the Appellant's last contact with the Commission was on March 9, 2021 and that although Commission staff had attempted to contact her on numerous occasions since that time, she had not responded. The Appellant did not respond to the NOCCH and did not attend the CCH.

The Chair determined that it was appropriate for the matter to proceed through the Commission's process for appeals which may not have been diligently pursued. The Chair advised that the Commission would hold the matter in abeyance for 3 months and if the Appellant did not contact the Commission during that time (to take steps to pursue the appeal or provide a reasonable explanation as to why she was unable to pursue it) the matter would be scheduled for a hearing pursuant to s. 182.1(1) of the MPIC Act, to determine whether the Appellant has failed to pursue her appeal and if so, whether the Commission will dismiss the appeal.

Further Communication Attempts

A letter dated March 30, 2022 confirming this information was sent to MPIC. It was sent to the Appellant by email message, regular mail and Canada Post Xpresspost. All regular mail was sent to the address which the Appellant provided to the Commission on her NOA. The Secretary to the Commissioner confirmed that the letter sent to the Appellant via Canada Post Xpresspost was successfully delivered on April 1, 2022 and the letter sent by regular mail was not returned to the Commission.

A letter was sent to the parties on July 7, 2022 and was sent to the Appellant by email message, regular mail and Canada Post Xpresspost. The letter noted that following the Commission's letter dated March 30, 2022, the Appellant had not provided any further information or been in contact with the Commission. The letter advised that a hearing date would be scheduled to determine whether the Appellant has failed to diligently pursue her appeal and, if so, whether the Commission should dismiss the appeal.

The letter offered possible dates for a hearing, which would be held via teleconference, and requested that the Appellant advise the Commission by August 5, 2022 as to which date was suitable. The Appellant was advised that if she did not provide a response by August 5, 2022, a peremptory date for the hearing would be set for Tuesday, November 15, 2022 at 9:30 a.m.

Scheduling and Notice of the Hearing

When the deadline of August 5, 2022 passed and the Appellant did not respond, a letter dated August 9, 2022 was sent to the parties advising that a hearing date had been set for November

15, 2022 at 9:30 a.m. via teleconference. A Notice of Hearing (NOH) and a copy of the Commission's Guidelines for Hearing were enclosed.

This letter was sent to the parties via email message and also to the Appellant via regular mail and Canada Post Xpresspost.

The letter sent to the Appellant via email message and regular mail were not returned and assumed delivered.

The letter sent to the Appellant via Canada Post Xpresspost was confirmed as delivered on August 17, 2022.

Failure to Pursue Indexed File

The indexed file of documents relevant to the Appellant's alleged failure to diligently pursue the appeal was provided to the parties on August 12, 2022. It was sent to the Appellant via Canada Post Xpresspost.

This indexed file was amended on August 23, 2022 to include a copy of the delivery confirmation of the NOH from Canada Post Xpresspost. A copy of the amended Table of Contents for the indexed file and a copy of the Canada Post delivery confirmation were also provided to the parties at that time.

A copy of the amended Table of Contents is attached to this decision as Appendix "A".

The Hearing

The hearing convened on November 15, 2022 at 9:30 am. The hearing was held by teleconference, as indicated in the NOH.

Counsel for MPIC appeared via teleconference. The Appellant did not attend. The Commission provided a grace period of 15 minutes and reconvened the hearing at 9:45 am.

The Appellant failed to appear.

The Commission continued without the Appellant and heard submissions from counsel for MPIC.

Issue

The issue before the Commission was whether the Appellant failed to diligently pursue the appeal and whether the appeal should be dismissed.

Decision

The Commission finds that the Appellant has failed to diligently pursue the appeal and the appeal should be dismissed.

Legislation

The applicable sections of the MPIC Act are 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.

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 letter mail 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 letter mail 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 reviewed the history of the Appellant's contact with the Commission, beginning with the filing of the NOA in January 2020, when her home address, telephone number and email address were provided.

The Appellant responded to and was in touch with the Commission on only one occasion after filing the NOA.

The Commission then followed up on a number of occasions, finally writing on July 14, 2021 and setting a deadline of August 13, 2021 for a response.

When this deadline passed with no response, the Commission scheduled a CCH to discuss the status of the appeal. The Appellant did not respond to any of the Commission's scheduling attempts or communications.

The CCH was held and the Appellant did not attend.

Counsel observed that the Appellant appears not to have responded to any of the Commission's communications since March of 2021. Despite many communications asking for updates or participation in scheduling the CCH and this hearing, nothing was heard from the Appellant.

This, he submitted, represents a failure to diligently pursue the appeal.

Counsel noted that s. 182.1 of the MPIC Act requires that the Commission give the Appellant the ability to make written submissions or otherwise be heard regarding the dismissal of her appeal. That opportunity was provided with this hearing, which the Appellant has not attended.

The indexed file for this hearing contains details of service of the NOH by email message, Xpresspost delivery and un-retuned regular mail to the address the Appellant provided. She responded to none of these.

Canada Post Xpresspost confirmed delivery with a signature. The regular mail and email message were not returned. Although the Commission cannot determine who signed the delivery notice for Canada Post, the regular mail sent to the address provided meets the requirements of s 184.1 of the Act. S. 184.1 (2) of the Act would allow the Appellant to establish that she has not in fact received the notice, but in this case, since the Appellant has not attended or contacted the Commission, there is no such submission under that subsection.

Therefore, counsel submitted that the requirements for notice has been met.

Counsel submitted that in past cases before the Commission MPIC's legal department has developed and relied upon 3 steps to determine whether there is a failure to pursue which should lead to an appeal's dismissal.

These factors are:

- 1) Whether the appellant failed to diligently pursue the appeal;
- 2) Whether these was a reasonable explanation for the failure;
- 3) Whether any reason goes to the justice of the proceedings and whether the appeal should be dismissed or allowed to continue.

In this case, he noted, there has been a clear failure to diligently pursue the appeal. The Appellant has not been in touch with the Commission for 18 months, despite repeated efforts to communicate with and contact her. The Appellant has been non- responsive.

No explanation was provided for her failure to pursue the appeal and no other factor that goes to the justice of the proceedings has been raised.

In these circumstances, counsel for MPIC submitted that the Commission should dismiss the appeal based upon the Appellant's failure to diligently pursue her appeal.

Discussion

S. 182.1 of the Act sets out two-steps for appeals which may not have been diligently pursued.

Section 182.1(1) allows for dismissal if the Appellant fails to "diligently pursue" his appeal.

Section 182.1(2) mandates the opportunity to be heard in respect of that dismissal.

The Appellant's home address, email address and telephone number were provided in writing with her Notice of Appeal. There is no evidence that the email messages and letters to these addresses are not being delivered. Those sent by regular mail were not returned to the Commission, and so are assumed delivered, pursuant to s. 184.1 of the Act. Canada Post Xpresspost confirmed delivery of the March 30, 2022 notice for this hearing. The Appellant's phone is not disconnected and voice mail messages have been recorded. She did not submit that she was not notified or submit any evidence or arguments.

The Appellant has not taken advantage of numerous opportunities to update the status of the appeal or even to submit, at a hearing or in writing, why the appeal should not be dismissed. She has provided no explanation for her failure to participate. The Commission agrees with counsel for MPIC that the Appellant was properly notified, had the opportunity to be heard at this hearing and failed to attend.

The onus is on the Appellant to show that she has diligently pursued the appeal and that the appeal should not be dismissed.

"Diligence" has been considered in previous cases to mean that an appellant must carry out their appeal with care and perseverance.

The evidence shows that, on numerous occasions, the Appellant has not taken care to respond to the Commission's inquiries. This matter is no further ahead more than two years after the filing of the appeal, in spite of many efforts the Commission has made to contact and hear from her. Numerous substantive matters remain outstanding since the beginning of the appeal.

A review of the documents on file shows that after filing her NOA, participating in mediation and indicating her wish to submit further physiotherapy reports, the Appellant has done nothing further. She failed to respond to numerous letter, email messages and telephone calls from Commission staff. She failed to provide any response, documents or details for a period of 20 months.

The Commission finds, on a balance of probabilities, that the Appellant has not pursued her appeal with care and perseverance.

Summary

In spite of having been given the opportunity to make submissions at this hearing, the Appellant has not met the onus upon her to establish diligent pursuit of the appeal by careful and persistent application or effort. The Commission finds that the Appellant has not provided an explanation for her failure to pursue the appeal or provided a reason why the appeal should not be dismissed.

Conclusion

Upon a consideration of the totality of evidence and submissions, as well as the relevant legislation, the Commission finds that the Appellant has failed to diligently pursue her appeal.

Disposition

Based upon the foregoing, the Appellant's appeal is hereby dismissed.

Dated at Winnipeg this 30th day of November, 2022.

LAURA DIAMOND