

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by M.K.B.
AICAC File No.: AC-06-156**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, M.K.B., was not present at the appeal hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Lori LaBine.

HEARING DATE: November 4, 2008

ISSUE(S): Entitlement to a permanent impairment award

RELEVANT SECTIONS: Sections 127, 184.1(1)(b) and 184.1(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

A Notice of Appeal was filed by M.K.B. (hereinafter referred to as the 'Appellant') on September 26, 2006 in respect of an Internal Review decision relating to permanent impairment benefits granted to the Appellant by MPIC. The Notice of Appeal contained the Appellant's address as [Text deleted]. Upon filing the appeal, the Appellant made arrangements for the Claimant Adviser Office to represent him in his appeal. The Claimant Adviser Office advised the Commission, by letter dated May 16, 2008, that as they had been unsuccessful in their attempts to reach the Appellant, they were withdrawing as the Appellant's representative.

The Appeals Officer who had conduct of this appeal advised the Commission that she had unsuccessfully attempted, on several occasions subsequent to May 16, 2008, to contact the Appellant.

She indicated that she received a new address from staff at MPIC for the Appellant at [Text deleted], with a phone number. The Appeals Officer tried phoning this telephone number with no response, and also wrote to the Appellant at the address on [Text deleted] asking that he confirm his address so that further documents and information regarding his appeal could be forwarded to him. This letter was returned.

The Appeals Officer also advised that she attempted to obtain another possible address from the Appellant's doctor in [Text deleted] and sent another letter to that address on June 6, 2008. However, no response was ever received from the Appellant.

The Commissioners' Secretary was instructed by the Commission to set this appeal down for a hearing and, as a result, the hearing was set for November 4, 2008 at 9:30 a.m. at the Commission's office in Winnipeg. The Commissioners' Secretary further advised the Commission that a Notice of Hearing to the Appellant in respect of his appeal, dated September 25, 2008, was sent to the Appellant's address at [Text deleted], by Canada Post Xpresspost and by Canada Post regular mail. A copy of the Notice of Hearing was also sent to the Appellant at [Text deleted], by regular mail. A copy of the Notice of Hearing is attached hereto and marked as Exhibit A.

The Notice of Hearing sent by regular mail to [Text deleted] was returned marked “moved/unknown”. The Notice of Hearing sent Xpresspost to the [Text deleted] address was also returned unclaimed.

Appeal Hearing

The appeal hearing commenced on November 4, 2008 at 9:30 a.m. The Appellant did not attend at that time but MPIC’s legal counsel, Ms Lori LaBine, was present. At the commencement of the hearing, MPIC’s legal counsel submitted that the Appellant had been properly served with the Notice of Hearing pursuant to Sections 184.1(1)(b) and 184.1(2) of the MPIC Act which provides as follows:

How notices and orders may be given to appellant

184.1(1) Under sections 182 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

...

(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.

Counsel submitted that as the Notice of Hearing was sent to the address given on the Appellant’s Notice of Appeal, as well as to the additional address in [Text deleted], the Appellant was deemed to have received a copy of the Notice after five (5) days.

In the alternative, counsel submitted that the Commission was entitled to dismiss the Appellant’s appeal on the grounds that the Appellant had abandoned his appeal and had not established, on a

balance of probabilities, that the permanent impairment benefits awarded by MPIC had not been properly assessed.

She pointed to the legal principles set out by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115, where the Court of Appeal reviewed the three (3) criteria to be considered in dealing with possible abandonment:

1. There must have been a continuous intention to prosecute the appeal from the time when the documents in question should have been properly filed;
2. There must be a reasonable explanation for the failure to file the document; and
3. There must be arguable grounds of appeal.

Counsel for MPIC also reviewed the Commission's decision in *J.N. (AC-06-71)*, which reviewed the *Fegol v. Asper* decision and concluded that the Appellant's conduct had clearly indicated that he had no continuous intention of processing his appeal, had provided no reasonable explanation and did not have any arguable grounds to proceed with the appeal.

Counsel submitted that in this case there was little evidence that the Appellant did have a continuous intention to pursue and appeal, when he had done nothing in the twenty-five (25) months since filing the appeal to pursue it.

There was no information from the Appellant as to why the matter had been delayed for two (2) years, and counsel noted that the Appellant had already been through the Commission's processes regarding a previous decision and so could not claim that he was unfamiliar with the process.

Counsel further submitted that there was a lack of evidence on the file to support the Appellant's contention that he had lost consciousness as a result of the motor vehicle accident and as such, was entitled to a further permanent impairment benefit for being "knocked out" or suffering a "head injury". Accordingly, counsel for the Appellant submitted that the Appellant's appeal both lacked merit and should be dismissed on those grounds, and that he had abandoned his appeal.

Discussion

The Commission finds that it is not clear whether the Appellant received a Notice of Hearing by mail. The Xpresspost letter and one of the regular letters containing Exhibit A was sent to the Appellant but returned to the Commission. Although a second regular letter, to an address which was not the last known address for the Appellant, was not returned, the Commission does not find, pursuant to Section 184.1(2) of the MPIC Act that the Appellant was deemed to have received a Notice of Hearing on the 5th day after the date of mailing this notice to him.

However, the Commission agrees with counsel for MPIC that the Appellant has abandoned his appeal.

The Commission notes that the Appellant, subsequent to the Claimant Adviser withdrawing as his representative, took no further steps to process his appeal.

I find that the Appellant, having filed a Notice of Appeal, had an obligation, after the Claimant Adviser Office withdrew as his representative, to have contacted the Commission to make appropriate arrangements to proceed with his appeal and he failed to do so. As a result, the

Commission was unable to provide the Appellant with the relevant material he needed in order to proceed with the appeal, or to consult with him as to an appropriate date to hear the appeal.

I also find that the Commission's officers took all reasonable steps, by telephone and letter, to attempt to contact the Appellant in order to set a date for the appeal hearing, but were unable to reach him.

The Commission therefore concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal after the Claimant Adviser Office withdrew as his representative.

The Commission also finds that the Appellant has not provided any reasonable explanation to the Commission for delaying the processing of his appeal.

In respect of the merits of the appeal, I find that the Appellant did not have any arguable grounds to proceed with the appeal, failing to put forward sufficient evidence to establish, on a balance of probabilities, that he suffered a loss of consciousness at the time of the motor vehicle accident which would entitle him to a further permanent impairment award on that basis.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly assessed his entitlement to personal impairment awards.

In summary, the Commission concludes that the Appellant abandoned his appeal for the following reasons:

1. There was not a continuous intention by the Appellant to prosecute the appeal from the time he filed his Notice of Appeal;
2. The Appellant did not provide a reasonable explanation for delaying the processing of his appeal;
3. There were no arguable grounds for his appeal.

The Commission, for these reasons, confirms the Internal Review Officer's decision dated September 14, 2006, and dismisses the Appellant's appeal.

Dated at Winnipeg this 4th day of December, 2008.

LAURA DIAMOND