

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by L.M.
AICAC File No.: AC-01-119**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, L.M., was represented by Ms Laurie Gordon of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATE: February 18, 2009

ISSUE(S): Extension 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 was injured in a motor vehicle accident on November 17, 1995. She was in receipt of Personal Injury Protection Plan benefits, including Income Replacement Indemnity ("IRI") benefits and treatment benefits.

The Appellant's case manager wrote to her on April 10, 2007, providing the Appellant with a two year determination decision determining her as a [text deleted] on a part-time basis (half-time).

The Appellant did not agree with this decision and filed for a review of the case manager's decision on March 13, 2008. An Internal Review Officer, on April 16, 2008, found that the Appellant's reason for failing to file her application for review within the 60 day period required under the MPIC Act did not qualify as a reasonable excuse under Section 172(2) of the Act.

Further, the Internal Review Officer upheld the case manager's decision regarding the Appellant's IRI entitlement and the two year determination.

On September 26, 2008, the Claimant Adviser Office filed a Notice of Appeal dated May 1, 2008, respecting the Internal Review Decision dated April 16, 2008, on the Appellant's behalf. This Notice of Appeal was filed outside of the 90 day time limit established by Section 174(1) of the MPIC Act within which to file appeals of Internal Review Decisions to the Commission.

The Appellant requested that the Commission exercise its discretion to allow the Appellant to file her Notice of Appeal outside of the time limit, pursuant to Section 174 of the MPIC Act.

MPIC has opposed the Appellant's request for an extension of time for filing her appeal.

Evidence and Submission for the Appellant

The Appellant testified at the hearing into her request for the 90 day extension. She indicated that she had been under psychological treatment for some time and described the various prescription medications which she regularly takes for pain and treatment of her bipolar disorder.

As indicated in the documents on the indexed file, the Appellant has filed several Applications for Review and Notices of Appeal regarding her motor vehicle accident and benefits.

She testified that in the early spring of 2008, in about March or April of that year, she approached the Claimant Adviser Office and met with one of the Claimant Advisers, Marcelle Marion.

She testified that the reason she approached the Claimant Adviser Office for assistance was that she was not functioning very well, due to her psychological condition. She suffered from what she called a “conditioned nasty response” to any dealings with MPIC. Therefore, she required the assistance of the Claimant Adviser in dealing with MPIC and with her claims.

The first thing she discussed with Ms Marion was the two year determination reviewed in the April 16, 2008 Internal Review Decision. She explained to Ms Marion that she was in no shape to deal with MPI because she was struggling just to survive and trying to [text deleted]. She indicated that she wished to appeal the decision and was going to leave that up to Ms Marion. It was her impression that Ms Marion was going to call the Commission and she understood that she could leave the appeal in her lap and trust her to deal with it.

Shortly after the meeting, Ms Marion came to her house with new paperwork to fill out. She instructed her to send it back.

The Appellant indicated that within about a week or so she filled out the paperwork and returned it to Ms Marion. Ms Marion never instructed her to file an appeal by herself, and the Appellant understood that Ms Marion was taking care of it for her.

The Commission also heard the evidence of Lynne Sabourin who is employed as an intake officer for the Claimant Adviser Office. She described her role in assisting the Claimant Advisers by making sure all forms are completed and faxed into the Commission. She also described the database which she uses for tracking these forms. The procedure at the Claimant Adviser Office is for existing clients to bring new appeals to her.

Ms Sabourin testified that Ms Marion never brought her the Appellant's 2008 appeal or intake papers. They did not form part of her database. Had she received such documents, she indicated that they would have formed part of her database and she would have faxed the papers to the Commission under her name, as she does on every other appeal.

Counsel for the Appellant submitted that this was a unique case. Evidence on the indexed file and in a letter from Ms Marion indicated that although Ms Marion had made verbal communication with the Commission on May 7, 2008, confirming that the Appellant would be appealing the decision of April 16, 2008, no written appeal was filed at the time. As a result, Counsel submitted that the Commission should have regard to the structure of Section 172(1) of the MPIC Act and compare it with the structure of Section 174(1) and (2) of the Act.

Application for review of claim by corporation

[172\(1\)](#) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

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.

Counsel argued that the legislature had chosen, in Section 172(1), to place both the requirement for a review application to be filed within 60 days and for it to be in writing in the same provision. However, she submitted that in Section 174(1) and (2) the requirement to file an appeal from a review within 90 days was intentionally separated from the requirement to submit that appeal in writing, pursuant to Section 174(2). She submitted that both requirements should be read separately and that Ms Marion's verbal communication of the Appellant's intention to appeal within the 90 day time limit meets the requirements of Section 174(1), with the later filing of the written Notice of Appeal meeting the requirements of Section 174(2).

In the alternative, Counsel submitted that the Commission should take into account the administrative error made by the Claimant Adviser as a relevant factor in exercising its discretion to relieve against the failure to comply with time limits under Section 174 of the Act.

Counsel reviewed the factors which the Commission considers in such cases. She noted that the length of delay between the deadline of approximately July 16, 2008 and the filing of the written Notice of Appeal on September 26, 2008 amounted only to approximately 2½ months. As a result, the prejudice to MPIC was limited by the short time delay.

Counsel also referred to other cases decided by the Commission, including *M.A. (AC-07-13)* where the Appellant was not responsible for the delay in filing of the appeal and the delay was due to the actions of the solicitor. The Appellant had not waived her right to appeal and her own conduct did not cause the delay. Rather, she spoke with Ms Marion and informed her of her

desire to appeal, completed the appeal packet provided her and returned it to Ms Marion. She believed that the Claimant Adviser Office would file the appeal on her behalf and she did not have to do anything further.

Counsel also submitted that there was an arguable issue to be determined both regarding the Appellant's reason for missing the 60 day period for filing an application for review (due to her psychological issues and break down of communication with her case manager) and regarding the two year determination.

Accordingly, it was submitted that the Commission should exercise its discretion to relieve against the 90 day time limit. The Appellant had full intent to file an appeal, which she believed had been filed. The appeal had merit and should be heard by the Commission.

Submission for MPIC

Counsel for MPIC submitted that the Commission should not read into Section 174 the interpretation that the time limit in Section 174(1) does not apply to the requirement for an appeal to be in writing pursuant to Section 174(2).

She submitted that the Section, while contained in two subsections, is quite clear that appeals must be filed within the prescribed time and that they must be filed in writing.

Counsel for MPIC also objected to a memorandum from Ms Marion and sworn before a Commissioner for Oaths, indicating that she had spoken with the executive director of the Commission on May 7, 2008 to discuss the Appellant's file and inform her that the CAO was

appealing the April 16, 2008 Internal Review Officer decision. Ms Marion was not available for cross-examination and the Commission had no way of knowing when the signed Notice of Appeal was actually received by Ms Marion.

Counsel for MPIC submitted that the Appellant had not provided a proper explanation for the lateness of her written appeal to the Commission. She submitted that an individual who leaves the filing of an appeal in the hands of someone else does not automatically get a “free pass” if that individual does not file the documentation. The argument that an Appellant should not be prejudiced by an administrative error of the Claimant Adviser Officer is not a correct argument, as then only people who are self-represented would have to meet the 90 day limit. It is not a valid argument to propose that the Claimant Adviser Office does not need to meet the time limit.

The explanation that Ms Marion failed to submit the appeal is not a proper explanation; it was Ms Marion’s job to do this.

Counsel for MPIC also noted the prejudice which would result to MPIC if the two year determination, which had already been delayed, needs to be revisited. Therefore, she submitted that due to the prejudice to MPIC and the lack of a reasonable explanation for the delay in filing, the Appellant’s appeal should be dismissed.

Discussion

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 does not agree with the interpretation of Sections 174(1) and (2) proposed by Counsel for the Appellant. In my view, the two subsections should not be read in such a disjunctive manner to reach a conclusion that the 90 day time limit set out in Section 174(1) need not be applied to the requirement for an appeal to be made in writing pursuant to Section 174(2). Both subsections should be considered together when reviewing and interpreting Section 174 of the Act. This is the practice of the Commission.

I have reviewed the factors which the Commission takes into account in exercising its discretion under Section 174(1) of the Act, as well as the *M.A* decision, *supra* referred to by Counsel for the Appellant.

These factors include:

1. the length of the delay;
2. the conduct of the Appellant and/or the Appellant's solicitor;
3. the reasons for the delay;
4. whether there has been any prejudice resulting from the delay;
5. whether there was any waiver by the Appellant in respect of the Appellant's right to have the Internal Review Officer's decision reviewed by the Commission;
6. any other factors which argue to the justice of the proceedings.

I have reviewed the documentary evidence on file and the evidence of the Appellant, as well as the parties' submissions. Although Counsel for MPIC is correct in noting that Ms Marion was unavailable for viva voce testimony or cross-examination, that factor applies more to the weight to be given to the memorandum stating she spoke with the executive director of the Commission on May 8, 2008. I note, however, that other notations on the Appellant's indexed file also make reference to this conversation.

The evidence of the Appellant that she brought her appeal to the Claimant Adviser Office and, after speaking with Ms Marion and completing documentation, trusted that the Appeal was being filed by the Claimant Adviser Office, was credible. The evidence on the file concerning her psychological problems at the time was consistent with and supported her testimony.

I have concluded that the Appellant did believe that her Notice of Appeal had been filed by the Claimant Adviser Officer. She exhibited a clear intent to challenge the Internal Review Decision and actively pursued this with the Claimant Adviser Office. She relied, to her detriment, on what was later discovered to be Ms Marion's error or negligence and I do not believe she should be prejudiced by these actions, particularly when one considers the vulnerable state of the Appellant, due to her psychological difficulties.

Therefore, upon consideration of the totality of the evidence, both oral and documentary, and upon consideration of the relevant factors surrounding the delay, the Commission finds that the Appellant has provided a reasonable excuse for her failure to appeal the Internal Review Officer's decision to the Commission within the 90 day time limit set out in Section 174 of the MPIC Act. As a result, the Commission will extend the time limit within which the Appellant may appeal the Internal Review Decision dated April 16, 2008.

Dated at Winnipeg this 18th day of March, 2009.

LAURA DIAMOND