

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by H.H.
AICAC File No.: AC-08-54**

PANEL: Mr. Mel Myers, Q.C., Chairperson

APPEARANCES: The Appellant, H.H., appeared on her own behalf;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

HEARING DATE: September 29, 2008

ISSUE(S): Extension of time to file Notice of Appeal

RELEVANT SECTIONS: Section 174 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

The Appellant, H.H., is requesting an extension of time in order to file a Notice of Appeal from a decision of the Internal Review Officer dated October 1, 2007.

The Appellant was involved in a motor vehicle accident on October 31, 2003 and sustained significant injuries. As a result of these injuries, the Appellant became entitled to Personal Injury Protection Plan benefits in accordance with Part 2 of the MPIC Act, including Income Replacement Indemnity ('IRI') benefits.

The medical information contained on the Appellant's file indicated the Appellant was unable to return to her pre-accident employment as a [Text deleted]. The medical information on the Appellant's file further indicated that she was capable of holding sedentary employment. Having regard to the Appellant's inability to return to her pre-accident employment, pursuant to Section 107 of the MPIC Act, a two-year determination took place. The Appellant's physical abilities were evaluated by ARCC on April 30, 2004. This evaluation indicated that the Appellant was capable of holding an employment that required a light level of functional ability. A Transferable Skills Analysis was completed on September 22, 2006 resulting in the Appellant being determined into the position of a Dispatcher/Radio Operator pursuant to Section 109(1) and (2) of the MPIC Act.

Case Manager's Decision

The case manager noted that since the Appellant's determined position resulted in an annual income greater than her current IRI benefit, the Appellant's IRI would end in accordance with Section 110(1)(d) of the MPIC Act.

On January 10, 2007 the case manager wrote to the Appellant advising her that the Appellant was entitled to a job search period, between February 1, 2007 and ending on February 1, 2008, at which time her IRI benefits would end.

The Appellant made application to have the case manager's decision reviewed by an Internal Review Officer.

Internal Review Officer's Decision

On October 1, 2007 the Internal Review Officer issued a decision confirming the decision of the case manager that the two-year determination was correct and dismissing the Application for Review.

Notice of Appeal

The Appellant subsequently filed a letter appealing the decision of the Internal Review Officer, dated May 18, 2008, which the Commission received. In this letter the Appellant provides an explanation why she filed the appeal beyond the 90-day time limit. In her application for leave to appeal, the Appellant stated:

I am writing to appeal the decision made by Danielle M. Robinson on October 1, 2007. Given the date of the appeal I understand it has passed the grace period of 90 days, but providing the circumstances of my condition I am requesting an extension. I delivered my child by cesarean section which took over 6 months to heal, but still experience pain when I sneeze. For the last 9 ½ months I have struggled physically to raise my child. My husband was in full-time college and therefore was not able to assist me as much as he would have liked nor could he very much anyways given that he has multiple fractures in his neck and back. I had surgery on my ankle November 13, 2007 to remove the remainder of the pins, which were causing great pain in my ankle. My ankle is still recovering. Though there is more range of motion then (sic) when the pins were in and I don't have to crawl to the bathroom in the morning anymore, I still have pain and experience increased pain when sitting in a prolonged position or walking for extended times.

The Appellant further stated in this letter:

My right leg is still in pain and gets worse the more I walk around or sit for periods of time. I have pain in my back, neck, shoulder and lower side where there is internal discomfort which feels like bruising. Sedentary or the more common term "deskbound" employment would involve sitting for long periods of time. I also feel it is physically dangerous for me to be typing, while going to SMD I would get cramps in my right hand and found it extremely difficult to use my left. My family doctor who I see on regular bases (sic) determined on June 5, 2007, that I was unfit for work. My left arm is disabled with limited use and I am unable to sleep on my left side.

Not only am I still feeling effects physically from the injuries I've sustained October 31, 2003, I am still dealing with the psychological hardships not only from losing a friend and the long ordeal of being through a horrible accident, but also from what I have been through with MPI. (underlining added)

The Commission forwarded a copy of this letter to Mr. Dean Scaletta, the Senior Solicitor with MPIC, and requested his response on June 4, 2008.

On June 6, 2008 Mr. Scaletta wrote to the Commission advising that the late filing of approximately four (4) months beyond the 90-day time period was prejudicial to MPIC. Mr. Scaletta further submitted that the Appellant had not provided any valid reason for the Commission to exercise its discretion in extending the time limit.

At the request of the Commission, the Appellant filed a Notice of Appeal in the form approved by the Commission on July 14, 2008, together with a submission which was identical in form to the submission she made in her letter of appeal to the Commission dated May 18, 2008.

Appeal Hearing

The relevant section of the MPIC Act in respect of this appeal is Section 174 of the MPIC Act, which provides as follows:

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.

Requirements for appeal

174(2) An appeal of a review decision must be made in writing and must include the claimant's mailing address.

The Commission convened a appeal hearing on September 28, 2008. The Appellant represented herself and Ms Pardip Nunrha represented MPIC. In her testimony the Appellant confirmed the comments set out in her letter of appeal. In response to questions from MPIC's legal counsel, the Appellant acknowledged that the birth of her child, who was born in the summer of 2007,

approximately one (1) month before the internal review decision was rendered, did not constitute a reasonable explanation by her for the delay in filing the Notice of Appeal.

In response to a question from the Commission, the Appellant advised that MPIC had referred her to a psychologist, Dr. Cathy Moser. The Appellant further advised the Commission that Dr. Moser diagnosed her with suffering from depression and prescribed anti-depressants. The Appellant testified that she saw Dr. Moser on several occasions and she found that the anti-depressants did not assist her in dealing with her depression. She further testified that as a result of the depression it made it very difficult to deal with matters in a timely fashion.

Submissions

The Appellant, in her submission, reiterated comments as set out in her letter of appeal.

MPIC's legal counsel in her submission indicated that the Appellant had not provided any valid reason for delaying for approximately four (4) months when filing a Notice of Appeal. MPIC's legal counsel further submitted that the delay in filing the Notice of Appeal was prejudicial to MPIC's ability to effectively case manage the Appellant's claim if the Commission set aside the Internal Review decision.

Discussion

Pursuant to Section 174 of the MPIC Act, the Commission has the discretionary power to extend the time for appealing an Internal Review decision. In exercising its discretion the Commission may consider various factors such as:

1. the actual length of the delay compared to the 90-day time period set out in s. 174 of the MPIC Act;
2. the reasons for the delay;

3. whether there has been any prejudice resulting from the delay;
4. whether there was any waiver respecting the delay; and
5. any other factors which argue to the justice of the proceeding.

The Commission finds that the delay of four (4) months by the Appellant in filing the Notice of Appeal would not cause MPIC any significant prejudice as a result of the delay. MPIC's decision in respect of the two-year determination, dated January 10, 2007, determined that the Appellant was capable of being employed as a dispatch/radio operator, and was based on the report from ARCC dated April 30, 2004 and the Transferable Skills Analysis which was completed on September 22, 2006. The case manager, in her letter dated January 10, 2007, stated:

Your Two-Year Determination

An evaluation of your physical abilities was completed by Associated Rehabilitation Consultants of Canada on April 30, 2004. This report indicated you were not physically capable of returning to your pre-accident employment, however would be capable of holding employment which required a light level of functional ability. Dr. Rennie also indicated in his report of August 5, 2004 that you would be capable of holding employment that was sedentary to light.

On September 22, 2006, a Transferable Skills Analysis (TSA) was completed by Mavis Menzies, Vocational Consultant for Continuum Consulting Incorporated taking into account your physical limitations. Based on these reports, the circumstances involving your claim, and our discussions, we have determined you into the position of a dispatcher/radio operator. The gross yearly employment income (GYEI), based on MPI's Table B of Schedule C for an entry level position as a dispatcher, is \$25,664.00.

The Appellant has challenged the correctness of this decision on the grounds that she is not physically capable of performing the duties of a dispatch/radio operator. The Commission notes that MPIC did conduct an investigation as reflected in the ARCC report and the Transferrable Skills Analysis report in order to make its two-year determination. In the Commission's view MPIC therefore had ample information, as a result of these two (2) reports, to defend its position as to the correctness of the two-year determination. In these circumstances the Commission

finds that a delay of four (4) months in the Appellant filing a Notice of Appeal does not prejudice MPIC's ability to defend the correctness of the two-year determination.

In her application for leave to appeal the Appellant stated:

Not only am I still feeling effects physically from the injuries I've sustained October 31, 2003, I am still dealing with the psychological hardships not only from losing a friend and the long ordeal of being through a horrible accident, but also from what I have been through with MPI. (underlining added)

The Commission notes that the Appellant suffered significant injuries in the motor vehicle accident which resulted in surgery to her ankle with a painful recovery, the limited use of her left arm, financial problems and difficulties in finding employment, all of which were significant factors in contributing to the Appellant's depression. The Appellant testified that as a result of her depression it made it very difficult for her to deal with matters in a timely fashion.

The Commission further notes that the Appellant testified in a clear and unequivocal fashion in explaining the reasons why there was a four (4) month delay in filing her appeal. The Commission finds that the Appellant was a credible witness and accepts her explanation that her physical and psychological problems (including depression) significantly contributed to her delay in filing a timely Notice of Appeal.

The Commission determines that, as a result of the physical and psychological problems (including depression) the Appellant suffered, primarily due to the motor vehicle accident, the Appellant has established, on a balance of probabilities, that she had a valid excuse for failing to file a Notice of Appeal in a timely fashion and grants the extension of time pursuant to Section 147 of the MPIC Act. As a result, the Commission will set the matter down for hearing to determine the merits of the Appellant's appeal.

Dated at Winnipeg this 23rd day of October, 2008.

MEL MYERS, Q.C.