



Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-03-109**

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Laura Diamond
Ms. Deborah Stewart

APPEARANCES: The Appellant, [text deleted], was represented by
[Appellant's legal counsel];
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Dianne Pemkowski.

HEARING DATE: March 23, 2004, July 14, 2004, September 27, 2004

ISSUE(S): Application for extension of time in respect of an Application
for Review of Internal Review Officer's Decision

RELEVANT SECTIONS: Section 172(1) and (2) of The Manitoba Public Insurance
Corporation Act ('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

[The Appellant] was involved in a motor vehicle accident on October 27, 1998 and sustained soft tissue injuries affecting her neck and shoulders, experienced headaches and sensations of weakness and numbness to her right arm and hand. At the time of the accident the Appellant had been self-employed as a [text deleted] for approximately four years. As a result of the injuries sustained in the motor vehicle accident, the Appellant was unable to return to work and was in receipt of Personal Injury Protection Plan ('PIPP') benefits from MPIC.

Case Manager's Decision

On May 31, 2002 the case manager wrote to the Appellant in response to the Appellant's request for reimbursement of various expenses. In her letter the case manager indicated that MPIC would not reimburse the Appellant for airfare from [text deleted] in the amount of \$368.08 and rerouting of mail in the amount of \$28.89. The Appellant also provided receipts of various expenses in respect of six items between November 6, 2001 and May 23, 2002. In respect of these expenses, the case manager did not specifically indicate whether or not MPIC intended to pay for these expenses and stated:

We are in the process of preparing a request for updated medical information in order to support the need for ongoing treatment and related expenses. As of the date of receipt of this letter, this will confirm that Manitoba Public Insurance is unable to consider funding and payment of any further expenses, as there is no information to support the need for ongoing care.

. . . .

Once further medical information becomes available, this information will be reviewed to determine your entitlement to further benefits.

Should you have any questions about this decision, I can be reached at [text deleted].

After signing this letter the case manager included the following notice:

IMPORTANT

If you are not satisfied with this decision you may request a review under Section 172(1) of the Manitoba Public Insurance Corporation Act. Application forms for review can be obtained from any Manitoba Public Insurance office or you can contact me directly. The Review Office must receive your written application within sixty (60) days from the date you receive this letter.

At this time relations had been strained between the case manager and the Appellant and, as a result, MPIC retained [text deleted], a vocational rehabilitation consultant employed by

[vocational rehabilitation consulting company], to act as a messenger between the Appellant and the case manager.

On June 24, 2002, the Appellant faxed a letter to [MPIC's vocational rehabilitation consultant] advising her that this letter contained an important message and requested that it be forwarded to MPIC:

IMPORTANT:

I am unable to understand the letter that was sent to me by [Appellant's case manager] dated May 31, 2002. I have attempted to determine through guesswork and math, which expenses were paid and which were denied. I have failed sorely in my attempt. Therefore, I respectfully request a detailed and comprehensive list of all expenses submitted to date. Included in this summary please identify which expenses were paid and which were denied. In addition, idometric totals and the rate at which the (sic) were reimbursed for the calendar year in which they were incurred would definitely assist me in my attempt to understand this letter more clearly. I sincerely apologize for the work required fulfilling this request however, thus far I have been unsuccessful in my attempts to "make-the-math-match". I feel it is appropriate to attempt to educate myself with the hope of attaining a clearer comprehension of your decision prior to a formal appeal of the decision. I hope you will accommodate my request, particularly, in consideration of the fact that I am unable to meet with you to discuss questions. It is quite possible that once I glean a conclusive understanding of your letter, the decision will appear quite logical. Please assist me in my goal. Subsequently, should this information not be available to me, please forward the required paperwork to initiate an appeal. I look forward to an equitable resolution concerning this matter. Have a great day! (underlining added)

On July 18, 2002 [MPIC's vocational rehabilitation consultant] faxed the Appellant wherein she confirmed receipt of a fax sent by the Appellant relating to a receipt by [text deleted], the Appellant's psychologist, and she indicated that she would be forwarding the Appellant's fax to MPIC. [MPIC's vocational rehabilitation consultant] further indicated that she would be away from her office between July 22 to August 12, 2002 and advised the Appellant that she could either hold her correspondence until she returned or that the Appellant could fax her correspondence directly to the case manager, [text deleted]. [MPIC's vocational rehabilitation consultant] further stated:

Today, you contacted our office at approximately 1:30; our Receptionist advised that I should be returning at approximately 1:30 and you indignantly replied "Well by my watch it's already 1:30".

I am requesting that you keep your responses cordial when addressing our staff and keep the sarcasm to yourself. I expect that you will comply with this request and I appreciate your efforts.

The Appellant, in a fax to [MPIC's vocational rehabilitation consultant] dated July 18, 2002, angrily replied and stated in part:

As far as your request to hold or direct my correspondence directly to [Appellant's case manager], I have fulfilled the request for obtaining reports from the requested practitioners and have submitted the invoices. I have the reports and, at this point, await direction from you (or whomever will be acting on your behalf during your absence) to proceed with respect to submitting these reports to the appropriate person. (I would sincerely hope that my file is not simply "Closed for Vacation"?? until mid-August)

Please note that I have made numerous requests to meet with [Appellant's case manager] in the past which to date, have gone unanswered. If you believe that you can arrange for us to meet in your absence, to proceed with my claim. GREAT I would be thrilled.

On August 7, 2002 the Appellant faxed a letter to [text deleted] of [vocational rehabilitation consulting company] complaining about the failure of MPIC to receive certain documents that she had provided to [MPIC's vocational rehabilitation consultant] and information in respect of payment of certain medical reports that the Appellant had received and provided to MPIC. In this fax the Appellant stated:

. . . Unfortunately, I am not in a position to proceed with a Formal Appeal (despite requesting that forms be forwarded to me on June 24, 2002 and that they have not yet been received ...). (underlining added)

Similar complaints were made by the Appellant in respect of MPIC's failure to respond in a timely fashion to her in her faxes to [MPIC's vocational rehabilitation consultant], dated July 18, 2002, and to [text deleted] dated July 28, 2002. In a further fax dated August 12, 2002 to [MPIC's vocational rehabilitation consultant] the Appellant again complained bitterly as to the

manner in which she had been treated by [MPIC's vocational rehabilitation consultant] in respect of the failure to respond to her requests promptly while [MPIC's vocational rehabilitation consultant] was away on vacation.

On September 5, 2002 [MPIC's vocational rehabilitation consultant] wrote to the Appellant wherein she provided a response to the Appellant's request for clarification of the case manager's correspondence to her dated May 31, 2002. In this letter [MPIC's vocational rehabilitation consultant] outlined exactly which expenses had been paid by MPIC and which expenses had been denied. [MPIC's vocational rehabilitation consultant] concluded her letter by stating *"I trust this correspondence addresses your fax dated June 24, 2002 requesting clarification of [Appellant's case manager's] correspondence to you dated May 31, 2002."*

On December 16, 2002 the case manager, in reply to the Appellant's request for a "team meeting", forwarded a fax to the Appellant in which the case manager wished to be specifically advised as to the purpose of this "team meeting" and who had been invited to this meeting. On January 8, 2003 the Appellant replied in a fax to [MPIC's vocational rehabilitation consultant] indicating that she wished a "team meeting" in order to assist in establishing a method of communication between the parties. In response, the case manager, on January 15, 2003, forwarded a fax to the Appellant indicating:

In response to your fax dated January 8, 2003 to [MPIC's vocational rehabilitation consultant], we are unable to move forward with scheduling a meeting if we do not know who is to be invited and the purpose of the meeting.

I await your response with this information.

Case Manager's Decision Regarding IRI

Although the decision of MPIC terminating the Appellant's IRI is not the subject matter of this appeal, the decision of the case manager and the Internal Review Officer in respect of MPIC's termination of Income Replacement Indemnity ('IRI'), are relevant to an understanding of the issue under appeal relating to an extension of time pursuant to Section 172(1) and (2) of the MPIC Act.

On January 22, 2003 the case manager wrote to the Appellant advising her that:

1. the medical evidence indicated that the Appellant was no longer unable to perform her work as a [text deleted] and, therefore, the Appellant was no longer entitled to IRI benefits.
2. in accordance with Section 110 of the MPIC Act, the Appellant would be entitled to a further one year of IRI benefits in order to establish her [text deleted] practice.
3. the medical evidence on file indicated that the treatment recommendation identified by the Appellant's psychiatrist was no longer medically required and that MPIC would no longer fund these treatments except in respect of psychotherapy.
4. the Appellant was advised that MPIC was arranging a further review of medical information with the consulting psychologist to determine how psychotherapy could benefit the Appellant in the future.

Internal Review Officer's Decision Regarding IRI

On May 5, 2003 the Internal Review Officer issued a decision wherein the Internal Review Officer rescinded the termination of the Appellant's IRI effective January 22, 2003 and referred the matter back to the case manager to determine how best to deal with the Appellant's claim. In this decision the Internal Review Officer stated:

I note that there was a decision letter issued by the case manager on May 31, 2002 dealing with your claims for reimbursement of various expenses. Although the decision generated quite a lot of subsequent discussion, no Application for Review of Injury Claim Decision was ever filed, and the time period for filing an Application has long since expired. Accordingly, I will not be dealing with any issues arising out of the May 31, 2002 decision. (underlining added)

In response the Appellant filed an Application for Review, dated August 21, 2003:

This decision is based on the opinion of [MPIC's physiatrist]. Many other medical reports exist which disagree. My extensive file will clearly indicate my previous attempts to resolve this. Finally I gave up. Many of my questions were never acknowledged nor answered. This type of treatment has, and continues to be typical concerning my claim with MPI. While you prefer a formal appeal on a designated form, my 80 days of attempt to have questions answered and very clear communication of my lack of agreement with the decision should be deemed an appeal.

In reply the Internal Review Officer wrote to the Appellant on August 21, 2003:

I rendered a decision on May 5, 2003 with respect to your Application for Review of Injury Claim Decision dated March 20, 2003.

In my decision, I noted that no request for a review of the decision letter from the case manager dated May 31, 2002 had ever been filed, and I stated that I would not be dealing with any of the matters arising out of that decision. You called me a short time later and I reiterated my position. I invited you to take the matter up with the case manager again if you wished.

On August 21, 2003, you submitted an Application for Review of Injury Claim Decision which requests a review of the May 31, 2002 decision. You suggest that your discussions with the case manager during the months following that decision "should be deemed an appeal".

I disagree. The decision letter of May 31, 2002 clearly set out your right to request a review, and clearly indicated that the request was in writing and within 60 days from your receipt of the letter.

As has already been noted, no such request was made to our office. Furthermore, there is nothing in your Application which would, in my view, constitute a "reasonable excuse" (within the meaning of Section of 172(2) of The Manitoba Public Insurance Corporation Act - copy enclosed) for failing to request a review within the statutory time period. (underlining added)

APPEAL

On August 26, 2003, [text deleted], Appeals Officer for the Automobile Injury Compensation Appeal Commission, wrote to the Internal Review Officer and stated:

This will serve to confirm our telephone conversation of today wherein you advised that the Commission may consider your letter to [the Appellant] of August 21st, 2003, as an Internal Review decision which may be appealed to this Commission.

On September 6, 2003 the Appellant filed a Notice of Appeal:

The “reasonable excuse” is subjective. MPI owes me thousands of dollars in rehabilitation expenses. I have never been provided with an unconditional opportunity to meet with my appointed case manager. His “invitation” to “take up the matter” is unreasonable.

The relevant provisions of the MPIC Act in respect of this appeal is Section 172(1) and (2) which state:

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.

Corporation may extend time

172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

Subsequent to the Notice of Appeal, and prior to hearing the merits of the appeal, the Commission received several reports from the Appellant’s clinical psychologist, [text deleted], and from MPIC’s clinical consultant, [text deleted].

[Appellant’s legal counsel], represented the Appellant in this appeal and Ms. Dianne Pemkowski

acted as legal counsel for MPIC.

Prior to hearing an appeal on the merits, the Commission conducted a Pre-Hearing Meeting to determine the issue in dispute under appeal as well as the issue in dispute between the parties.

The Commission determined that:

1. the issue under appeal is whether or not the Internal Review decision of August 21, 2003, refusing to grant an extension of time, should be overturned on the basis that there was reasonable excuse for not asking for a review of the May 31, 2002 decision within sixty (60) days of that decision.
2. the issue in dispute between the parties was identified in the case manager's decision letter of May 31, 2002 relating to airfare in the amount of \$368.08, rerouting of mail in the amount of \$28.89, a list of various other expenses outlined in the May 31, 2002 letter and further clarified in [MPIC's vocational rehabilitation consultant's] letter to the Appellant dated September 5, 2002.
3. MPIC did not have the jurisdiction to pre-determine future claims for care and treatment of expenses of the Appellant and to the extent the case manager's letter of May 31, 2002 purported to determine that, this determination was invalid and of no effect.

Appeal Hearing – Extension of Time

The appeal hearing relating to the Appellant's Application for an Extension of Time to file an Application for Review pursuant to Section 172(1) and 172(2) of the MPIC Act, commenced on September 27, 2004. The Appellant testified as to the enormous difficulty she had in communicating with MPIC, the failure of MPIC to respond in a meaningful way to her inquiries, and the frustration she had in receiving prompt responses to her communication.

The Appellant's legal counsel, in his submission to the Commission, referred to a number of documents and to the testimony of the Appellant in submitting that the Appellant had provided a reasonable excuse for failing to make an Application for Review of the Internal Review Officer's decision within 60 days of that decision. In support thereof [Appellant's legal counsel] cited a number of cases dealing with the issue of courts or administrative bodies granting extensions of time. [Appellant's legal counsel] submitted that, having regard to the conduct of MPIC's case manager in failing to deal in a reasonable manner with the Appellant which resulted in a great deal of frustration and anger on the part of his client, and having regard to the psychological condition of the Appellant, that the Appellant has established, on a balance of probabilities, that she had a reasonable excuse for failing to file a timely Application for Review of the Internal Review Officer's decision.

In reply, MPIC's legal counsel argued that on May 31, 2002 MPIC had provided a decision letter denying certain benefits to the Appellant and clearly advising her that under Section 172(1) she could file an Application for Review within 60 days from the date she had received this letter. The Appellant had failed to comply with the 60 day notice, and had not made an Application for Review until August 21, 2003, a period of fifteen months after the decision letter of May 31, 2002. MPIC's legal counsel submitted that the Appellant had failed to establish, on a balance of probabilities, that she had a reasonable excuse and, therefore, in these circumstances, the appeal should be dismissed.

DISCUSSION

The Commission finds that the decision letter of May 31, 2002 was a partial, and not a complete, decision of all of the Appellant's claims that she had made as of that date, pursuant to Section

172(1) of the MPIC Act. An examination of this letter indicates that the case manager denied payment of airfare and rerouting of mail expenses, but in respect of the payment of other expenses outlined in her letter of May 31, 2002 the case manager stated:

We are in the process of preparing a request for updated medical information in order to support the need for ongoing treatment and related expenses. As of the date of receipt of this letter, this will confirm that Manitoba Public Insurance is unable to consider funding and payment of any further expenses, as there is no information to support the need for ongoing care.

....

Once further medical information becomes available, this information will be reviewed to determine your entitlement to further benefits.

Notwithstanding that the case manager's decision was not a final decision in respect of the Appellant's claims, the case manager did provide a notice of the Appellant's right to apply for the review of the decision within Section 170(2) of the MPIC Act and also agreed to provide the appropriate application forms for review if the Appellant contacted the case manager directly.

Timely Application

The Commission finds that the case manager's letter of May 31, 2002 was unclear and raised a number of questions in the mind of the Appellant that she needed to have clarified. The Appellant wrote to [MPIC's vocational rehabilitation consultant] on June 24, 2002 requesting clarification of the case manager's letter dated May 31, 2002 and clearly indicated that she was unable to determine from the case manager's letter what expenses had been paid by MPIC and what expenses had not been paid. She further stated in this letter that:

1. she was not in a position to appeal the case manager's decision until she obtained clarification.
2. in the alternative, if the information she requested was not available MPIC should

provide her with the required paperwork to initiate an appeal.

It should be noted that the case manager in her letter to the Appellant on May 31, 2002 invited the Appellant to contact her directly if she wished appeal documents. The Appellant's letter to [MPIC's vocational rehabilitation consultant] dated June 24, 2002 requesting the documentation was sent within the 60 day period in which an Application for Review can be made under Section 172(1) of the MPIC Act and, therefore, MPIC was aware of the Appellant's position in respect of this matter. Unfortunately, the Appellant did not hear from MPIC and, as a result, in a fax to [text deleted] of [vocational rehabilitation consulting company], dated August 7, 2002 again stated:

. . . . Unfortunately, I am not in a position to proceed with a Formal Appeal (despite requesting that forms be forwarded to me on June 24, 2002 and that they have not been received. . . .) (underlining added)

The Appellant did not receive a response from MPIC in respect of this matter until she received [MPIC's vocational rehabilitation consultant's] letter dated September 5, 2002 providing a clarification of the expenses. The Commission notes that a period of 97 days had elapsed between the case manager's letter of May 31st, 2002 and [MPIC's vocational rehabilitation consultant's] letter of explanation dated September 5, 2002.

The Commission further notes that the Appellant never received the forms for the Application for Review from the case manager which the case manager promised the Appellant in her letter of May 31, 2002.

The Commission determines that:

1. the Appellant's request for clarification for information before she could file an

appeal and the request for the appropriate appeal forms were reasonable requests.

2. the failure of the case manager in a timely fashion to provide clarification of her letter and to provide the appropriate forms for an Application for Review were without justification and directly contributed to the Appellant's failure to file a timely Application for Review.

The Appellant advised the case manager within 60 days after May 31, 2002 that prior to filing the appeal she required clarification in respect of certain expenses referred to in the May 31st letter. The case manager, in response to several requests by the Appellant for clarification, at no time advised the Appellant that she was not entitled to any clarification during the 60 day period following the May 31st letter. The Commission therefore concludes that it was not unreasonable for the Appellant to reasonably believe that until she received clarification from the case manager she would not be required to file an appeal. The Commission notes that on September 5, 2002 [MPIC's vocational rehabilitation consultant's] letter of clarification was provided to the Appellant, which was a period of 97 days after the case manager's letter of May 31, 2002. As a result, the Appellant was unable to meet the 60 day deadline as set out in Section 172(1) of the MPIC Act.

MPIC could have remedied this matter by providing the Appellant with the 60 day notice when it forwarded [MPIC's vocational rehabilitation consultant's] letter of September 5, 2002 to the Appellant in accordance with Section 170(2) of the MPIC Act, which provides:

Claimant to be given notice of right to review

170(2) Where the corporation makes a decision respecting compensation under this Part, it shall, at the time it gives written notice of the decision to the claimant, give notice of the right of the claimant to apply for a review of the decision.

If MPIC had included the 60 day notice in [MPIC's vocational rehabilitation consultant's] letter

of September 5, 2002, the Appellant would have had a reasonable opportunity at that time to file a timely Application for Review in respect of the MPIC decisions in the letters of May 31 and September 5, 2002.

Unfortunately, the Appellant did not receive notice from MPIC that she had not made a timely Application for Review of the case manager's decision of May 31, 2002 until she received the Internal Review Officer's decision of May 5, 2003 which was a period of approximately 11 $\frac{3}{4}$ months after the May 31st, 2002 letter. The Appellant had filed an Application for Review on March 20, 2003 in respect of the termination of her IRI benefits. The Internal Review Officer, in his decision dated May 5, 2003, rescinded the case manager's decision to terminate the IRI and referred the matter back to the case manager. However, the Internal Review Officer in his decision also stated that the Appellant had not filed an Application for Review in respect of the May 31, 2002 decision dealing with her claim for reimbursement for various expenses and further stated that the time period for filing an Application for Review had long since expired. It was only after receiving the Internal Review Officer's decision, dated May 5, 2003 (a period of approximately 11 $\frac{3}{4}$ months after the case manager's decision of May 31, 2002), that the Appellant first learned that she had failed to make a timely Application for Review within 60 days following the case manager's decision of May 31, 2002.

The Commission finds that MPIC failed to carry out its statutory duty in accordance with Section 150 of the MPIC Act, which states:

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

Contrary to Section 150 of the MPIC Act, MPIC did not:

1. in a fair and effective manner, advise and assist the Appellant in her attempt to challenge the case manager's decision of May 31, 2002.
2. in a timely fashion, provide an explanation to the Appellant in respect of the case manager's decision of May 31, 2002 and failed, as promised, to provide the Appellant with the Application for Review forms.

Having regard to the unfair and unreasonable manner in which MPIC dealt with the Appellant as outlined herein, the Commission finds that the Internal Review Officer erred in rejecting the Appellant's Application for Review on the grounds that it was untimely. The Commission finds that the Internal Review Officer should have accepted jurisdiction to determine the merits of the Appellant's Application for Review and he failed to do so.

Estoppel

The Commission further determines that it was inequitable for MPIC to decide that the Appellant failed to comply with the 60 day limit as set out in Section 172(1) of the MPIC Act.

The common law principle of equitable estoppel has been expressed in the following way:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Combe v. Combe, [1951] 1 All E.R. 767 (C.A.), at p. 770.

MPIC, in support of its position in objecting to the Appellant obtaining an extension of time, relies on the notice inserted into the case manager's letter to the Appellant dated May 31, 2002

wherein the Appellant was advised that she was required to file a written Application for Review within 60 days of the receipt of the May 31st letter. However, this notice also contained a representation by the case manager that application forms for review could be obtained from any Manitoba Public Insurance office or directly from the case manager.

The Commission earlier in this decision stated on June 24, 2002 the Appellant faxed a letter to [MPIC's vocational rehabilitation consultant] requesting clarification in respect of the May 31st letter and stated that if the information was not available to forward the required paperwork to initiate an appeal. This request was made within the 60 day period for filing an Application for Review pursuant to Section 172(1) of the MPIC Act. On August 7, 2002, the Appellant faxed a letter to [text deleted] of [vocational rehabilitation consulting company] complaining that she was not in a position to proceed with the formal appeal despite requesting the forms be forwarded to her on June 24, and they had not yet been received.

The Commission finds that:

1. the case manager, on behalf of MPIC, represented to the Appellant in her letter of May 31, 2002 that if the Appellant would contact her directly the Application for Review forms would be provided to the Appellant.
2. the Appellant, in accordance with instructions from MPIC, requested the Application for Review forms from representatives of [vocational rehabilitation consulting company] on June 24, 2002 and August 7, 2002 and MPIC failed to provide the Application forms to the Appellant.
3. at no time thereafter did MPIC provide forms in respect of the Application for Review to the Appellant.
4. the Appellant, relying on these representations, did not contact the MPIC office to

- obtain the Application for Review forms within the 60 day period and, as a result, did not file an Application for Review within 60 days following May 31, 2002.
5. as a result of the representations made by MPIC the Appellant was prejudiced in failing to file a timely application within the 60 day period.

The Commission finds that:

1. having regard to representations made by MPIC to the Appellant, which the Appellant acted upon, MPIC is estopped from asserting that the Appellant did not make a timely application to file an Application for Review within 60 days of the case manager's May 31, 2002 letter.
2. having regard to MPIC's conduct, the Appellant was not required to file an Application for Review within 60 days of receipt of the case manager's decision of May 31, 2002 in accordance with Section 172(1) of the MPIC Act.
3. the Appellant's Application for Review, dated August 21, 2003, was a valid Application for Review which entitled the Appellant to have an Internal Review Officer review the case manager's decision dated May 31, 2002.
4. the Internal Review Officer's letter to the Appellant, dated August 21, 2003, constituted an Internal Review decision wherein the Internal Review Officer rejected the Appellant's Application for Review of the May 31, 2002 letter.
5. the Appellant's Notice of Appeal dated September 6, 2003 gave the Commission jurisdiction to determine whether or not the Appellant had made a timely Application for Review pursuant to Section 172(1) of the MPIC Act.

Conclusion

The Commission determines, for the reasons set out above, that the Internal Review Officer's

decision dated August 21, 2003 was incorrect and that the Appellant did make a timely Application for Review of the case manager's decision dated May 31, 2002.

Reasonable Excuse – Section 172(2) of the MPIC Act

In the alternative, if the Appellant's Application for Review dated August 21, 2003 was untimely, the Commission is satisfied that the Appellant had a reasonable excuse for failing to file a timely Application for Review within the 60 day period following the May 31, 2002 letter.

The Commission has found that MPIC directly contributed to the failure of the Appellant to file a timely Application for Review within 60 days after May 31, 2002. The Commission has determined that the confusing nature of the case manager's letter of May 31, 2002, the failure of MPIC in a timely fashion to respond to the Appellant's request for clarification of the May 31, 2002 letter, and the failure of MPIC to provide the promised forms for Application for Review to the Appellant, directly contributed to the failure of the Appellant to file a timely Application for Review in respect of the case manager's May 31, 2002 decision.

This Commission determines that the manner in which MPIC dealt with the Appellant increased the already strained relationship that existed between the Appellant and MPIC on May 31, 2002. MPIC had a great deal of difficulty in communicating with the Appellant and, as a result thereof, retained Ms. [MPIC's vocational rehabilitation consultant], a vocational rehabilitation consultant with [vocational rehabilitation consulting company], to act as a mediator and messenger between the Appellant and the case manager. Notwithstanding the appointment of [MPIC's vocational rehabilitation consultant], and her attempt to deal with a most difficult situation, the failure of MPIC to deal with the Appellant in a timely and sensitive fashion caused an enormous amount of frustration and anxiety to the Appellant and rendered her unable to cope effectively in dealing

with her dispute with MPIC.

The Commission has had the opportunity of considering the three psychological reports from [Appellant's psychologist] dated March 1, 2001, July 17, 2002 and May 12, 2004 and [MPIC's psychologist's] psychological report of April 6, 2004. [MPIC's psychologist] was requested by MPIC to review [Appellant's psychologist's] initial psychological reports dated March 1, 2001 and July 17, 2002 and determine whether or not the information contained within the two psychological reports would be sufficient explanation for the Appellant's non-compliance with the sixty day requirement to file an Application for Review on the case manager's decision dated May 31, 2002. [MPIC's psychologist] advised MPIC after reviewing these two reports ". . . *there is no information in this report <referring to the July 17, 2002 report> that would suggest the claimant was incapable*" of doing so.

[Appellant's psychologist], at the request of the Appellant's legal counsel, provided a written response to [MPIC's psychologist's] report dated May 12, 2004 in which he disagreed with [MPIC's psychologist's] opinion as to the psychological incapacity of the Appellant to comply with the 60 day requirement.

The Commission notes that [MPIC's psychologist] did not personally interview the Appellant but had an opportunity of reviewing the Appellant's MPIC file, together with [Appellant's psychologist's] reports dated March 1, 2001 and July 17, 2002. On the other hand, [Appellant's psychologist], in his report to the Appellant dated March 1, 2001 indicates that the Appellant first attended a diagnostic and assessment session on October 25, 2001 and subsequently, [Appellant's psychologist] saw the Appellant for psychotherapy initially weekly and then twice weekly, commencing on October 25, 2001 and continuing through the months of November,

December, January and February 2002. [Appellant's psychologist] further indicated that he had a number of telephone contacts with [MPIC's vocational rehabilitation consultant], who was acting as liaison between the Appellant and MPIC.

[Appellant's psychologist], in his letter to the Appellant dated July 17, 2004, also indicates that a clinical review since his last report occurred on numerous occasions during the month of March, April, May, June, August, September, October, November and December 2001 and as well as April 18 and 25, 2002, May 2, 9, 16, 23 and 30, 2002, June 6, 20 and 27, 2002, July 4, 11, 12 and 18, 2002. [Appellant's psychologist] further indicates that he also had phone and email contact, as needed, with the Appellant and various of her care givers. Accordingly, [Appellant's psychologist], unlike [MPIC's psychologist], had an opportunity over a long period of time to assess the Appellant's psychological condition, and in particular during the sixty day period following the case manager's decision of May 31, 2002.

The Commission finds, having regard to [Appellant's psychologist's] personal contact with the Appellant, that he was in a better position than [MPIC's psychologist] to determine the psychological capacity of the Appellant during the sixty day period following May 31, 2002. [Appellant's psychologist], since October 25, 2000 had the opportunity of meeting with the Appellant, interviewing her, assessing her credibility and psychological condition. Therefore, for these reasons, the Commission prefers the psychological assessment of [Appellant's psychologist] rather than the assessment of [MPIC's psychologist] as to the Appellant's state of mind during the sixty day period subsequent to May 31, 2002 and her capacity to comply with the 60 day time limit in Section 172(1) of the MPIC Act.

[Appellant's psychologist], in his report to the Appellant dated March 1, 2001 stated:

Functionally, it appears that the psychological and physical trauma resulting from the motor vehicle accident and the subsequent frustrating experiences in dealing with MPI has induced or exacerbated a form of alexithymia in [the Appellant]. Alexithymia is impairment in the ability to discern, differentiate, experience, or express her emotions to either one's self or another person. The alexithymia is mild as [the Appellant], under the proper therapeutic conditions and prompting, is able to adequately differentiate and express her emotions. People who tend towards coping via repression, particularly those with alexithymia, tend to have chronically high levels of both muscles tension and autonomic nervous system activation. The former (i.e., muscle tension) often causing headaches, migraines, muscle stiffness and soreness, either localized, to a 'few areas *or* generalized throughout the body. The latter is often the cause of many common physical symptoms such as decreased peripheral blood flow (i.e., cold hands and feet), gastrointestinal upset, esophageal spasm, coughing, etc. . . .

In his summary, [Appellant's psychologist], in his report dated May 12, 2004, states:

Summary Conclusions: The period of time during which [the Appellant] was to make a appeal regarding her termination of rehabilitation benefits, [the Appellant] was undergoing considerable and prolonged psychological distress from both her interactions involved in the administration of her claim with MPI and with her personal life. It was also during this time that [the Appellant] was in the middle of seriously trying to implement new ways of coping with stress, by experiencing and expressing her feelings more fully rather than minimizing and repressing them and channelling them into states of chronic anger. This process was extremely exhausting for her, psychologically and physically, as evidenced by her state during therapy sessions, and by her not leaving her apartment for weeks at a time and general withdrawal from the world. Review of my notes suggests [the Appellant] met or came close to meeting the DSM-IV-TR criteria for a major depression episode in the period of time just after the second report, in the latter half of July 2002, suffering from depressive symptoms including depressed affect, withdrawal, diminished pleasure, insomnia, fatigue, cognitive impairment, and feelings of worthlessness and helplessness. (underlining added)

Also, [the Appellant's] prior experience with MPI (see August 9th note re: [text deleted] and the reinstatement of IRI benefits) was that appeals do not have to be formal, and that deadlines are not formal, and that MPI does not submit to its own formal deadlines regarding responding within the 60 day periods. Finally, her submission of the requested healthcare provider reports on her condition, as well as her phone contacts with [text deleted], [text deleted], and [text deleted], led her to believe that she was actively engaged in appealing the rehabilitation termination decision.

An individual without alexithymia, with better people and social skills, with less anger at and history with the parties involved, may have had the psychological and social capacity to properly and formally address the appeal process and the related issues, and to do so in a timely and appropriate manner. [the Appellant] however was unable to do so, oscillating between the collapse and agony of feeling overwhelmed and defeated after years of feeling neglected, dismissed and abused, and her regrouping and re-empowering herself in her fight for proper treatment by those she felt were charged with her care and rehabilitation process for returning her to her previous a state of well-

being and vocational functioning. At the time of this particular appeal process she was feeling overwhelmed, depressed, and defeated and did not have the cognitive clarity to properly and formally address the appeal process within the sixty time frame, though she did believe she was doing so by providing the health care provider reports and contacting and protesting to MPI and [vocational rehabilitation consulting company] about the termination letter and process. (underlining added)

The Commission had the opportunity of observing the manner in which the Appellant testified, both in examination and in cross-examination. The Commission finds that the Appellant testified in a direct and clear manner without equivocation and the Commission determines that she was a credible witness. The Commission also finds that [Appellant's psychologist's] psychological opinion as to the Appellant's statement of mind in the sixty day period following May 31, 2002 corroborates the Appellant's testimony that she gave at the appeal hearing.

The Commission finds that having regard to the unreasonable manner in which MPIC dealt with the Appellant in respect of her attempts to challenge the case manager's decision of May 31, 2002 overwhelmed the Appellant and exacerbated the Appellant's alexithymia during the sixty day period following the case manager's decision of May 31, 2002, As a result, the Commission determines that the Appellant has established, on a balance of probabilities, that she was psychologically unable to cope effectively during that period of time and this resulted in her failure to file a timely Application for Review in accordance with Section 172(1) of the MPIC Act. For these reasons, the Commission is therefore satisfied that the Appellant has established, on the balance of probabilities, that she had a reasonable excuse for failing to file a timely Application for Review.

Decision

The Commission determines that:

1. the appellant has established, on a balance of probabilities, that the Internal Review

Officer erred in his decision dated August 21, 2003 when he determined the Appellant did not make a timely Application for Review of the case manager's decision dated May 31, 2002. The Commission finds that the Appellant did make a timely Application for Review of the case manager's decision dated May 31, 2002, and/or in the alternative

2. it is satisfied that the Appellant has established, on a balance of probabilities, that she had a reasonable excuse for failing to file a timely Application for Review of the case manager's decision in accordance with Section 172(2) of the MPIC Act. As a result, MPIC erred in failing to extend the time in order to permit the Appellant to make a timely Application for Review pursuant to Section 172(2) of the MPIC Act.

The Appellant's claim shall therefore be referred back to an Internal Review Officer to conduct an Internal Review in accordance with the provisions of the MPIC Act. As a result, the Appellant's appeal is allowed and the Internal Review decision dated August 21, 2003 is therefore rescinded and the foregoing is substituted for it.

Dated at Winnipeg this 8th day of December, 2004.

MEL MYERS, Q.C.

LAURA DIAMOND

DEBORAH STEWART