



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-112

PANEL: Mr. Mel Myers, Q.C., Chairman
Ms. Barbara Miller
The Honourable Mr. Armand Dureault

APPEARANCES: The Appellant, [text deleted], appeared together with her daughter and representative, [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: August 20, 2004

ISSUE(S): Extension of Time in respect of a Notice of Appeal

RELEVANT SECTIONS: Section 174 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 December 22, 1998 and, as a result, sustained soft tissue injuries to her back, neck and right knee. At the time of the accident the Appellant was employed as a flower arranger/designer in a florist shop but due to motor vehicle accident injuries she was unable to return to work and commenced receiving Income Replacement Indemnity ('IRI') benefits.

On October 8, 2002 the case manager wrote to the Appellant and advised her that pursuant to Section 107 of the MPIC Act, MPIC had determined the Appellant's employment as an entry

level "Receptionist & Information Clerk". The case manager further advised the Appellant in his letter that the Appellant's full IRI would continue until October 9, 2003 at which time it would be reduced pursuant to Section 115 of the MPIC Act. Upon receipt of this letter the Appellant sought an Internal Review decision.

Internal Review Decision

The Internal Review hearing took place on July 10, 2003. On September 15, 2003 the Internal Review Officer issued his decision and stated:

At the hearing I was advised that the determination itself is not being disputed. The only issue at this time is your ability to do the determined employment on a full-time, or even a part-time, basis.

REVIEW DECISION

For the reasons set out below, I am suspending the running of the one-year grace period under Section 110(1)(d) of the *Act* from February 3, 2003 (the date when you were first prescribed Carbamazepine) until the date when you discontinued use of this medication. Based on the information provided by [Appellant's doctor], this should be about seven months, but the actual date of discontinuance will have to be confirmed by him.

Your full IRI was to end on October 9, 2003 pursuant to Section 110(1)(d) of the *Act*. It will now be extended by the number of days you were on Carbamazepine. Sections 115 and 116 of the *Act* will continue to apply.

The Internal Review decision sets out at length the reasons for the Internal Review Officer's decision and at the conclusion of the decision the Internal Review Officer stated:

APPEAL RIGHTS

If you are unsatisfied with this decision, you have ninety days within which to appeal to the Automobile Injury Compensation Appeal Commission. The Commission can be reached at: (underlining added)

Room 1720 – 330 Portage Avenue
Winnipeg, MB R3C 0C4

Telephone: 945-4155

Fax: 948-2402

Please note that the Commission operates independently from MPI and its decisions are binding on MPI, subject to the appeal provisions of Section 187 of the *Act*.

On October 7, 2003 a Senior Case Manager wrote to the Appellant and informed her as follows:

The Internal Review Office provided you a decision dated September 15, 2003 in regards to the Two Year Determination Process and one year job search. This letter will confirm the extension of your one year job search period.

As of the date of the two-year determination, October 10, 2002, you had one year to secure the employment, in accordance with Section 110(1)(d) of the Manitoba Public Insurance Corporation Act (attached). Based on the information provided by [Appellant's doctor] the Internal Review office has advised to suspend the one year job search for the time period that you were taking the medication Carbamazepine.

Our records indicate you began taking this medication on February 3, 2003. [Appellant's doctor] has indicated that he is currently reducing this medication and will have discontinued it all together by the end of October 2003.

Based on this information we will extend your job search period for eight months until June 10, 2004.

The case manager further stated:

On June 10, 2004, your IRI benefit will be reduced by either your actual net earnings or the net earnings from the Schedule C income level, \$571.31, whichever is greater, in accordance with Section 115 of the Manitoba Public Insurance Corporation Act (attached). This applies even if you do not hold the determined employment.

.....

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 <u>sixty (60) days</u> from the date you receive this letter.

Pursuant to the directions set out in this letter, the Appellant filed an Application for Review dated November 28, 2003 and stated:

I don't agree with the decision that was written (sic) in letted (sic) dating October 7/2003. This letter does not appeal or reflect on my physical/mental situation and to my ability to work. More information will be probityng (sic) on a letter (sic) date.

On November 26, 2003 MPIC wrote to the Appellant as follows:

This is to confirm receipt of the Application for Review of the Injury Claim Decision made with respect to your December 22, 1998 automobile accident.

The entire claim file has been requested from the Rehabilitative Case Management Centre. Once that material has been received, it will be assigned to an Internal Review Officer who will be in touch with you by letter.

Please find enclosed an Internal Review Information sheet which should answer any questions you have with respect to his process. If you have any other questions in the meantime, please do not hesitate to contact the Internal Review Office at [text deleted].

However, the Internal Review Officer wrote to the Appellant dated December 3, 2003 as follows:

Your recent Application has been brought to my attention. It appears to relate to the letter from the case manager dated October 7, 2003.

The October 7, 2003 letter was not a “fresh decision” on the part of the case manager. It merely implemented my decision of September 15, 2003.

This letter should not have included the “60-day” clause because there is, in fact, nothing new for me to review.

I have already considered the issue of the two-year determination, and have already rendered a decision on the matter.

I understand you have an appeal pending with the Automobile Injury Compensation Appeal Commission. That is the appropriate forum for dealing with your ongoing disagreement with the two-year determination.

In the circumstances, we will not be scheduling an Internal Review hearing with respect to your Application dated November 28, 2003 and we will, in fact, be closing the Internal Review file [text deleted] that was opened in connection with it.

The Appellant, in reply, wrote to the Internal Review Officer by letter dated December 5, 2003:

[text deleted], Senior Case Manager, send me a letter on October 7, 2003. I have attached a copy of the letter.

Is important note in the end on the letter.

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.

Now you send me a letter on December 3, 2003 that should not include the "60 days review."

I don't agree with your decision in the letter you send me, also I don't agree with [MPIC's senior case manager] letter decision.

[Appellant's doctor] suspend me carbamazepine and change the medication for gabapentin and Butalbital/ASA/Caffeine. But now I back with carbamazepine.

I will be sending you a letter from my Doctor, with new information, and copy of the medication I have.

In reply, the Internal Review Officer wrote to the Appellant dated December 10, 2003 as follows:

I have your letter dated December 5, 2003.

I was aware of the notice in the letter from [MPIC's senior case manager] dated October 7, 2003. As I indicated in my letter dated December 3, 2003, the notice should not have been included with that letter. It was done so in error.

Your matter is now before the Automobile Injury Compensation Appeal Commission.

If you have additional material to submit in support of your appeal, that is the appropriate body to which your submission should be made.

The Appellant replied to the Internal Review Officer by letter dated December 10, 2003 as follows:

I have received your letter dated December 3, 2003 regarding my application for Review of Injury Claim Decision. In your letter, you have advised that my appeal should be directed to the Automobile Injury Compensation Appeal Commission. On the contrary, I have received another letter from [MPIC's Internal Review Officer #1], dated November 26, 2003 advising that my entire claim file has been requested from the RCMC and it will be assigned, and received, to an Internal Review officer. With these two letters, I feel confused especially that I was advised to appeal the decision (according to [MPIC's senior case manager's] report of October 7, 2003) of MPI if I am not satisfied with it for a review under section 172(1) of MPI. She indicate that the Review office must receive

my application within 60 days from the date I receive her letter.

Given my limited knowledge with the MPI regulations, I am totally confused with this situation. You have advised that my appeal should be directed to the AICAC but that does not agree with either [MPIC's senior case manager] or [MPIC's Internal Review Officer #1's] letters. Please contact or write to me for advise. (underlining added)

I appreciate your help and cooperation in this matter.

On January 8, 2004 the Commission's Director of Appeals wrote to the Internal Review Officer and advised him:

In response to your letter dated December 10, 2003 to [the Appellant], wherein you state that "the matter is now before the Automobile Injury Compensation Appeal Commission. I wish to advise that the Commission does not have an active appeal from [the Appellant]. (underlining added)

On June 15, 2004 the Appellant filed a third Application for Review together with a letter in support of that Application. MPIC forwarded these documents to the Commission's Director of Appeals with the following note:

[text deleted], attached please find an application and letter from [the Appellant] received in our office June 16th, 2004. This is not a new Review as she is appealing [MPIC's Internal Review Officer #2's] September 15th, 2003 decision letter copy of which is attached.

On June 29, 2004 the Commission's Appeals Officer wrote to the Appellant:

Receipt is acknowledged of your correspondence which was sent to the offices of MPIC rather than to this Commission. It appears that you wish to appeal the decision rendered by MPIC's Internal Review Office dated September 15th, 2003.

Unfortunately, you have missed the 90-day time limit within which you must file your Notice of Appeal as noted on pages 7 and 8 of the September 15th, 2003 decision. The Commission does, however, have the power to extend the time within which a Notice of Appeal from a decision of the Internal Review Officer must be filed but requires a written explanation from you that would serve as good reason for extending that time.

Upon receipt of your written explanation, it will be reviewed and you will be notified as to whether it was found to be reasonable and whether or not your appeal will be allowed to proceed.

I would also ask you to complete the enclosed form of Notice of Appeal.

Please let us have your completed form of Notice of Appeal and your written explanation no later than July 18th, 2004.

In reply, the Appellant, on July 13, 2004, wrote to the Commission's Appeals Officer as follows:

I am sending you a copy of the letter that received from [MPIC's senior case manager] (Rehabilitative Case Management Centre), on October 7, 2003. In the letter she says I had 60 days to apply for a Review of Injury Claim Decision.

I am sending you a copy of Application for Review of Injury Claim Decision dated on November 26, 2003.

Also a copy of the letter that received from [MPIC's Internal Review Officer #1] on November 26, 2003 with application number 03-712, this application was send on the according date that it was due.

After confusing letter from [MPIC's Internal Review Officer #2] on December 3, 2003, I responded on December 5, 2003, after I did not have a respond from [MPIC's Internal Review Officer #2], I send him another letter on December 10, 2003. Which I imagine that you must have all the copies on my file. After not having any respond I called [text deleted] (Senior Case Manager Rehabilitative Case Management Centre) and she send me with [text deleted] (Senior Case Manager Rehabilitative Case Management Centre), and he ask me by phone, if I agree with the decision, and I Respond to him my disagree, so he send me another application for Review of Injury Claim Decision. I send the application form, on June 15, 2004 for the third time. On June 16, 2004 I received another letter from [MPIC's Internal Review Officer #1] And confirm that she received my application, Internal Review Case number [text deleted].

I don't understand this entire letters that I received. Was I need is a confirmation day and time for my appeal case. This way we could move on and stop wasting so much time. It is a discrimination MPI has on me due to the fact that we do not agree upon my case. It is continues my last option would be for me to go see a Lawyer since MPI stop My income, and you don't even care what would happen to me. Since I have been a victim of a car accident and a victim of MPI discrimination. I witch that I would have A respond as soon as possible from you. So we could come to an agreement that we both agree on.

Upon receipt of this letter the Commission's Appeals Officer wrote to MPIC requesting if they had any objections or comments in respect of the Commission allowing additional time for the Appellant to file a Notice of Appeal.

On July 27, 2004 MPIC's legal counsel wrote to the Commission and, after reviewing the three internal review files opened by MPIC in connection with this matter, set out his reasons why the Appellant had ample notice of her right to appeal and of the 90 day period for so doing and stated that MPIC did "*not feel an extension of the appeal period is appropriate in this case.*"

The Commission, upon receipt of MPIC's legal counsel's letter, decided to hold a hearing to determine whether or not, pursuant to Section 174 of the MPIC Act, the Commission would allow an extension of time to permit the Appellant to file an appeal from the MPIC's review decision.

Appeal

The relevant provision of the MPIC Act in respect of extensions of time is Section 174, which provides:

Application to appeal from review

174 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.

The Appellant attended the hearing together with her daughter, [text deleted], and an interpreter, [text deleted]. The Appellant appeared to be able to understand English but required her daughter to act as her spokesperson. The Appellant's daughter submitted that, as a result of conflicting communications the Appellant received from the Internal Review Officer and from two members of MPIC's staff, she was confused and, as a result, did not file a timely application to appeal the Internal Review decision in this matter.

In his submission MPIC's legal counsel submitted that:

1. the Appellant was clearly informed by the Internal Review Officer in his initial decision dated September 15, 2003 that the Appellant had a right to appeal within 90

days to the Automobile Injury Compensation Appeal Commission and provided the Appellant with the address of the Commission.

2. in his letter to the Appellant dated December 3, 2003, the Internal Review Officer stated:
 - (i) the case manager should not have included the 60 day clause because there was not a fresh decision by the case manager in her letter dated October 7, 2003 but she was merely implementing his decision of September 15, 2003.
 - (ii) the case manager erred in including the 60 day clause as in fact there was nothing new to review.
3. in reply to the Appellant's letter dated December 5, 2003 the Internal Review Officer advised the Appellant again that the 60 day clause had been included in error by the case manager and that the Commission was the appropriate forum for dealing with her concerns.
4. the Internal Review Officer mistakenly believed at that time the Appellant had filed a Notice of Appeal to the Commission and provided a copy of his letter to the Automobile Injury Compensation Appeal Commission.

MPIC's legal counsel, in his written submission to the Commission dated July 27, 2004, stated:

According to the Internal Review decision dated September 15, 2003, the actual two-year determination is not in dispute. The essence of the matter in dispute at that time was whether [the Appellant] was capable of doing the determined employment. The Internal Review Officer concluded, with one qualification, that she was.

The situation has not changed since December, 2003.

It is our position that [the Appellant] had ample notice of her right to appeal, and of the 90-day period for doing so. We do not feel an extension of the appeal period is appropriate in this case.

Discussion

In [text deleted] (*AC-01-75*), a decision of the Commission dated July 23, 2004, the Commission reviewed the decision of the Manitoba Court of Appeal in *Binkley v Bajcura*. [1980] M.J. No. 183 (Man. C.A.). In that case the Appellant had appealed two orders from the Court of Queen's Bench in respect of two appeals relating to orders of a referee granting an extension of time for the service of two Statements of Claim. The majority of the Manitoba Court of Appeal dismissed the appeal and in arriving at their decision adopted the unanimous decision of the Saskatchewan Court of Appeal in *Simpson v. Saskatchewan Government Insurance Office* ((1968) 65 D.L.R. (2d) 324) and stated:

Culliton, C.J.S., for a unanimous court, reviewed the practice in other jurisdictions, opted for a broad and liberal interpretation of the Saskatchewan rule (which is more restrictive than the Manitoba rule) and at pp. 332-333 (DLR) expressed the principle which should govern a court in the exercise of its discretionary powers. The following passage appears at p. 333:

“In an application to renew a writ of summons the basic question which faces the Court is, what is necessary to see that justice is done? That question must be answered after a careful study and review of all the circumstances. If the refusal to renew the writ would do an obvious and substantial injustice to the plaintiff, while to permit it is not going to work any substantial injustice to the defendant or prejudice the defendant's defence, then the writ should be renewed. This should be done even if the only reason for non-service is the negligence, inattention or inaction of the plaintiff's solicitors and notwithstanding that a limitation defence may have accrued if a new writ was to be issued. If the non-service of the writ was due to the personal actions of the plaintiff, that, of course, would be a fact to be considered by the Court. Each case should be considered in the light of its own peculiar circumstances and the Court, in the exercise of its judicial discretion, should be determined to see that justice is done.”

The majority of the court found that the plaintiff failed to provide an adequate explanation for the significant delay in having the Statements of Claim served upon the defendant in each case and the plaintiff had failed to provide an adequate explanation for the delay on the plaintiff's part for changing lawyers. The court concluded that the Plaintiff's conduct did contribute to prejudice which follows a long delay by denying the defendant an opportunity of obtaining timely medical

information about the defendant's injuries.

Having regard to this Court of Appeal decision, the Commission in determining whether, under Section 174 of the MPIC Act, it shall exercise its discretion granting a further time to allow the Appellant to appeal the review decision must take into account such matters as the length of the delay, the prejudice resulting from the delay, the conduct of the Appellant in contributing to the delay and whether the Appellant had waived the right to apply for compensation under the MPIC Act.

Upon a review of the evidence submitted before the Commission, and the submissions made by both parties, the Commission is satisfied that, as a result of the conflicting instructions the Appellant received from three MPIC employees in respect of filing a Notice of Appeal or filing an Application for an Internal Review, the Appellant became confused and, as a result thereof, failed to make a timely application to the Commission to appeal the Internal Review decision.

The Commission finds that the Appellant's confusion commenced when the Internal Review Officer informed her that the December 15, 2003 Internal Review decision was final in nature and not subject to any further internal review. He further advised her that the appropriate appeal body to deal with her submission was the Automobile Injury Compensation Appeal Commission. However, MPIC's Senior Case Manager and another MPIC employee did not agree with the Internal Review Officer's interpretation of his December 15, 2003 Internal Review decision and informed the Appellant she was required to make further applications for internal review which she proceeded to do.

The Commission notes that there were two issues before the Internal Review Officer at the time

of his internal review. The first issue dealt with a two year determination and the Internal Review Officer determined that the case manager was correct in determining an entry level position for the Appellant as “Receptionist & Information Clerk” pursuant to Section 107 of the MPIC Act.

The second issue dealt with the effective date of the reduction of the Appellant’s IRI benefits.

The Internal Review Officer in his decision determined that:

1. pursuant to Section 110(1)(d) of the MPIC Act there would be a reduction of IRI effective October 9, 2003 but this date was not a fixed date but was subject to the length of time the Appellant would be required to take medication.
2. directed the case manager to determine the length of time the Appellant would be taking a particular medication and for this period of time there would be an extension of the one year grace period.
3. on the expiration of the one year grace period the case manager would determine the specific date when the reduction of IRI would occur.

The Commission finds that it was the conditional nature as to the effective date of the reduction of the Appellant’s IRI benefits which caused the conflicting instructions to be given to the Appellant by MPIC employees.

The Commission notes that on October 7, 2003 the Senior Case Manager sent a letter to the Appellant advising her of a new end date regarding her IRI entitlement and concluded that she was rendering a decision pursuant to Section 172(1) of the MPIC Act which states:

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.

The Senior Case Manager was of the view that she was not implementing the final decision of the Internal Review Officer but was rendering a decision independent of the Internal Review Officer's decision. As a result, the Senior Case Manager advised the Appellant, pursuant to Section 172(1) of the MPIC Act, that the Appellant was entitled, within 60 days, to apply to have this decision reviewed. This Senior Case Manager's instruction to the Appellant caused the Appellant to ignore the Internal Review Officer's advice to file an appeal and instead the Appellant complied with the Senior Case Manager's decision and filed an Application for Review to the Internal Review Officer dated November 28, 2003. The Senior Case Manager's decision was confirmed by an employee of the Internal Review Office who spoke to the Appellant on November 26, 2003, confirmed receipt of the Appellant's Application for Review and provided the Appellant with an Internal Review Information Sheet.

When the second Application for Review was brought to the attention of the Internal Review Officer he disagreed with the decisions of the Senior Case Manager and the employee of the Internal Review Office. The Internal Review Officer wrote to the Appellant by letter dated December 3, 2003 indicating that the Senior Case Manager had not made a fresh decision but was merely implementing his decision of September 15, 2003 and that the Senior Case Manager's letter should not have included the 60 day clause.

Unfortunately, the Internal Review Officer also mistakenly believed that the Appellant had filed a Notice of Appeal and informed the Appellant that she had an appeal pending before the Appeal Commission and this was the appropriate forum for dealing with her ongoing disagreement with the two-year determination.

The Commission finds that it was not surprising for the Appellant to become totally confused due to the conflicting instructions she received from MPIC officers as to her right to file a timely appeal to this Commission.

The Appellant's confusion is documented in her letter to the Internal Review Officer dated December 5, 2003 when she refers to the conflicting advice she received from the Internal Review Officer and the Senior Case Manager as to her entitlement to file an internal review application with 60 days of receipt of the Senior Case Manager's decision. In response, the Internal Review Officer again advised the Appellant that the Senior Case Manager had erred and again mistakenly advised the Appellant that the matter was now before the Commission.

The Appellant was aware that she had never filed an appeal as of that date to the Appeal Commission. The Appellant wrote to the Internal Review Officer and pointed out the contradictions between the directions she received from him and the directions she received from the Senior Case Manager and the employee of the Internal Review Office and informed him:

Given my limited knowledge with the MPI regulations, I am totally confused with this situation. You have advised that my appeal should be directed to the AICAC but that does not agree with either [MPIC's senior case manager] or [MPIC's Internal Review Officer #1's] letters. Please contact or write to me for advise.

I appreciate your help and cooperation in this matter. (underlining added)

Unfortunately, the Internal Review Officer did not respond to this letter to clarify the matter. It is the Commission's view, having regard to the contradictory advice given by both himself and the two other officers of MPIC, the Internal Review Officer should have taken the appropriate steps to clarify the matter with the Appellant.

The Commission, however, notes that the Internal Review Officer did send a copy of his December 10th letter to the Commission. In reply, the Commission advised the Internal Review Officer by a letter dated January 8, 2004 that the Commission did not have any appeal pending before it from the Appellant. It is the Commission's view that the Internal Review Officer at that time again had ample opportunity to take the appropriate action to have cleared up the Appellant's confusion in respect of her status to appeal his decision and failed to do so.

The Commission notes that in a subsequent letter from the Appellant to the Commission's Appeals Officer, dated July 13, 2004, the Appellant indicates that after receiving the Internal Review Officer's confusing letter dated December 3, 2003 that she wrote to the Internal Review Officer by letter dated December 5, 2003 and not having received a response wrote him again on December 10, 2003 and stated

After not having any respond I called [text deleted] (Senior Case Manager Rehabilitative Case Management Centre) and she send me with [text deleted] (Senior Case Manager Rehabilitative Case Management Centre), and he ask me by phone, if I agree with the decision, and I Respond to him my disagree, so he send me another application for Review of Injury Claim Decision. I send the application form, on June 15, 2004 for the third time. On June 16, 2004 I received another letter from [Internal Review Officer #1] And confirm that she received my application, Internal Review Case number 04-374.

The Commission notes that the Appellant, on June 15, 2004, filed a third Application for Review which deals with the same Senior Case Manager's decision that is dealt with by the Appellant in her first and second applications for review.

It is clear from the above noted chronology of events that the delay in the filing of a timely Application to appeal the Internal Review decision cannot be blamed on the Appellant. An examination of the Appellant's conduct indicates that she consistently desired to challenge the decision of the Internal Review Officer but was thwarted by conflicting instructions she received

from the Internal Review Officer, the Senior Case Manager and an employee of the Internal Review Office. As well, the Appellant's confusion in respect of this conflicting advice was compounded by the mistaken position taken by the Internal Review Officer that the Appellant had filed an appeal to the Commission when in fact the Appellant had never filed such an appeal. The Commission finds that the Appellant was prejudiced in filing a timely appeal application to the Commission by the conflicting and confusing advice she received from employees of MPIC.

The Commission rejects the submission made by MPIC's legal counsel that the Appellant had clear notice that she was entitled to appeal within 90 days of receipt of the Internal Review decision and that she failed to comply with this advice. The Commission finds that, due to the conflicting advice the Appellant received from MPIC employees, she was legitimately confused as to the manner in which she could proceed to challenge the Internal Review Officer's decision.

The Commission also notes that the Appellant was not fluent in the written and spoken English language and notwithstanding the advice she received from her daughter it was extremely difficult for the Appellant to comprehend the conflicting advice she received from MPIC employees.

The Commission therefore determines that for the reasons outlined herein the Appellant's delay in making a timely application to appeal the review decision was not the fault of the Appellant.

The Commission further finds that the Appellant at no time by her conduct waived her right to file an appeal to this Commission and if it was not for the confusing and conflicting advice she received from MPIC's employees she would have proceeded to making a timely appeal to the Commission.

In respect of the issue of prejudice, the Commission notes that MPIC's legal counsel did not produce any evidence to demonstrate that the Appellant's delay in filing a timely application to appeal has caused any prejudice to the MPIC's defense nor did MPIC's legal counsel argue the issue of prejudice before the Commission.

Decision

The Commission determines, having regard to the evidence filed at the appeal hearing, the submissions of the parties, and for the reasons set out herein, that the Appellant has established, on a balance of probabilities, that she had a reasonable explanation for failing to file a timely appeal to this Commission. As a result, the Appellant's appeal is allowed and an extension of time is granted in order to permit the Appellant to proceed with an appeal before this Commission.

Dated at Winnipeg this 1st day of October, 2004.

MEL MYERS, Q.C.

BARBARA MILLER

HONOURABLE ARMAND DUREAULT