

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [APPELLANT]  
AICAC File No.: AC-22-044**

**PANEL:** Laura Diamond, Chairperson  
Keith Poulson  
Kerissa Cymbaluk

**APPEARANCES:** The Appellant, [Text Deleted], was represented by Rodion Ihnatenko, Claimant Advisor Office (“CAO”). [Text Deleted] appeared as Interpreter. Manitoba Public Insurance Corporation (“MPIC”) was represented by Andrew Johnson.

**HEARING DATE:** June 6, 2023.

**ISSUE(S):** To determine whether the Commission will grant the Appellant an extension of time to file her Notice of Appeal.

**RELEVANT SECTIONS:** Section 174(1) of The Manitoba Public Insurance Corporation Act, C.C.S.M. c. P215 (the “Act”) and Section 1 of Regulation P215 – M.R. 38/94.

**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 June 9, 2019. She sought medical treatment and received chiropractic treatment benefits from MPIC. At the time of the MVA, she was employed as a [Text Deleted] in [City #1], where she lived. She continued with her employment but took some days off from work. She then advised MPIC that her MVA -related injuries were preventing her from working and requested Income Replacement Indemnity (IRI) benefits.

In a decision dated October 17, 2019 (CMD) her case manager advised that she was not entitled to IRI benefits.

On July 24, 2021, the Appellant filed an Application for Review from this decision.

In an Internal Review Decision (IRD), dated August 10, 2021, an Internal Review Officer (IRO) for MPIC noted that the Appellant had missed the 60 day time limit under the MPIC Act for filing an Application for Review. The IRO declined to extend the deadline for filing on the basis of a reasonable excuse, as no explanation had been provided.

Further, the IRO went on to consider the merits of the application, upholding the case manager's decision denying IRI benefits, as the medical information on file failed to support the Appellant's position that she was substantially unable to perform the duties of her employment.

On May 4, 2022, the Appellant filed a Notice of Appeal (NOA) with this Commission from the IRD dated August 10, 2021.

The NOA was not filed within the 90 day deadline for filing appeals provided under s. 174 (1) of the Act. It was filed 179 days late. The Commission convened a hearing to determine whether it should exercise its discretion under the Act to extend the time for filing the appeal.

**Decision:**

For the reasons set out below, the Commission will not exercise its discretion to grant an extension of time for the Appellant to file a Notice of Appeal.

**Documentary Evidence**

When it received the NOA, the Commission asked the Appellant to provide her reasons for failing to file the NOA within the 90 day time limit.

The Appellant provided a signed letter dated May 28, 2022 which advised:

*“Please reconsider my Notice of Appeal that was filed passed the eligible date.*

*I did not receive any papers regarding Appeal until end of March 2022. As it happened this letter was dropped off in another person’s mailbox. I have found this letter end of March in our lobby and not in my mailbox.*

*I sincerely apology for any inconvenience it causes. Please accept my explanation. As you can notice, all the previous forms and papers were always sent in reasonable times and before stated due days.*

*I would really appreciate the Commission to extend the due time of filling my Appeal.”*

MPIC opposed the Appellant’s request and provided a copy of the Canada Post delivery confirmation, dated June 6, 2022, which showed delivery of the IRD to the Appellant on August 11, 2021.

MPIC also filed a Report of Investigation/Discussion created by its case manager and dated August 19, 2021. It included notes that the Appellant had stated she received the IRO decision letter and had never had a mental problem, as was previously mentioned by her employer. The notes also documented a request for the Appellant to sign medical authorization forms.

MPIC provided copies of Authorization For Release of Health Care Information forms signed by the Appellant and dated August 27, 2021 and September 29, 2021. These authorized MPIC to seek further information from her doctor and chiropractor.

Finally, MPIC provided a Report of Investigation/Discussion from its case manager dated October 22, 2021. This note documented a telephone call to the Appellant to advise her that there had been a review by its Health Care Services Team concluding that there was no entitlement to IRI. This call was not answered. The case manager left a message advising that a decision letter would be forthcoming and asking the Appellant to contact the writer to discuss it.

The Commission compiled the documentary evidence submitted by the parties into an Indexed File (the Index). A copy of the Table of Contents for the Index is attached and marked as Schedule A to these Reasons for Decision.

### **Evidence of the Appellant**

The Appellant testified at the hearing and was cross-examined by counsel for MPIC.

#### Direct Examination

The Appellant stated that after the MVA, in November 2019, she was let go from her work at a [text deleted] in [City #1]. She explained that this was because she worked in the kitchen and due to MVA-related injuries to her spinal cord she was unable to lift heavy objects. She described hearing cruel remarks which were made to her by others in [City #1]. This, along with the loss of her job, caused her to move to [City #2] to live with her mother.

At the time the IRD was issued in August 2021, she was living in her own apartment at the address set out in the IRD on [Street], in [City #2]. She described difficulties finding a doctor in [City #2], especially during the Pandemic. She continued to have difficulty with her spine. She developed a stomach ulcer from the pain medication she had to take. She did not receive IRI from MPIC and had to go on welfare as a result.

The Appellant explained that she had been in Canada for 20 years but English was not her first language. An MPIC employee from [City #3] had visited her after the MVA and when the Appellant said she needed help, they told her in English that the answer was no.

When her counsel asked her whether she remembered receiving the IRD in the mail from MPIC in August 2021, she said that whenever she gets a letter she takes it from her mailbox, but that this happened a few years ago, so she could not recall.

She did not remember having any telephone conversations with MPIC. She recalled speaking with the CAO and the Appeals Officer at the Commission. Every time she received a letter from CAO she went to a “sworn interpreter” in the [text deleted] bureau of an international travel center in

[City #3] for assistance. She needed assistance with the forms, because she does not speak English very well.

The Appellant assured the panel that her previous submissions had been sent in on time and she knew about MPIC deadlines.

When her counsel asked why she was late in filing her NOA, the Appellant said that it was because sometimes these things fall on weekends or holidays. She said she did not understand the documents and needed help with interpretation. When asked again to look at the NOA and explain further, she said that she had trouble receiving documents in [City #1], and when she called the [City #3] MPIC office, they never called her back. There were also some times when offices were closed because of the Pandemic, which caused delay.

#### Cross-Examination

On cross-examination, the Appellant confirmed that she was living at the [text deleted] address on the IRD in August of 2021.

She was asked to comment on her letter to the Commission dated May 28, 2022. This letter stated that she did not receive any papers regarding this appeal until March 2022, because they had been dropped off in someone else's mailbox. She subsequently found them in her lobby at the end of March 2022.

The Appellant could not recall writing this letter and then added that she did not write it. She denied that it was her signature at the bottom of the letter, explaining that her signature looks a little different.

She said that she eventually did receive the IRD letter but could not recall when or in what month because she had so many documents and it was so complicated that every time she got a letter she would have it translated.

She acknowledged that when she did receive the IRD letter she saw that it was dated August 10, 2021. She also acknowledged the notice at the end of the IRD setting out her right to appeal within 90 days, and agreed that although this was a reference to the same kind of appeal she eventually filed with the Commission, she did not file her NOA until May 6, 2022.

The Appellant also explained that she had a very difficult time with her employer and others in [City #1], and emphasized that in spite of some references to this in her file, she did not have a mental problem. When asked about the case manager's August 19, 2021 note about the Appellant having stated that she received the IRD but did not have mental problems, the Appellant denied saying this to the case manager.

The Appellant said that although the case manager may have told her she would send authorization forms to her to complete (as reported in the case manager's Report of Incident/Discussion of August 19, 2020) she did not understand what she was being told. In spite of this, she acknowledged that she had received and signed the two authorization forms on file (dated August 27, 2021 and September 29, 2021) and confirmed that these contained her signature. She recalled receiving them by fax, signing and putting them in an envelope to mail. This is what she always does, she said, although it was more difficult during COVID.

## **Submissions**

### **Submission for the Appellant**

Counsel for the Appellant submitted that the Commission has the discretion, pursuant to s. 174 of the MPIC Act, to extend the time to appeal an IRD.

In the exercise of this discretion, the Commission has considered various relevant factors, such as:

- the actual length of the delay compared to the 90 days set out in s. 174(1)
- reasons for the delay
- whether any prejudice results from the delay
- whether there has been any waiver respecting the delay
- other factors which argue to the justice of the proceeding

The Appellant submitted that although the actual length of the delay may not be insignificant, the majority of it in this case was caused by the erroneous delivery of the MPIC IRD letter to the wrong mailbox. He indicated that this had been established on the evidence by the Appellant's letter to the Commission dated May 28, 2022.

The panel asked whether there was any corroboration of this evidence before the Commission, and whether the Appellant had even confirmed the contents of the letter in her testimony, since she had indicated that she did not write or sign this statement.

Counsel took the position that although the Appellant had said that the signature on the letter looked slightly different than her own, she had not denied the contents of the statement and that he was relying upon those facts. On the basis of this letter, the Appellant had not discovered the IRD until the end of March 2022 and she filed the NOA within the next month or so, in early May of 2022. He submitted that it was no fault of the Appellant that she had not received the IRD until March.

He noted that the Canada Post confirmation of the IRD delivery on file contains no identification of the content of the item being delivered, who the sender was or what the delivery address was. Nor did it contain a confirmation signature. It was therefore not possible to view this document as confirmation of delivery of the IRD to the Appellant.

Although the case manager's note of August 19, 2021 appeared to indicate that the Appellant had confirmed for the case manager that she had received the IRD, he noted that the Appellant was unable to recall this conversation. He went on to note that during cross-examination the Appellant had stated that during this conversation she had confirmed that she did not have a mental problem, but not that she had received the IRD.

Counsel went on to submit that the Appellant was not aware that she only had 90 days to file her appeal and without further assistance from MPIC, she did not have sufficient understanding of the complexity of the file to be able to do so.

In the event the Commission finds that the Appellant did indeed receive the NOA in August of 2021, and did not agree that she filed the NOA within 90 days of its receipt, he took the position that, in the alternative, the Commission should find that the Appellant was not made aware, advised or assisted by MPIC to understand that she had only 90 days. Her failure to understand the complexity of the matter, he submitted, was the reason for the delay.

Another reason for the delay was that the Appellant had been and is still suffering from the effects of her MVA injuries and trying to handle this as best as she could. At the time of the IRD the Appellant had health issues which significantly affected her. Counsel could not point to any medical evidence submitted which established that the Appellant's health issues impacted her ability to file her appeal on time.

Counsel submitted that the material on file did not show that MPIC had suffered any prejudice from the delay. He noted that this was not a situation where there had been any waiver.

Finally, counsel submitted that COVID-19 restrictions had caused further delays when the Appellant had asked for transportation to MPIC offices which often turned out to be closed due to the pandemic.

In conclusion, counsel submitted that the combination of these factors made it difficult for the Appellant to file her appeal on time. She always had an intent to file, but circumstances beyond her control prevented her from doing so. She filed her appeal as soon as she came into possession of the IRD.

In the alternative, if the Commission finds that the Appellant did receive the IRD in August of 2021, then it should also find that she was unable to file her appeal within 90 days due to her lack of understanding of the complexity of the matter and to COVID related delays.

Taking all of this into account, he submitted, the Appellant requests that the Commission extend the time allowed for filing the NOA.



Submission for MPIC

Counsel for MPIC submitted that the Commission should not exercise its discretion to extend the time limits.

He noted that the factors which had been outlined by the CAO for consideration were set out in Reasons for Decision provided by the Commission in *AC-18-057*. These include the length of the delay, the reasons for it, prejudice, waiver and other factors arguing to the justice of the proceedings.

However, counsel submitted that this case was impacted by the question of the credibility of the Appellant's testimony. Her counsel had submitted two arguments which were diametrically opposed. CAO argued that the Appellant's written statement of reasons supported the claim that she had not received the IRD until March of 2022. This was not in evidence at the appeal hearing, as the Appellant had denied writing or signing this statement of reasons.

On the other hand, CAO also submitted that the real reason for late filing was that she did not understand the requirement to appeal within 90 days.

These reasons are opposed because if the Appellant did not receive the IRD until March 2022 than she did appeal within 90 days, on May 6, 2022.

Counsel relied upon the rules of procedure set out in Regulation 38/94 under the MPIC Act. Section 1(1) provides that MPIC deliver documents by personal delivery or Canada Post. Section 1(2) provides that documents are deemed served by mail on the day that Canada Post confirms the document is delivered.

According to the Canada Post tracking notice in the Index, the IRD was delivered on August 11, 2021. The Regulation does not set out exceptions to this deemed delivery and although CAO raised concerns about the veracity of this document, these were unfounded and remain confirmation of the Canada Post delivery of the IRD on August 11, 2021, resulting in a deadline for filing the appeal in November 2021.

Counsel submitted that this filing delay of almost six months is significant. Previous decision of the Commission have denied relief for much shorter periods, including 44 days in *AC-10-51*.

In considering the reasons for the delay, the onus is on the Appellant to prove a reasonable excuse for failing to file within 90 days (see *AC-20-031*).

Counsel submitted that the onus has not been met in this case. It is not really clear what the Appellant's reasons are. Two different versions were proposed that cannot be reconciled with each other. In her direct testimony the Appellant stated that COVID was the reason for the delay, without expanding upon that.

Counsel advised that he appreciated that there were some language barrier issues for the Appellant. However, he noted that she also testified that when she received documents she sought help and had them translated.

MPIC does not accept the proposed receipt date in March 2022, and counsel noted that it is important to assess the credibility of the Appellant in that regard. The surrounding circumstances do not support that position.

The Canada post delivery confirmation indicates delivery in August 2021.

The notes of the August 2021 telephone call (where the Appellant indicated she had received the IRD) can be examined in spite of the Appellant's claim that she does not recall this conversation. The specific contents of the IRD regarding claims of her "mental problems" were referenced in that telephone call. The note also mentions medical authorizations for Drs. [Text deleted] and [Text deleted], which indeed were executed and returned by the Appellant in August and September 2021.

MPIC submitted that these surrounding documents support that the call note was in fact accurate and that the Appellant admitted to having received the IRD by the date of the call.

Similar call notes have previously been considered by the Commission in *AC-18-092* at pages 17 and 18.

In considering the Appellant's credibility the Commission should consider that:

- In her testimony, the Appellant stated she missed the deadline because of COVID
- Nothing about COVID is mentioned in the May 28, 2022 statement of reasons, where the only reason put forward is delivery to the wrong mailbox
- In her testimony, the Appellant did not indicate that the IRD was delivered to the wrong mailbox, and denied writing or signing the statement of reasons which claimed this
- The Appellant stated that she does not recognize the May 28, 2022 statement of reasons for late filing which was submitted. Yet this statement was referenced and relied upon by her counsel in his submission, leaving the Commission to conclude that these reasons were put forward by the Appellant

Counsel submitted that the Appellant's story kept changing and pointed out that if she had received the IRD in March 2022, she should have filed an appeal right away, instead of waiting until May.

The Appellant, he submitted, had not provided reasons for the delay which would weigh in favour of the Commission's exercise of its discretion.

Waiver did not come into play. While no specific prejudice was noted, there is inherent prejudice associated with delay. No factors were put forward which argued to the justice of the proceedings.

Therefore, counsel submitted that the Commission should not grant an extension of time to file an appeal and that the Appellant's appeal should be dismissed.

### **Legislation**

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

### **The MPIC Act**

#### **Appeal from review decision**

174(1) A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

#### **Regulation 38/94**

##### **Manner of service**

1(1) Where a document is required under this regulation to be given, sent or otherwise served on a person, service may be effected personally or, subject to confirmation of delivery by Canada Post, by delivery by mail to the last address provided by the person to this corporation.

##### **Effective date of service by mail**

1(2) A document served by mail under subsection (1) is deemed to be served on the day that Canada Post confirms is the day on which the document is delivered to the address to which it is mailed.

### **Discussion**

The panel has reviewed the testimony of the Appellant, submissions of the parties, as well as the legislation and case law referred to.

We find that the delay in filing the NOA in this appeal was significant enough to require an analysis of the reasons for the delay.

The Appellant has taken three positions in this regard.

#### 1. Receipt of IRD

The Appellant submitted that she did not receive the IRD until March 2022 and that she therefore filed her NOA within 90 days of this receipt.

The panel finds that the Appellant has failed to establish a factual basis for this assertion.

The Canada Post confirmation of delivery indicates that the IRD was delivered on August 11, 2021 and, in accordance with the Regulation, MPIC submitted that this satisfies the requirement for delivery and results in the Appellant being deemed to have received notice of the IRD on this date.

The Appellant argues that the Canada Post confirmation contained no details or signature confirmation of delivery, and has attempted to disprove this deemed assumption of receipt of the IRD by arguing that she did not actually receive it until March 2022.

However, the Appellant's assertions on this point were contradictory, and therefore lacked credibility.

Appellant's counsel relied upon her written and signed May 28, 2022 statement of reasons, which set out receipt of the IRD in late March 2022. But in her testimony, the Appellant denied that she had authored or signed the May 28, 2022 letter. During her direct testimony she did not confirm that she had received the IRD in March.

On the other hand, counsel for MPIC was able to challenge the assertion of the March 2022 receipt, through the case manager's August 19, 2021 notes of a phone call where the Appellant admitted to having received the IRD. The Appellant denies this statement.

At the time of this call, the case manager also made note of the Appellant's challenge to allegations about her mental health, which were discussed within the IRD decision. The only mentions of mental health in the Index documents were found in the IRD and in this particular case manager's note. This leaves the panel to conclude that the Appellant had reviewed the IRD by August 19, 2021 and was discussing it over the phone with the case manager.

Although the Appellant testified that it was the case manager who brought up her mental health and not her, she also testified that she did not recall the conversation. The Appellant's confusing testimony on this point does not lead the panel to prefer her evidence over the documentary evidence on the file. The Appellant did not recall the conversation, while the document, in addition to noting her comments regarding receipt of the IRD and mental health, contained detailed information about the Appellant's doctors and their phone numbers which were followed in the documentary evidence by medical authorization forms to these very doctors, executed by the Appellant.

This internal consistency among the documents supports MPIC's position that the case manager's call notes of August 19, 2021 contained some accurate reflections of a telephone conversation she held with the Appellant. This does not support the Appellant's reliability in claiming that she did not say these things and that she does not even remember having this conversation.

Accordingly, the panel finds that the contradictory nature of her evidence on this point, where the Appellant cannot confirm who wrote the statement of reasons, who signed them or whether the contents are accurate, raises questions about the source and veracity of the only document which was provided by the Appellant to the Commission's Appeals Officer as representing the reasons for her late filing.

The panel accepts MPIC's submission regarding the delivery and receipt of the IRD in August 2021.

## 2. Difficulty Understanding

In the alternative, counsel for MPIC submitted that if the panel finds that the Appellant filed her NOA more than 90 days after her receipt of the IRD, the Commission should not exercise its discretion to grant an extension of time, based upon language barriers faced by the Appellant or her difficulty understanding the complexity of the case.

The panel recognizes that the Appellant has some challenges with understanding English. Although her spoken English is not difficult to understand, the panel notes that she experienced difficulty understanding, in particular, the written documents surrounding the claim and appeal. There is little if any evidence that MPIC staff provided assistance in this regard, or that they were even aware of the problem.

However, the Appellant's own testimony suggests that she had systems in place to address this. In particular, she testified that she sought out translation assistance provided by what she called "sworn translators" working through the [text deleted] bureau of an international travel center, and that it was her practice to have all documents received translated in this manner.

The panel notes that the rights and requirements for filing an appeal, including the 90 day time limit, are clearly set out on the last page of the IRD. Further, the NOA form which commences an appeal is not a lengthy or complex form. It is readily available from the Commission's offices and on the Commission's website, and the Appellant provided no testimony to support a claim that she had difficulty filling out or filing this form once she did attend to it in May 2022.

The Appellant's testimony, advising that she knew about MPIC deadlines and had always sent past submissions in on time, leads the panel to believe that she was aware that MPI had deadlines to meet in filing documents and contradicts the assertion of counsel for the Appellant that MPIC failed to assist her in understanding the matter and that her lack of understanding contributed to her late filing of the NOA.

The panel finds that the Appellant has not established on a balance of probabilities that she was prevented from filing her NOA in a timely manner due to a language barrier or the complexity of the file.

### 3. COVID-19 Pandemic

The Appellant submitted that office or other closures associated with the COVID-19 pandemic prevented her from filing her appeal on time. The IRD is dated August 10, 2021 and her appeal period expired in November of 2021.

The panel acknowledges that the pandemic presented challenges for many individuals in such situations, including the Appellant.

However, the Appellant did not provide evidence or specifics of how this prevented her from filing an appeal.

Canada Post continued delivery service.

She testified that she regularly uses faxes to correspond.

The panel takes notice that the Commission's offices were accepting mail, faxes, emails and phone messages throughout the pandemic. There was no evidence that the Appellant tried any of these methods to file an appeal during the 90 day period or that she encountered any specific roadblocks in that regard.

The panel finds that the Appellant failed to establish on a balance of probabilities that challenges presented by the pandemic prevented her from filing her NOA in a timely manner.

**Disposition**

The panel finds that the Appellant failed to file her NOA within 90 days of receipt of the IRD. We further find that the Appellant has failed to establish a reasonable excuse for this failure which would lead the Commission to exercise its discretion to extend the 90 day time limit.

Accordingly the Appellant's request to extend the time limit for filing her NOA is denied and the appeal is hereby dismissed.

Dated at the City of Winnipeg, in the Province of Manitoba, this 5<sup>th</sup> day of July, 2023.

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**LAURA DIAMOND**

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**KEITH POULSON**

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**KERISSA CYMBALUK**