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Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-20-035**

COMMISSIONER: Jacqueline Freedman

APPEARANCES: [Text Deleted] (the “Appellant”) was self-represented;
Manitoba Public Insurance Corporation (“MPIC”) was
represented by Mitch Mraovic.

HEARING DATE: April 25, 2023

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”).

**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 the driver of a vehicle when he was in an accident on January 27, 2019 (the “MVA”). The Appellant sustained injuries as a result of the MVA, and as a consequence he received benefits pursuant to the Personal Injury Protection Plan (“PIPP”) provisions of the MPIC Act, including physiotherapy benefits. MPIC also provided a reconditioning program for the Appellant.

On September 10, 2019, MPIC's case manager issued a decision that terminated the Appellant's PIPP benefits, for failure to follow or participate in the rehabilitation program. An Internal Review Decision ("IRD") was issued dated December 2, 2019, which confirmed the case manager's decision.

The Claimant Advisor Office ("CAO"), on behalf of the Appellant, filed an appeal of the IRD with the Commission on February 26, 2020. In October 2020, the appeal returned to the Commission from mediation, unresolved, and the Commission proceeded to prepare an index in the Appellant's appeal and attempted to ready the appeal for hearing.

The CAO ceased to represent the Appellant in June 2022, and he became a self-represented party. The Commission's subsequent attempts to contact the Appellant were unsuccessful. Further details of the appeal management process are described below.

Ultimately, the Commission wrote to the parties on January 18, 2023, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission for an extended period. 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 before the Commission 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, on a balance of probabilities, that the Appellant has failed to diligently pursue his appeal, and his appeal should be dismissed.

Procedural Matters:

As noted above, the Appellant's appeal returned to the Commission from mediation, unresolved, in October 2020. In December 2020, the Commission prepared the index in this appeal, and sent one copy to MPIC, and one copy to the CAO, who was the Appellant's representative at that time. In February 2021, the CAO advised the Commission that they would have a discussion shortly with the Appellant regarding witnesses, and would soon submit a Request to Set Hearing form. After further correspondence between the Commission and the CAO over the next several months, the Commission requested an update on March 18, 2022. The CAO advised the Commission by return email on that date that the Appellant was not responding to their emails.

On June 3, 2022, the CAO advised the Commission by email as follows: "[The Appellant] advised me that he wishes to withdraw his appeal. I sent him an NOW [Notice of Withdrawal] on May 2, but he hasn't returned it yet. I have emailed him again to see if he has changed his mind."

On June 29, 2022, the CAO advised the Commission by letter that they ceased to represent the Appellant in his appeal, and he became a self-represented party. The CAO returned the Appellant's appeal index to the Commission.

On July 7, 2022, the Appeals Officer attempted to contact the Appellant by telephone and email, but no response was received.

On July 27, 2022, the Appeals Officer sent a letter to the Appellant to the address provided by him in his Notice of Appeal (the “NOA Address”). That letter was returned to the Commission by Canada Post on August 29, 2022.

The Commission’s records indicate that on September 1, 2022, the Appeals Officer contacted MPIC to determine whether MPIC had alternate contact information for the Appellant. On that date, MPIC provided an alternate mailing address for the Appellant (the “Alternate Address”). On September 6, 2022, the Commission sent a letter to the Appellant at the Alternate Address, asking him to contact the Commission by September 16, 2022, but no response was received.

The Commission then wrote to the parties on October 11, 2022, and updated them on the status of the appeal to that point. This letter was sent to the Appellant at both his NOA Address and his Alternate Address. The Commission’s October 11, 2022 letter advised the Appellant 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. 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 three weeks from the date of the letter, the appeal would be held in abeyance for three months. The Appellant was further advised that if he did not contact the Commission in the next three 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 his appeal.

As noted above, the Commission wrote to the parties on January 18, 2023 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.

On February 24, 2023, the Commission sent a Notice of Hearing for the present hearing (enclosing the Commission's Guidelines for Hearing) to the Appellant, via Canada Post Xpresspost and regular mail, to his NOA Address and to his Alternate Address.

The Notice of Hearing sent via Canada Post Xpresspost to the Appellant's NOA Address was returned to the Commission unclaimed. Canada Post records indicate that the Notice of Hearing sent via Canada Post Xpresspost to the Appellant's Alternate Address was accepted and signed for by "[The Appellant]" on March 9, 2023. The Notices of Hearing sent to the Appellant by regular mail to his NOA Address and to his Alternate Address were not returned to the Commission.

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.

In March 2023, the Commission sent a package to the Appellant containing the indexed file for use at the present hearing. The package was sent via Canada Post Xpresspost on March 16, 2023 to the Appellant's NOA Address and on March 23, 2023 to his Alternate Address. The package sent via Canada Post Xpresspost to the Appellant's NOA Address was returned to the Commission unclaimed. Canada Post records indicate that the package sent via Canada Post Xpresspost to the Appellant's Alternate Address was accepted and signed for by "[Text Deleted]" on March 29, 2023. Attached to these Reasons and marked as Schedule "A" is a copy of the Table of Contents of that indexed file.

On April 24, 2023, the Commission telephoned the Appellant and left a message with a reminder of the date and time of the hearing scheduled for the following day. The Appellant returned the call to the Commission after business hours and left a message requesting further information with respect to the hearing. The Appeals Officer telephoned the Appellant on April 25, 2023, in advance of the scheduled start time. She reviewed with him the documents in the indexed file for the present hearing, and confirmed that he had the telephone instructions for the hearing.

The present hearing commenced by teleconference as scheduled on April 25, 2023 at 9:30 a.m. Counsel for MPIC was in attendance on the teleconference line. The Appellant joined the teleconference shortly thereafter, and the hearing proceeded with both parties in attendance.

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 the Appellant:

The Appellant first addressed the issue of notice of the present hearing. He said that he first became aware of the hearing when Commission staff left a telephone message for him on the day before the hearing. Although mail had been sent to him at his Alternate Address, he no longer resides

there. The Alternate Address is where he previously resided with his wife, who is now his ex-wife. He was living there in September 2022, but he moved out that month, when they divorced. He said that if mail had been signed for at the Alternate Address in March 2023, it was likely his ex-wife, and not he, who signed for it. The Appellant said that when he received the telephone message from the Commission, he went to the Alternate Address and picked up his mail from his ex-wife. It was then, the night before the hearing, that he reviewed the relevant documents.

At that point, I interrupted the Appellant and asked him if he would like an adjournment of the present hearing, in order to have more time to prepare his submissions; he declined and said that he did not require an adjournment.

The Appellant continued and addressed the issue of his appeal at the Commission. Based on previous discussions with his former CAO representative, he had been under the impression that his appeal was over. Although, from a mental health perspective, this was a weight taken off his shoulders, he did not want his appeal to be over. Therefore, when the CAO had sent him a Notice of Withdrawal, he ignored the correspondence, and he did not sign the Notice of Withdrawal because he did not want to withdraw his appeal. He did not know that he would have another chance to talk about it (i.e., at the present hearing). The Appellant would like his appeal still to be open, because he still has knee pain, although it is less than it was previously.

He submitted that he had pursued his appeal, prior to the CAO ceasing to represent him. He acknowledged that he had not taken steps to move his appeal forward since the CAO ceased representation in June 2022; however, he was under the impression that his appeal was closed. He was unaware that he could proceed as a self-represented party, but he would be prepared to do so

now. The Appellant also acknowledged that it was his responsibility to keep the Commission informed as to his contact information; however, he had believed that his appeal was closed.

At the conclusion of his submission, I asked the Appellant once more if he would like an adjournment in order to provide further submissions; he declined again, and said that he did not require an adjournment, as he did not think he would have anything further to add to his submissions.

Submission for MPIC:

Counsel for MPIC provided a written submission in advance of the hearing, which was appreciated. He also provided an oral submission at the hearing.

Counsel referred to past decisions of the Commission on the issue of failure to pursue an appeal, including *AC-17-033* and *AC-14-088*. Based upon these decisions, he submitted that the Commission should consider the following in deciding whether to dismiss an appeal for failure to diligently pursue it:

1. Did the Appellant receive proper notice of the hearing?
2. If so, did the Appellant fail to diligently pursue their appeal?
3. If so, did the Appellant provide an adequate explanation for their failure?
4. Despite the above, is there some reason why the appeal should or should not be dismissed, in whole or in part?

1. Notice

Counsel noted the requirement to give proper notice of the hearing to the Appellant. The Commission sent the Notice of Hearing to the Appellant's NOA Address, as required by the legislation. The Commission went beyond the legislative requirements and obtained the Appellant's Alternate Address from MPIC, and sent the Notice of Hearing to that address as well. The Appellant acknowledged that he did reside there until some time in September 2022. Counsel submitted that the obligation is on the Appellant to keep the Commission updated with respect to his current contact information, including his current mailing address. He further submitted that the Appellant's attendance at the hearing was evidence that he had received notice of the hearing.

Counsel also pointed out that, at the hearing, the Appellant was given an opportunity to make submissions in respect of the proposed dismissal of his appeal, as required by the legislation. He was asked twice if he wanted an adjournment, but declined, and said that he did not have any further submissions to make.

2. Failure to Diligently Pursue the Appeal

Counsel submitted that simple pursuit of an appeal is not sufficient; any pursuit must also be diligent. He noted that in *AC-17-033*, the Commission found that diligence in pursuit of an appeal requires "careful and persistent application or effort".

The Appellant was not responsive to the CAO, as the CAO advised the Commission in March 2022. The CAO then advised the Commission, in June 2022, that the Appellant wanted to withdraw his appeal, and sent him a Notice of Withdrawal to sign. The Appellant said that he

understood that his appeal was closed, and that this was a weight taken off his shoulders. He then contradicted himself, and said that he did not want his appeal to be over, and that this is why he did not sign the Notice of Withdrawal. The logical next step would have been for him to follow up, with either the CAO or the Commission. However, he did not do so, which reflects a lack of persistent care or effort.

Counsel submitted that the Appellant also failed to apply diligence in keeping the Commission updated with respect to his current contact information. He noted that on July 27, 2022, the Commission sent a letter to the Appellant to his NOA Address, but Canada Post returned it to the Commission. On September 1, 2022, MPIC advised the Commission that they had a new address for the Appellant, the Alternate Address. The Appellant confirmed he was living at that address in September, although he moved out some time in September after his divorce.

The Appellant said that he only became aware of the present hearing because of the Commission's reminder phone call, after which he picked up his mail from the Alternate Address. Counsel submitted that the Appellant could have picked up his mail at any earlier time, had he been making diligent efforts with respect to his appeal. Counsel pointed out further that the Canada Post Xpresspost records indicate that the Notice of Hearing sent to the Appellant's Alternate Address was accepted and signed for by the Appellant on March 9, 2023.

Counsel submitted that the Appellant did not carefully and persistently apply effort to advance his appeal following the filing of his NOA. The Commission employed multiple mechanisms to try to reach the Appellant. The Commission wrote to the Appellant and specifically warned him of the consequences of his failure to take active steps to pursue his appeal. Notwithstanding

this warning, the Appellant did not respond. Counsel submitted that the Appellant failed to diligently pursue his appeal.

3. No Adequate Explanation

Counsel noted that the Appellant provided oral submissions; however, he submitted that the Appellant's submissions did not provide adequate reasons for his failure to pursue his appeal. Counsel pointed out inconsistencies contained within the Appellant's submissions. On the one hand, the Appellant stated that he did not want his appeal to be over; however, on the other hand, his CAO representative advised the Commission that the Appellant wished to withdraw his appeal. Further, having been sent a Notice of Withdrawal, the Appellant did not follow up with the CAO, or with the Commission, to check on the status of his appeal. He did not update his contact information with the Commission. He delayed picking up his mail at the Alternate Address for approximately six months, and does not appear to have advised Canada Post of his forwarding address.

Counsel submitted that the Commission must conclude that the Appellant has not provided an adequate explanation for his failure to diligently pursue his appeal.

4. No Other Considerations

Finally, counsel submitted that there are no other considerations that have been identified which would weigh in favour of allowing the Appellant's appeal to continue at this stage, notwithstanding his failure to pursue it.

Counsel therefore submitted that the Commission should dismiss the appeal in its entirety pursuant to subsection 182.1(1) of the MPIC Act.

Discussion:

As indicated above, the issue before the Commission is whether the Appellant has failed to diligently pursue his appeal and, if so, whether the Commission should dismiss his appeal.

Notice of the Hearing

On February 24, 2023, the Commission sent the Notice of Hearing for the present hearing to the Appellant by regular mail to his NOA Address, in accordance with the requirements of paragraph 184.1(1)(b) of the MPIC Act.

Under subsection 184.1(2) of the MPIC Act, the Notice sent to the Appellant was deemed to have been received by him on the fifth day after mailing, unless the Appellant establishes that, acting in good faith, he did not receive the Notice at his NOA Address, “or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person’s control.” The Appellant did not establish the non-receipt of the Notice at his NOA Address for any of these enumerated reasons, nor did he establish the non-receipt of the Notice at his NOA Address, for any reason, in the presence of his acting in good faith. “Acting in good faith” would require, at the very least, that the Appellant keep the Commission up-to-date with respect to his current mailing address and/or that he make arrangements to have his mail forwarded (on this point, see, for example, *R. v. Osman*, 2016 ONCJ 85 and *Corporation (City of Burlington) v. Alfano*, 2014 ONCJ 99). Therefore, under the legislation, the Appellant is deemed to have received notice of the present hearing at his NOA Address on the fifth day after mailing.

As well, on February 24, 2023, the Commission sent the Notice of Hearing to the Appellant by Canada Post Xpresspost to his Alternate Address. Although the Appellant said it was likely that it was his ex-wife, and not he, who signed for mail sent to the Alternate Address in March 2023, that is not borne out by Canada Post's records. Those records indicate that the Notice sent by the Commission via Canada Post Xpresspost to the Appellant's Alternate Address was accepted and signed for by the Appellant on March 9, 2023. (Canada Post's records do indicate that the package containing the indexed file for use at the present hearing Notice sent by the Commission via Canada Post Xpresspost to the Appellant's Alternate Address was accepted and signed for by the Appellant's ex-wife on March 29, 2023.)

The Appellant's signature on the Xpresspost confirmation of delivery of the Notice of Hearing, as well as his attendance by teleconference at the hearing, establish that the Appellant had actual notice of the present hearing.

The Commission therefore finds, on a balance of probabilities, that the Appellant received proper notice of the present hearing 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.

The Appellant attended the hearing and made oral submissions. He was twice offered the opportunity to adjourn the hearing, in order that he could take further time to prepare his

submissions. He declined the offer of an adjournment both times, and said that he did not have any further submissions to make.

The Commission finds, on a balance of probabilities, that the Appellant was 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.

Whether the Appellant Failed to Diligently Pursue the Appeal

The onus is on the Appellant to show that he has diligently pursued his appeal and that the appeal should not be dismissed. He submitted that he had pursued his appeal prior to CAO ceasing representation, and said that he would like his appeal still to be open. MPIC submitted that the Appellant failed to diligently pursue his appeal and that he has not provided an adequate explanation for his failure. MPIC submitted that the Commission should therefore dismiss his appeal under subsection 182.1(1) of the MPIC Act.

As noted above, the Commission has previously found that “diligence” is defined to mean “careful and persistent application or effort”. As set out below, the Appellant’s conduct of his appeal over the last year does not meet this definition.

The Appellant acknowledged that since the CAO ceased representation in June 2022, almost one year ago, he has not taken any active steps to move his appeal forward. He ignored the CAO’s correspondence because he did not want to sign the Notice of Withdrawal that had been sent to

him. Having done that, however, he did not contact the Commission to inquire as to the status of his appeal following his receipt of the Notice of Withdrawal.

Similarly, the Appellant did not take any steps to keep the Commission up-to-date with respect to his various changes of address. The Commission only learned of the Alternate Address because of inquiries directed to MPIC, and the Appellant advised the Commission of his current address only at the conclusion of the present hearing.

It also appears that the Appellant did not take reasonable steps to ensure that he received correspondence from the Commission on a timely basis, regardless of his place of residence. He said that he went to the Alternate Address on the day before the present hearing and picked up mail that appears to have been held there for him for several months. He did not give any reason as to why he could not have retrieved his mail from the Alternate Address on an earlier date.

The Commission made several attempts to contact the Appellant, by email, telephone and letter. The Commission specifically wrote 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, or take any further steps to pursue his appeal in response to the Commission's efforts to contact him.

The Appellant's explanation for his failure to pursue his appeal since CAO ceased representation was that he was under the impression that his appeal was closed. He gave this same explanation for his failure to keep the Commission informed as to his contact information. This explanation, however, is inconsistent with his expressed desire that his appeal still be open. It is not reasonable

that the Appellant, having been sent a Notice of Withdrawal and not wanting to sign it, did not take any steps to contact the Commission at any time in the last year to inquire as to the status of his appeal. Further, it is not reasonable that the Appellant, wanting his appeal still to be open, did not take any steps to keep the Commission updated with respect to his current contact information. The Appellant therefore has not adequately explained his failure to diligently pursue his appeal.

Conclusion

Upon a consideration of the totality of the evidence and submissions, and upon a consideration of the relevant legislation, the Commission finds, on a balance of probabilities, 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 Commission has determined to exercise its discretion to dismiss the Appellant's appeal in its entirety, and accordingly the Appellant's appeal is dismissed.

Dated at the City of Winnipeg, in the Province of Manitoba, this 31st day of May, 2023.

JACQUELINE FREEDMAN