

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-17-007**

PANEL: Pamela Reilly, Chairperson

APPEARANCES: The Appellant, [Text Deleted], attended with her representative [Text Deleted] (the “Representative”). Manitoba Public Insurance Corporation (“MPIC”) was represented by Ms. Hayley Main (“Counsel”).

HEARING DATE: April 18, 2023.

ISSUE: Whether the Appellant failed to pursue her appeal diligently.

RELEVANT SECTIONS: Sections 182(3) (4), 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:

On December 11, 2014, the Appellant was walking on the highway when a passing vehicle struck her (“the MVA”). Her Application for Personal Injury Protection Plan (“PIPP”) benefits listed MVA-related injuries as, among other things, a fractured pelvis, fractured left arm with laceration, lacerations to her head, left thigh, shoulder and finger, as well as loss of consciousness.

On July 4, 2016, the Appellant's case manager issued a decision ("the CMD") that the Appellant's various injuries resulted in a total Permanent Impairment ("PI") award of \$70,881.12.

On August 17, 2016, the Appellant requested that MPIC's Internal Review Office review the CMD because she disagreed with the calculation of the PI award. Although not considered in the CMD, the Appellant also complained about MPIC's treatment of her Personal Care Assistance ("PCA") benefits.

On November 10, 2016, the Internal Review Office issued its decision ("the IRD"), which concluded that due to a calculation error, the Appellant had received a 6% overpayment. Notwithstanding the overpayment, the IRD upheld the PI award in the CMD, and dismissed the Application. The IRD did not deal with PCA benefits.

The Commission Appeals Officer assigned to the Appellant's appeal ("the AO") received the Appellant's Notice of Appeal ("NOA") on January 11, 2017, to which she attached three typewritten pages of reasons for her appeal. She explained in detail, why she disagreed with MPIC's PI calculation and termination of her PCA benefits. The NOA requested the option of mediation with the Automobile Injury Mediation ("AIM") Office.

On February 19, 2017, the AIM office advised the AO that the Appellant decided not to participate in mediation. The Claimant Advisor Office ("CAO") then notified the AO that it represented the Appellant.

The Commission compiles an Indexed File of documents (the "Indexed File") relevant to the appeal, and sends this to the parties. On September 15 and 27, 2017, the AO sent

the Indexed File and a Supplemental Index to the CAO. On December 11, 2017, the CAO advised that the Appellant now wished to attend mediation.

On October 16, 2018, the AIM office advised that the parties had completed mediation and returned the appeal to the Commission for processing. On October 18, 2018, the CAO advised the AO that it no longer represented the Appellant.

On November 14 and November 16, 2018, the AO received voice mail messages from an unidentified male. The male caller advised that the Appellant would obtain further reports and requested the AO contact the Appellant at an email address that the caller provided. The AO telephoned the Appellant; however, the telephone number provided on her NOA was not in service.

After obtaining another telephone number from the CAO, the AO spoke to the Appellant on November 16, 2018. The Appellant advised that she was trying to obtain a referral to a specialist to provide a medical report. She advised that someone was assisting her but refused to provide a name or contact information. On November 20, 2018, the AO emailed a letter to the Appellant that explained the process for obtaining and submitting reports to the Commission, requested an update on when the AO could expect such a report, and enclosed an Authorization for Representation form (the "Authorization Form"), which would allow the AO to speak to her representative.

On December 6, 2018, the AO received a signed Authorization Form that named the Appellant's Representative. The Authorization Form did not include contact information for the Representative. In response to the AO's request about when the Appellant

expected a medical report, she said she did not have a timeline as it “takes time to get an appointment to see a doctor”.

On March 4, 2019, the AO emailed the Appellant’s Representative (using the Appellant’s email address), and requested that he provide his mailing and email addresses. On March 29, 2019, the Appellant responded by email stating, “We are compiling additional reports and assessments and will notify you when we have completed these.”

On April 1, 2019, the AO addressed an email to both the Appellant and the Representative requesting that either one of them complete the enclosed “New Information” form for each anticipated report. The AO did not receive a response from either the Appellant or her Representative.

On June 26, 2019, the AO sent another email to the Appellant requesting the completed New Information form, and confirmation that the Appellant had received the Indexed and Supplemental Indexed Files. The Appellant did not respond. On July 18, 2019, the AO left a voicemail message and sent an email requesting that the Appellant contact the AO.

On August 12, 2019, the Appellant contacted the AO by email, as follows:

Please mail me a copy of the Indexed file you are referring to. I would prefer you mailing it to me as I will always have difficulty with accessing and reading my emails. I would prefer receiving information by mail. I am currently awaiting to get in to see doctors and receive additional information for my appeal.

On August 15, 2019, the AO telephoned and spoke with the Representative who stated that he was not aware that he was representing the Appellant. He said he was a friend who would “help her out.” In response to the AO’s request for his mailing address, to

provide him with the Indexed File, the Representative told the AO to, “just send it to [the Appellant]”.

On August 22, 2019, the AO utilized Xpresspost to mail the Indexed File to the Appellant. On December 19, 2019, the AO left a voicemail with the Representative requesting he confirm receipt of the Indexed File. Neither the Representative nor the Appellant responded.

On March 6, 2020, the AO reached the Representative by telephone, at which time he confirmed that he would review the Indexed File with the Appellant on the upcoming weekend. He said he would contact the AO the following week, which he did not.

On August 11, 2020, the AO called the Representative’s telephone number, which was now out of service. On August 17, 2020, the AO left a voicemail message for the Appellant, followed by an email, requesting that she contact the AO. On August 19, 2020, the Representative left a voicemail advising the AO that they were still trying to get specialist reports and that once received, the Appellant would contact the AO. The AO noted the call-display telephone number, which was different than the number the AO had on file.

On February 16, 2021, the AO telephoned the Representative who advised that the Appellant had obtained one report and was trying to obtain further reports. On April 22, 2021, the AO utilized Xpresspost to send a letter to the Appellant advising that the Commission would schedule a Case Conference Hearing (“CCH”) to discuss the appeal. The AO also enclosed a Supplemental Index.

On May 21, 2021, Canada Post returned the Xpresspost package to the Commission with the notation, "Reason: Unclaimed". The AO emailed the Appellant to advise her of the failed delivery and requested a response. On May 25, 2021, the AO telephoned and spoke to the Appellant, who confirmed that the AO had her correct address. The AO advised that it would resend the returned package to the Appellant. The AO explained that it would schedule a CCH, which both the Appellant and her Representative must attend.

On February 9, 2022, the Commission Secretary left a voice message for the Appellant requesting a return call to discuss her availability for scheduling a CCH date. In addition, the Commission Secretary utilized the Appellant's email to request the Appellant's availability for either March 22, 23, or 24, 2022 to set a CCH. The Commission Secretary also telephoned the Representative whose phone service stated, "the user is unavailable", with no ability to leave a voice message.

On February 11, 2022, the Commission Secretary called the Appellant's cell phone, which was no longer in service. On the same date, the Commission Secretary called both phone numbers previously used to contact the Representative, however both numbers were no longer in service.

On February 11, 2022, the AO utilized Xpresspost to send a letter to the Appellant, which outlined the AO's attempts to contact the Appellant. The letter provided a choice of dates for scheduling a CCH and explained that if the Appellant did not respond by February 28, 2022, the Commission would schedule March 23, 2022 at 9:30 a.m.

Canada Post records showed that it attempted delivery of the letter, and left a card at the Appellant's address with instructions to pick up the package at her local post office. On April 6, 2022, Canada Post returned the delivery with the notation, "Reason: Unclaimed".

On March 1, 2022, the AO mailed a Notice of Case Conference Hearing ("NOCCH"), which advised the Appellant of her CCH scheduled for March 23, 2022, and provided call-in instructions. Canada Post records indicated that it left a card with the Appellant instructing her where to pick up the package. On March 1, 2022, the Commission Secretary also utilized the Appellant's email to advise her of the NOCCH date, time and teleconference instructions.

On March 23, 2022, the Commission Chairperson and MPIC Counsel attended the CCH. The Commission Chairperson waited 15 minutes; however, neither the Appellant nor her Representative attended. On March 23, 2022, the Commission Chairperson sent a letter to the parties outlining the discussions at the CCH, which noted that the Appellant had not provided any new medical information, and the appeal had not progressed since October 2018. The letter advised that if the Appellant failed to contact the Commission within six (6) months, the Commission would schedule a Failure to Pursue ("FTP") Hearing.

On March 25, 2022, the AO sent a separate letter via email, regular mail and Xpresspost, outlining the AO's attempts to contact, and obtain information from, the Appellant. The letter expressly quoted *MPIC Act*, section 182.1(1), "Dismissal for failure to pursue appeal". The letter stated that the Appellant should advise the Commission within three (3) months of the steps she had taken to pursue her appeal. Further, if the Appellant failed to respond, the Commission would schedule a hearing to determine whether she

had failed to pursue her appeal diligently and, if so, whether the Commission should dismiss her appeal.

Issue:

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

Decision:

The Commission finds, on a balance of probabilities, that the Appellant has failed to pursue her appeal diligently and therefore dismisses the Appellant's appeal.

The Hearing:

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

The Commission creates a FTP Indexed File, which contains all documents relevant to the FTP Hearing. The 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 Indexed File Table of Contents.

Preliminary Discussions:

Both the Appellant and her Representative attended the teleconference FTP Hearing. The Commissioner explained that the issue involved section 182.1(1) of the *MPIC Act* and whether the Appellant had failed to pursue her appeal diligently. The Commissioner

invited the Appellant to provide testimony to address this issue, after which Counsel or the Commissioner may have questions for her.

The Representative confirmed that he had the FTP NOH, issued February 17, 2023. He submitted that it would not be fair to have the Appellant give testimony because he was the one who interacted with Commission staff. Further, the Appellant suffered memory problems due to her head injury.

The Commissioner offered the Representative the options of either directing the Appellant with her testimony, or he could testify, as well as make closing remarks. The Representative opted to testify. Counsel agreed and the Appellant did not object. The Commissioner administered the affirmation to the Representative and reminded him that the issue involved whether the Appellant had failed to pursue her appeal diligently.

Representative Testimony:

The Representative said that the Appellant was trying to see a specialist. He said that with the COVID pandemic, “a lot of doctors and specialists were not seeing patients directly”. This delayed things for the Appellant. He said that when things opened up after COVID, “doctors were backlogged” and it took a while to get an appointment. Then some doctors were not taking new clients.

The Representative said, “This was relayed to [the AO] on numerous occasions,” with the AO not getting back to him. He said that the Appellant’s doctor had documented the Appellant’s symptoms very well, and “if he gives a referral to a specialist – it takes almost a year to see [the doctor] at the pain clinic.”

The Representative said that they were also dealing with the Appellant's MPIC Case Manager who was not co-operative and delayed responding to their questions, which happened "a lot of times." In response to the Commissioner's question about when these conversations occurred, the Representative said "2016 and into 2017, when the file kinda goes cold". The Commissioner reminded the Representative to speak to circumstances since January 10, 2017, when the Appellant filed her appeal with the Commission.

The Representative responded that they were "getting further information from the doctors". He said the AO was not at work all the time, "which further complicated things – between COVID and her being away from her job, and then back to the specialists." He described this as a "back and forth", and stated, "If you don't hear back from her and don't hear things from her end...", then left the thought unfinished. He said he talked to another Commission staff person who advised that there was a backlog, and the Commission would get in touch with him.

MPIC Counsel Cross-examination:

In response to Counsel questions about the AO's requests for his contact information, the Representative stated that he did not have the FTP Indexed File. He nonetheless replied that the AO's requests for his email or mailing addresses "was well documented that they tried to call, and numbers were no longer in service." He confirmed that he refused to provide his address because "everything should go to [the Appellant]...there may be information she doesn't want anyone to know."

The Representative confirmed his testimony that the Appellant suffered a head injury, which affected her memory. When questioned about the appropriateness of having all

correspondence go to the Appellant who experienced memory problems, the Representative responded, "If she received mail that was over her head, then she can decide."

In response to Counsel questions about whether he took any steps to check with the Appellant to ensure he had received Commission information, the Representative responded that the Appellant's email had been "hacked" in late 2016 or early 2017. He agreed that he probably provided the AO with this same email in 2018, but they "didn't realize when that hack was happening." He did not recall when they realized the email was 'hacked.'

In response to Counsel questions, the Representative confirmed that the Appellant's address has always been the address set out in her NOA. Counsel referred to the AO's March 25, 2023 letter, which is in the FTP Indexed File. The Representative then confirmed that he in fact, did have the FTP Indexed file.

The Representative confirmed that the AO addressed the letter to both him and the Appellant at the Appellant's address and reiterated that all correspondence should go through the Appellant. He said, "I don't live with her so, I don't know why I'm the representative."

Counsel noted the documentary evidence that Canada Post returned the AO's letter dated April 22, 2021, and asked if the Representative was checking in with the Appellant to stay updated on correspondence from the Commission. The Representative said he did not check in. He said that someone was picking up the mail and did not know why the

Xpresspost was unclaimed. The Representative then said that the Appellant lives in [text deleted] and the mail goes to [text deleted], MB. Nonetheless, he reiterated that was comfortable with all mail going to the Appellant.

In response to Counsel questions about his telephone number in 2022, the Respondent said this was a work number and was not sure if it was still valid in 2022. He noted the documentary evidence of 'user not available'. He said he would have provided the AO with a new phone number the next time he called her.

In response to Counsel questions about Canada Post returning Xpresspost letters in February and March 2022, the Respondent said that he talked to Canada Post who told him that it does not leave a card notifying you that there is a package in the mail. He confirmed that he spoke with the AO about Canada Post returning AO mail and agreed that the AO had to re-send prior packages.

In response to Counsel questions about whether he found it strange that he had not had any contact with the Commission for years, the Representative said that between the AO being away and being told by someone else that the Commission had a backlog, he "thought somebody would be in touch to schedule things."

In response to Counsel questions about how the Commission would contact him if it did not have his current phone number, the Respondent said, as follows:

If you're going to mail something out, wouldn't you follow up in a couple of days and ask if it's received? Standard procedure, right?

He said that the AO should telephone the Appellant and he was confident the Appellant would let him know about the call.

In response to Counsel questions, the Respondent admitted that the Appellant had seen some doctors in the past four years, but had not provided any medical records to the Commission. He said he and the Appellant told the AO that when they had a report, they would submit it.

Referring to the documentary evidence that states the last conversation the Commission had with the Representative was on February 16, 2021, the Representative said he later spoke with Commission staff about a backlog, and spoke with the new AO about rescheduling the FTP Hearing to the end of May 2023. In response to Counsel Questions about whether he made notes of conversations, he said he works construction and rather than jot down messages, he made a mental note the calls.

To show that he had proof of further contact with the AO, the Representative then, without notice of what he planned to do, played an August 2022 voice message from the AO. The Commissioner noted that the recorded message spoke of the AO's many attempts to contact the Appellant, without receiving a response. The message advised that it is the Appellant's responsibility to respond and further advised that the Commission planned to schedule a failure to pursue hearing. The message advised that the AO had emailed the Appellant a letter to that effect, at which point the Representative cut off the recording.

The Commissioner confirmed with the Representative that he cut the recording short, and advised that she wished to hear the entire recording. The Respondent questioned what

relevance the recording had to the hearing and asked why he should have to play it if, it is not in the Indexed File.

The Commissioner explained that the recording appeared relevant to the issue. The Commissioner noted that the Representative chose to put the recording into evidence as proof of his contact with the AO. The Commissioner advised that it was his choice whether to play the entire recording. However, if he chose not to play the entire recording, the Commissioner could conclude that the recording contained information damaging to the Appellant.

The Representative played the entire recording, which advised, as follows:

...this is [AO gives name] from [AICAC]... Please call back to discuss at [provides phone number]. We've made several attempts to get in touch with [the Appellant] and have not received a response. I remind you that it is her responsibility...The Commission is on the path of a Failure to Pursue...

The recording goes on to advise that on March 25 [2022] the AO sent a FTP letter to the Appellant using both her email and the mailing address on her NOA. The AO stated that other than a recent call, the AO had not received any response. At this point, Counsel concluded her Cross-examination.

In response to the Commissioner's question about the documentary evidence (which states that on February 16, 2021, the Representative advised the AO that the Appellant had received one medical report) the Representative disputed he made that comment.

In response to the Commissioner's question about whether the Appellant had obtained any reports or medical records, the Representative said that the Appellant had obtained her doctor's medical records, which reported who she contacted.

In response to the Commissioner's question asking whether the Appellant had provided medical records to the Commission, the Representative replied, "Is MPI not getting her records?" The Commissioner asked if the Appellant was sending medical records regarding her appeal, to MPIC, to which the Representative replied, "that's what [the Appellant] said."

Representative submissions:

The Representative submitted that the appeal process is not clear. He questioned why his address was so important when he is only the Representative. He submitted that COVID, the AO's absence from the office, and the difficulty getting appointments with specialists, all affected the appeal process.

He said that the Failure to Pursue process is complicated and the legislation and regulations do not help to provide a clear path of how to go about the appeal or this 'pursuing'. He said that when you talk to the AO or someone else at MPI, and are told there is a backlog, "you kind of wait to hear back from them. And, you get a message that they haven't heard back from you. So, the ball is in their court, is it not?"

The Representative submitted that there is no evidence that the Appellant wanted to delay her appeal. He said she has taken every step to move the appeal along. He referred to the documentary evidence that stated the Commission mailed the NOCCH on March 1, 2022. He referred to the Tracking Information about Canada Post leaving a card advising

where to pick up the package, and that no one had claimed the package by March 9, 2022. He noted the nine days (March 1 – 9), and submitted, “if you’re not checking the mail everyday, you would have missed that card.”

The Representative questioned why the AO, after mailing documents, would not follow that up with a phone call. He submitted that the Appellant’s phone number has not changed.

The Representative concluded that a combination of circumstances led to where we are today. He submitted that it took the AO, who is hired to deal with appeals, “four weeks” to respond to his or the Appellant’s emails. “So, when you don’t hear from your appeals officer for three months, you assume it’s part of the backlog, that their end has to get caught up and on track.”

MPIC submissions:

The day before the FTP Hearing, Counsel provided written submissions (“Written Submissions”), which the AO also sent to the Appellant by email, on April 17, 2022. Counsel adopted the Written Submissions. She added that notwithstanding the Representative’s testimony and submissions, these did not change MPIC’s position, and the Written Submissions remained applicable.

Counsel submitted that none of the Representative’s testimony changed the fact that the Appellant did not take substantive steps to move the appeal forward. She submitted that the August 22, 2022 voice message played by the Representative does not assist, because we do not know what happened after the message, other than the Commission

proceeded with scheduling the FTP Hearing. The implication is that any response by the Appellant was not substantive.

Counsel pointed out that, despite the Representative stating that the Appellant had obtained medical records; she did not provide any medical information to the Commission. Counsel submitted that while we all acknowledge that COVID may have caused delays, this does not account for the significant three-year delay in failing to provide any information.

Counsel submitted that the Appellant and her Representative demonstrated a pattern of failing to respond in a timely manner, or at all. Counsel referred to the many phone numbers provided that were out of service, and the email that was apparently hacked, but which the Appellant continued to use. Counsel noted the Representative's lack of faith in the rural mail service; however, he declined to provide an alternative address.

Counsel submitted that the evidence shows periods when neither the Appellant nor her Representative appeared to be receiving some form of communication from the Commission, yet they did not take proactive steps of their own to communicate. Counsel submitted that this demonstrates the Appellant did not pay attention or take reasonable care of her appeal. She submitted that although the Representative stated that the Appellant wished to proceed, her conduct in the past several years does not support that contention.

MPIC's Written Submissions noted the *MPIC Act* sections relevant to the Commission's consideration of whether or not it should dismiss the appeal because the Appellant did not diligently pursue her appeal.

The Written Submissions note that the *Act* allows the Commission to notify the Appellant by letter mail. The only address the Appellant provided is the one in her NOA, which the AO used. The Appellant and her Representative attended the FTP NOH. Therefore, MPIC submitted that the Commission properly notified the Appellant.

On the issue of whether the Appellant has failed to pursue her appeal diligently, the Written Submissions referred to prior Reasons by the Commission, which stated the FTP Hearing does not require a consideration of the merits of the appeal, and that "diligently" means an appellant must show care and effort in pursuing an appeal. The documentary evidence shows that the Appellant did not take reasonable care and effort to pursue her appeal.

The Written Submissions noted that the onus is on the Appellant to show that she diligently pursued her appeal. In this case, the Appellant has not substantively responded or followed up on her appeal for over four (4) years, nor provided a reasonable explanation for that delay. The Written Submissions requested that the Commission dismiss the appeal for failure to pursue diligently.

Representative Reply:

In reply to Counsel's oral submission, the Representative noted that the August 22, 2022 voice mail from the AO went to [quotes phone number], which was different from the initial

number he provided, and therefore showed that the AO had his current telephone information.

The Representative disputed that the Appellant had done nothing in three (3) years, and stated, “Just over a year ago, MPI requested [the Appellant’s] medical file.” He asked why MPIC would ask for that information if they were not proceeding with the appeal. In response to Commissioner Questions, the Representative confirmed that the Appellant had other claims with MPIC, separate from this appeal.

Legislation:

The applicable sections of the *MPIC Act* and Regulations are as follows:

Commission to determine its practice and procedures

182(3) The Commission shall determine its own practice and procedures and shall give full opportunity to the appellant and the corporation to present evidence and make submissions.

Hearing may be conducted orally or in writing

182(4) The Commission may conduct a hearing orally, including by telephone, or in writing or partly orally and partly in writing

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 C, 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 determine whether the Appellant has failed to pursue her appeal diligently and if so, whether the Commission should dismiss the appeal.

Discussion:

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 finds that the word “diligently” requires some evidence of careful, steady and persistent effort. The onus is on the Appellant to show, on a balance of probabilities, that she has not breached s.182.1(1).

Section 184.1(1)(b) states that the Commission may send a notice of hearing by regular lettermail to the address stated in the NOA, or another address provided by the Appellant in writing. The Appellant did not provide the Commission with a different address from the one on her NOA. Her Representative confirmed the address is still valid.

The undisputed documentary evidence shows that the Appellant advised the AO to continue using lettermail delivery to her. The Commission finds that the Appellant and her Representative received the FTP Indexed File and the FTP NOH that informed the

Appellant of her hearing date for this hearing. The Commission finds that the Appellant had proper notice of the FTP Hearing in accordance with s.184.1(1)(b).

The Representative said that COVID caused delays in seeing doctors and obtaining medical reports. The Commission takes notice that the COVID pandemic officially began in March 2020. The Commission received the NOA in January 2017. The CAO represented and attended mediation with the Appellant until approximately October 2018, when AIM returned the file to the Commission. The Appellant had this almost two-year period, with the assistance of the CAO, to prepare her case for mediation and obtain necessary medical reports. This was pre-COVID.

In December 2018, the AO requested that the Appellant complete the “New Information” form and requested a time-line for anticipated medical reports. The Commission finds that this request put the Appellant on notice that the Commission (not MPIC) collected the Appellant’s medical reports, and alerted her to the fact that time-lines were important. The Appellant’s explanation for the now two-year, pre-COVID delay was that it “takes time to get an appointment.”

Between March 2019 and March 2020, the documentary evidence shows that the AO sent almost monthly email messages to the Appellant, requesting responses and updates about medical records. On March 29, 2019, the Appellant responded by email stating that she was compiling additional reports and assessment and would notify the Commission when she had completed this. On April 1, 2019, the AO emailed the Appellant to remind her of the “New Information” form and requested the Appellant complete this for each medical report she anticipated. The Appellant did not respond.

In response to the AO phone call on July 18, 2019, the Appellant responded by email three (3) weeks later (August 12, 2019) and requested that the AO communicate with her by lettermail. The Appellant wrote that she “will always have difficulty with accessing and reading my emails”. The Appellant’s statement appears inconsistent with the Representative’s testimony that her email was ‘hacked’. The AO re-sent the Indexed File.

The Appellant’s email stated that she was still waiting to “see doctors and receive additional information for my appeal.” The Appellant did not explain why she was still waiting, or whom she was still waiting to see. She did not state what referrals, if any, her doctor made or when she anticipated the additional information. The Representative did not testify as to why the Appellant was still waiting to see doctors and receive information.

The documentary evidence shows that the AO left a voice mail for the Representative, on December 19, 2019, asking about the re-sent Indexed File. The Representative did not testify about, or explain, why he did not respond to this message. The Representative did not testify to, or explain this further one-year delay between December 2018 and December 2019, which is pre-COVID, and almost three (3) years past the NOA filing.

On March 6, 2020 (before COVID pandemic lock downs), the AO spoke with the Representative who said he would review the Indexed File and respond the following week. He did not respond. The Respondent did not testify as to his reasons for failing to respond.

When the AO next tried to contact the Representative on August 11, 2020, the phone number was not available. The AO resorted to voice mail and email messages to the

Appellant. The Representative responded with a voice mail message on August 19, 2020, stating that the Appellant was working with her doctors for a specialist referral. The Representative did not state that the Appellant's delays were the result of COVID. Nor did the Representative leave a new phone number. The AO noted the new telephone number of the call display.

In April 2021, now more than four (4) years past the NOA filing, the Commission attempted to schedule a CCH for March 23, 2022. The Commission finds that the AO spoke with the Appellant on May 25, 2021, at which point the Appellant was on notice that Canada Post had returned her mail as "unclaimed".

The Commission finds that it put the Appellant on notice that the Commission would schedule a CCH that required both the Appellant and her Representative to attend. In the ten-month period, between May 25, 2021 and March 25, 2022, the Commission finds that the AO made various phone calls, sent more letters that went unclaimed, and followed up with emails. On the other hand, the Commission finds that there is no evidence that the Appellant or her Representative contacted the Commission.

The Commission finds that upon receiving notice of the pending CCH, the Appellant's failure to follow up with the Commission for ten (10) months, her failure to claim her mail, and her failure to attend the CCH, is not reasonable. The Commission finds that such behaviour is not indicative of a careful, steady and persistent effort to pursue her appeal.

The Representative submitted that the appeal and FTP Hearing process was complicated. However, he did not testify to this contention, or provide any examples to illustrate how

the appeal process confused them. The Commission reviewed the documentary evidence. None of the documented responses from either the Appellant or the Representative indicates that the process confused them. As previously noted, the CAO initially represented the Appellant, suggesting that she probably received professional advice about the appeal and its process.

The Representative sought to place blame on the Commission for not responding to his calls or emails, or follow up lettermail, with a phone call. His contention is not supported by the documentary evidence that shows the AO using multiple methods to make consistent contact with either or both the Appellant and her Representative. The documentary evidence and the Representative's testimony both show that neither the Appellant nor her Representative initiated any contact with the Commission to keep it apprised of the Appellant's progress.

The Commission noted the August 22, 2022 voice message in which the AO expressly advised the Representative, variously, that the Commission was in the process of scheduling a FTP Hearing, that it was the Appellant's responsibility to maintain contact with the AO, and that the Appellant had not been responding. This message should have been a red flag to a reasonable representative and appellant, who intend to pursue an appeal.

In the six (6) months between the AO's August 2022 message and the mailed February 17, 2023 FTP NOH, there is no evidence that either the Appellant or her Representative left voice mail messages or email messages asking for an explanation or expressing confusion about the August 2022 voice message.

While the Representative stated that they assumed the delay in setting the FTP Hearing was due to a Commission backlog, it is clear they understood the Commission might dismiss the appeal. A reasonable appellant, making a clear and steady effort to pursue their appeal, would probably have contacted the Commission to advise that she wished to proceed and did not want the Commission to dismiss her appeal. Instead, she passively waited for the FTP Hearing to proceed.

The Commission finds that the Appellant has not discharged her burden, on a balance of probabilities, of showing that she made a clear, steady and persistent effort to pursue her appeal. The Commission finds on a balance of probabilities, that the Appellant has not provided a reasonable explanation for the 6-year delay and failure to move her appeal forward.

Disposition:

The Commission finds, on a balance of probabilities that the Appellant has failed to pursue her 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 25th day of April 2023.

PAMELA REILLY