

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-16-027, AC-16-028**

PANEL: Laura Diamond, Chairperson.

APPEARANCES: [Text Deleted] (hereinafter referred to as the Appellant), was self represented, but did not attend the hearing. Manitoba Public Insurance Corporation (“MPIC”) was represented by Matthew Maslanka.

HEARING DATE: April 4, 2023.

ISSUE(S): Whether the Appellant has failed to diligently pursue his appeal, and if so, whether the Commission will dismiss the appeal.

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 motor vehicle accidents (MVA) on March 20, 2014 and August 29, 2014. After reviewing details of his employment status at the time of the MVA, his case manager determined that he should be considered an “[Occupation 1]” for certain purposes under the benefit scheme of the *MPIC Act*.

The Appellant sought internal review of this finding and, on December 8, 2015, an internal review decision (IRD) upheld the case manager's decision.

Appeal

The Appellant filed an appeal dated March 3, 2016 with this Commission.

An indexed file (Index) containing relevant documents was collected by MPIC and a copy provided to the parties in June 2016. Commission staff continued to be in contact with the Appellant as he sought further documentation, including medical reports, to include in the Index. Most of this correspondence was conducted through email exchange between the Appellant and his assigned Appeals Officer at the Commission. The Appellant identified witnesses he wished to call to testify at the appeal hearing and the Commission, as is its practice, requested brief witness statements.

In 2017, the Appellant advised that he was still seeking further medical reports.

In 2018, he advised that he was looking for a new doctor and would be attending further specialist appointments, although he did not yet have a referral.

On May 15, 2018, the Commission emailed the Appellant asking whether he had further medical reports, but he advised that he did not as he was still trying to find a new doctor.

On September 26, 2018, the Commission emailed again to request a status update. The Appellant advised that he was now working on his own regimen for recovery and was receiving chiropractic treatment.

On August 10, 2020, the Commission wrote to the Appellant to advise that in spite of his assurances of intent to proceed, the file had not progressed and the Commission had not heard from him in over a year and a half. A Notice of Withdrawal (NOW) form was provided, which he was asked to complete and return within three (3) weeks if he no longer wished to pursue his appeal.

The Appellant was also advised that in some cases where an appellant does not take active steps to pursue their appeal, the Commission has the power to consider whether to dismiss the appeal for a failure to pursue (FTP), under s. 182.1(1) of the *MPIC Act*. If he did not return a completed NOW or contact the Commission, his file would be held in abeyance for a period of six (6) months. If he did not contact the Commission or take steps to advance the appeal, or to provide an explanation for failing to pursue it within the six (6) months, the Commission could schedule a hearing to determine whether he had failed to diligently pursue his appeal and whether the Commission should dismiss it.

The Commission then received an email from the Appellant, dated September 16, 2020, which advised that he was having trouble finding suitable medical care to assist with his recovery and between that and the Pandemic, he could not move forward with his appeal at that time.

Following further inquiries from Commission staff on December 30, 2020 the Appellant confirmed that he wished his appeal to be held in abeyance pending further treatments. The matter was held in abeyance for several months.

On April 28, 2021, the Commission wrote to the Appellant to advise that a Case Conference Hearing (CCH) would be scheduled to discuss the issues and case management of his appeal.

When staff inquired as to his scheduling availability for the CCH, the Appellant emailed on September 10, 2021 and September 13, 2021 to advise that his condition had not improved and he still had no legal counsel, so he could not attend a CCH. He advised that the earliest he could attend would be in 2024, some two (2) years away.

The Commission responded by letter of October 5, 2021 (also sent by email) allowing the Appellant six (6) weeks to seek counsel and asking that after six (6) weeks he contact the Commission to discuss the matter.

The letter also reiterated information provided to the Appellant on August 10, 2020, emphasizing the option to represent himself (as many appellants at the Commission do) or to obtain the services of the Claimant Adviser Office (CAO) without charge. He was reminded of his obligation to pursue his appeal.

The Appellant responded by email dated October 7, 2021 to express his displeasure with his MPIC compensation and advise that he did not believe he was required to provide any further explanation or evidence.

When it did not hear further from the Appellant, the Commission scheduled the matter for a CCH to be held by teleconference on March 8, 2022, in order to discuss the case management of the appeal.

The Appellant responded by email to advise he could not attend as he had not retained counsel and did not have access to a computer or phone. The Commission advised that he could be

accommodated by using a private room with a telephone at the Commission offices in order to take part in the CCH.

However, on January 12, 2022 the Appellant advised that he still did not have legal counsel and would only attend when he had retained counsel.

On January 17, 2022, the Commission wrote to the Appellant by email and regular mail to advise that more than three (3) months had now elapsed since its letter of October 5, 2021, which provided the Appellant with six (6) weeks to obtain counsel. The appeal had already been held in abeyance since August 10, 2020. The letter reminded the Appellant that it is not necessary to have counsel in order to proceed with an appeal at the Commission and advised that the CCH would proceed on March 8, 2022. If he chose not to participate, the Commission could determine whether it is necessary to set a date for a failure to pursue hearing.

Although counsel for MPIC was present at the CCH on March 8, 2022, the Appellant did not attend.

On March 9, 2022, the Commission wrote to the Appellant summarizing the history of the appeal file and advising that on this basis, the Commission had determined to set the matter down for a hearing under s. 182.1 (1) of the *MPIC Act* to determine whether he had failed to diligently pursue his appeal and, if so, whether the Commission would dismiss his appeal.

The Appellant was advised by email dated March 10, 2022 that the Commission would prepare and provide him with an indexed file for the FTP hearing.

In preparation for the FTP Hearing, the Commission compiled an FTP Indexed File (FTP Index) which contains all documents relevant to the FTP Hearing. These documents constitute evidence that either party may rely upon at the hearing. The Commission numbers these documents for ease of reference by the parties and the Panel.

Attached to these reasons and marked as Schedule “A” is a copy of the FTP Index Table of Contents.

These were sent to the Appellant by Xpresspost on March 14, 2022. On June 8, 2022, Canada Post confirmed delivery of the FTP Index package by Xpresspost.

On February 16, 2023, the Appellant was sent a Notice of Hearing (NOH) for the FTP hearing and a copy of the Commission’s Guidelines for Hearing, by regular mail and courier.

When the courier returned the correspondence without successful delivery, they were sent to the Appellant by Xpresspost and email message on February 21, 2023. On March 1, 2023, Canada Post confirmed that this Xpresspost package was delivered on February 24, 2023.

On February 25, 2023, the Appellant emailed to advise that he would not attend a hearing until he had legal representation and new doctors.

An updated copy of the TOC for the FTP with additional Tabs 25-28 were sent to the parties on March 2, 2023. Canada Post confirmed delivery of this package on March 10, 2023.

The FTP Hearing

Because of safety considerations arising from the pandemic, and with written notice to the parties, the Commission conducted the FTP Hearing via teleconference.

The hearing was convened with only counsel for MPIC in attendance.

Appellant testimony and submissions

The Appellant did not appear at the scheduled time for the hearing. The Appellant did not file any written submissions or evidence. In accordance with Commission policy, the Commission Chairperson waited 15 minutes for the Appellant to attend the hearing. The Appellant did not appear and therefore the hearing proceeded without him.

MPIC submissions

Counsel reviewed s. 182.1 of the *MPIC Act* and noted that prior decisions of the Commission (*AC-14-146*) have established that considerations of the merits of the appeal is not contemplated. Rather, the *Act* requires that the Commission be of the opinion that the Appellant has failed to diligently pursue his appeal.

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, showing care and effort. Diligent pursuit requires an appellant to show care and effort in pursuing the appeal.

In the present case, the documents show that the Appellant filed his NOA seven (7) years ago, in March 2016. The Commission's letter to him of August 10, 2020 recounted the history of communications from the Appellant to that date, and noted that there had been no communication from him in over a year and a half.

Further efforts at communication were detailed in the Commission's letter dated October 5, 2021. The Appellant had confirmed that he wished to continue seeking an appeal, but that for reasons which included difficulty finding a new doctor and continued efforts at recovery, he would not be available for a CCH until 2024.

At that time, the file was held in abeyance by the Commission for a period of a further six (6) weeks in order that he could take steps to pursue further doctor reports or retain counsel. He was advised that a CCH would then be scheduled and if he did not attend the Commission would decide whether a FTP hearing would be scheduled.

The Appellant received this letter and responded by email declining to participate for the reasons he had already provided.

The Commission scheduled a CCH for March 8, 2022 and sent Notice of the CCH, dated January 11, 2022, which advised that if either party failed to appear, the CCH would proceed in their absence and the Commission may proceed to schedule a date for hearing.

The Appellant responded on January 12, 2022 to say he still did not have legal counsel and would only attend when he did have counsel. The Commission wrote back on January 17, 2022 to advise that the CCH would proceed on March 8, 2022.

The CCH was held on March 8, 2022 and the Appellant did not attend, so the Commission wrote to him on March 9, 2022 to advise that an FTP hearing would be scheduled. The Appellant responded by email on March 11, 2022 to advise that he would not attend the hearing until he could afford legal representation.

After receiving the NOH for the FTP hearing of April 4, 2023, he emailed again on February 25, 2023 to say that he was not obligated to provide the Commission with information and would not attend the hearing until he had legal representation and a GP and concussion doctor.

MPIC submitted that the Commission's history of correspondence with the Appellant shows a *prima facie* case of an Appellant failing to diligently pursue his appeal. Aside from email communications from the Appellant to the Commission, there is no evidence he has done anything to further his appeal since filing his NOA more than seven (7) years ago. There is no evidence that care and effort has been applied in this case.

No reasonable excuse has been provided for this failure to pursue the appeal. The Appellant was advised as early as October 2021 that it is not necessary to have legal representation at the Commission and that many appear as self-represented appellants. He was also advised of the existence of the CAO office to assist him. There is no evidence of any efforts made to obtain counsel or CAO assistance, and the Appellant has done nothing to participate in the appeal process. Although the Appellant has the right to retain counsel, he does not have the right to determine when and if he will actually do so, and to put that off indefinitely does not meet the requirement to pursue an appeal.

This was further compounded by his failure to appear at the CCH of March 8, 2022 where he may have been able to provide details of such efforts. He then elected not to attend at the FTP hearing, robbing himself of the opportunity to provide information.

Counsel submitted that throughout the appeal process the Appellant has been refusing to engage with his appeal. Rather than display willingness to participate, he refused to engage and cooperate with the Commission's attempts to move the appeal forward. Such attempts were met only with his resistance. His emails to the Commission served only to delay and prolong the process further and should not be construed as attempts to move the appeal forward.

In *AC-14-146* the Commission considered the very same argument of an appellant who said he wanted to retain counsel but could not do so. That appellant even appeared in order to make representation at the FTP hearing. Still the Commission there found he had not taken proper steps to pursue his appeal, noting that a reasonable appellant, not having funds to retain counsel, would still respond and follow up with the Commission and attend case conferences when scheduled.

In this case, the Appellant has not even attended the FTP hearing.

The Appellant's appeal was filed seven (7) years ago, with no significant advancement by him of his case. There was a two (2) year gap after September 26, 2018 where the Commission had no communication from him. Any communication that was later received was only in response to the Commission initiating contact, with the Appellant responding when the Commission tried to move the matter along. He has been reactionary, aimed at putting off any progress in his appeal. This shows that he has been receiving the Commission's communication and been aware of the steps they were taking, but in no way should such communication be interpreted as diligent pursuit.

Therefore, counsel submitted that because of the Appellant's failure to engage in any meaningful way or to attend at a CCH or this hearing, and his attempts to draw out the process, the Commission should find that he has failed to diligently pursue the appeal and the appeal should be dismissed.

Legislation

The applicable sections of the *MPIC Act* and *Regulations* 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.

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.

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.

Issue

The Commission must decide whether the Appellant failed to diligently pursue his appeal and if so, whether the Commission should dismiss the appeal.

Discussion

The content of the email communications from the Appellant to the Commission, along with the posting of regular mail (which was not returned and assumed delivered) and Canada Post confirmation of Xpresspost delivery to the Appellant, established that the Appellant had notice of the FTP hearing.

The Commission finds that he was given proper notice of the hearing, pursuant to s 184.1 of the *Act*, and that he was given an opportunity, as set out in the NOH, to make submissions to the Commission regarding the issue of whether the appeal should be dismissed.

Section 182.1(1) of the *MPIC Act* grants the Commission authority to dismiss an appeal at any time, if the Commission determines an appellant has failed to pursue the appeal diligently. This section does not require the Commission to consider the merits of the appeal. The Commission agrees that the word “diligently” requires some evidence of careful, steady and persistent effort.

The onus is on the Appellant to show that he has not breached s. 182.1(1). The Appellant has provided no evidence to show that he has diligently pursued the appeal or of any reasonable excuse for his failure to do so.

The Commission agrees with counsel for MPIC that his refusal to participate or cooperate until he had retained counsel, with no evidence of efforts to do so or to consult with the CAO, does not constitute a reasonable excuse. Nor does his expressed wish to find new doctors. These are matters which can, and often are, discussed at CCH case management meetings, but the Appellant declined to attend the scheduled CCH and this hearing.

The Commission agrees that at various times the Appellant has answered the Commission's inquiries by providing email responses. However, this basic attention to the Commission's communication is not sufficient to meet his responsibility to pursue his appeal with careful, steady and persistent efforts. Rather, in this case, these communications only served to delay the Commission's efforts to move the appeal process forward. I agree with counsel for MPIC that over the course of seven (7) years, the Appellant has not made diligent efforts to advance and pursue his appeal.

Disposition

The Commission finds, on a balance of probabilities that the Appellant has failed to pursue his appeal diligently. Consequently, in accordance with s. 182.1(1), the Commission dismisses the appeal.

Dated at the City of Winnipeg, in the Province of Manitoba, this 20th day of April, 2023.

LAURA DIAMOND