

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-03-42**

PANEL: Mr. Mel Myers, Q.C.

APPEARANCES: The Appellant was not present at the appeal hearing; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Leanne Zabudsky.

HEARING DATE: August 4, 2009

ISSUE(S):

1. Entitlement to reimbursement for Botox treatments for TMJ condition; and
2. Entitlement to treatment benefits.

RELEVANT SECTIONS: Section 136(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5 of Manitoba Regulation P215-40/94

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

A Notice of Appeal was filed by [the Appellant] on April 15, 2003 in respect of an Internal Review Decision dated January 22, 2003 relating to entitlement to reimbursement for Botox treatments for TMJ condition and entitlement to chiropractic treatment. The Notice of Appeal contained the Appellant's address as [text deleted].

The Commission's records indicate the following:

1. On October 29, 2003 the Commission prepared an Indexed File of all of the relevant documents in respect of the appeal and this file was forwarded to the Appellant's counsel.
2. In the month of November 2005, the Appellant's counsel advised the Commission that they were no longer acting on behalf of the Appellant and believed the Appellant may have moved to [text deleted].
3. In the month of November 2008, the Commission learned that the Appellant was residing in [text deleted] and the Commission contacted the Appellant by letter. The Appellant responded and advised the Commission that she wished to obtain reports from her chiropractor and her doctor in respect of her TMJ problem in her jaw.
4. In the month of October 2008, the Commission forwarded a copy of the Indexed File to the Appellant. The Appellant did not provide any further medical reports to the Commission.
5. In the month of May 2009, an Appeals Officer from the Commission left a voicemail message with the Appellant indicating that the Director of Appeals would be in contact with the Appellant to arrange a date for a case conference to discuss the status of her appeal.
6. On May 5, 2009 and on May 12, 2009, the Director of Appeals left a voicemail message for the Appellant to contact her to arrange a date for a case conference hearing. No response was received.

As a result, the Commission sent a Notice of Hearing to the Appellant dated May 25, 2009, stating:

The Commission has fixed the following date for a case conference:

Date: Tuesday, the 4th day of August, 2009
Time: 10:30 a.m. (CENTRAL STANDARD TIME)
Place: 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

(*VIA TELECONFERENCE*)

The purpose of the meeting is to discuss the status of the appeal.

If there are any procedural or preliminary issues the parties would like raised, please advise in writing and at least one week prior to the meeting. Issues for which the Commission has not received such reasonable advance notice may not be considered at the meeting.”

This notice, addressed to the Appellant was sent by regular mail and Xpresspost to the Appellant at the following two addresses:

1. [text deleted]
2. [text deleted]

On receipt of this Notice of Hearing the Appellant contacted the Commission’s Appeal Officer by telephone and indicated that she wished to proceed with her appeal. As a result, a further Notice of Hearing was sent to the Appellant dated July 8, 2009 which stated:

You have filed a Notice of Appeal from an Internal Review decision dated January 22, 2003.

The Commission has fixed:

Date: Tuesday, the 4th day of August, 2009
Time: 10:30 a.m.
Place: 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

(*VIA TELECONFERENCE*)

for a hearing into your appeal.

The subject of the hearing is to determine whether the appeal has been abandoned.

At this hearing, you will have the opportunity to make submissions that you have not abandoned your appeal.

If you do not attend the hearing, the Commission may consider whether you have abandoned your appeal. Alternatively, the Commission may proceed with the hearing of your appeal and may issue its final decision.

The time and date are firm; postponements will only be granted under extraordinary circumstances.

This notice, addressed to the Appellant, was sent by regular mail, Xpresspost and by Purolator Courier to the Appellant's address in [text deleted]. A report from a member of the Commission's staff stated that the Notice of Hearing that was sent by Purolator Courier indicated that the Notice of Hearing was delivered to the Appellant on July 13, 2009 at 14:23 at the Appellant's address at [text deleted].

The Commission notes that the address at [text deleted] was the address indicated in the Appellant's Notice of Appeal dated April 15, 2003. The Commission notes that pursuant to Section 184.1(1) and (2) of the MPIC Act, the Appellant is deemed to have received notice of the Commission's hearing scheduled for August 4, 2009.

Hearing:

The hearing commenced by teleconference Tuesday, August 4, 2009 at 10:30 a.m. in the presence of Ms Leanne Zabudsky, MPIC's legal counsel. The Commission contacted the Appellant by telephone at the number provided to the Commission by the Appellant. Unfortunately, the telephone response was a voice message from the Appellant indicating she

was not present and requested the caller to leave a message. The Commission responded by advising that the Commission was conducting a hearing by teleconference and the Commission would proceed with the hearing notwithstanding that the Appellant had not answered the telephone.

Abandonment of the Appeal:

MPIC's legal counsel submitted that the Commission was entitled to dismiss the Appellant's appeal on the grounds that the Appellant had abandoned her appeal and had not established on a balance of probabilities that she was entitled to a reinstatement of Botox treatments for her TMJ condition or entitlement to any other treatment benefits.

Counsel for MPIC reviewed the decision of the Internal Review Officer dated January 22, 2003 wherein the Internal Review Officer dismissed the Appellant's application for review of the case manager's decision. MPIC's legal counsel submitted that based on the decision of the Internal Review Officer, the Appellant had failed to establish, on a balance of probabilities, that:

1. the expenses the Appellant was claiming for Botox treatments and other treatments must have been incurred because of a motor vehicle accident in accordance with Section 136(1)(a) of the MPIC Act; and
2. the treatments must be "medically required" in accordance with Section 5 of Manitoba Regulation MR P215-40/94.

Discussion:

The Commission reviewed the decision of the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004 CarswellMan 287 (Man. C.A.) in its decision on [text deleted] (File No. AC 06-71), where the Commission stated:

“In that case the Applicant was seeking an order restoring his appeal following its deemed abandonment as a result of the Appellant’s failure to comply with The Court of Appeal Rules (Civil). In arriving at her decision in respect of this application, Madam Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99, 2004 CarswellMan 300 (Man. C.A.) and stated:

I also agree with Freedman J.A. in *Elias*, at para. 8, that the appropriate criteria to be considered are those set out in *Bohemier v. CIBC Mortgages Inc.* (2001), 160 Man. R. (2d) 39, 2001 MBCA 161 (Man. C.A.), and are:

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

Madam Justice Steel found that the Appellant had a continuous intention to prosecute the appeal but failed to satisfy the last two (2) criteria and, as a result, dismissed the Appellant’s Application to the Court.”

The Commission finds that the legal principles set out by the Manitoba Court of Appeal in *Fegol v Asper (supra)* relating to the issue of abandonment are relevant in this appeal to the issue of whether or not abandonment had occurred. The Commission determines, based on the following evidence before the Commission that the Appellant had abandoned her appeal:

1. The Appellant filed a Notice of Appeal on April 15, 2003.
2. On January 2, 2009, the Appellant advised the Appeals Officer that she was seeing her doctors next week and would be obtaining reports. The Appellant did not respond to contacts by the Appeals Officer in the month of March, April 2 and April 28, 2009.
3. On May 5, 2009, the Appellant did not respond to a voicemail left by the Director of Appeals advising the Appellant to contact her to arrange a date for a case conference hearing.

4. A further voicemail message was left by the Director of Appeals to the Appellant on May 12, 2009 but no response was received.
5. On May 5, 2009, the Director of Appeals left a voicemail message for the Appellant to contact her to arrange for a date for a case conference, but no response was received.
6. On May 12, 2009, the Director left a voicemail message for the Appellant to contact her to arrange for a case conference hearing and no response was received.
7. The Commission sent a Notice of Hearing dated May 25, 2009 to the Appellant setting a date for a hearing on August 4, 2009 to discuss the Appellant's status of appeal via teleconference.
8. In response, the Appellant contacted the Commission's Appeals Officer and indicated she wished to proceed with her appeal.
9. As a result, the Commission sent a further Notice of Hearing to the Appellant dated July 8, 2009 advising the Appellant the hearing would be held via teleconference on August 4, 2009 to determine whether or not the Appellant had abandoned her appeal.
10. At approximately 10:30 a.m. on August 4, 2009 the Commission attempted to contact the Appellant by telephone but only reached the Appellant's voicemail.
11. The Appellant had an obligation to participate in a teleconference on August 4, 2009 which was being held to determine whether the Appellant's appeal had been abandoned;
12. The Appellant had received a Notice of Hearing indicating the hearing would be held on August 4, 2009, but the Commission was unable to reach the Appellant by telephone. As a result, the Appellant could not participate in the hearing at that time.

Decision:

The Commission therefore concludes that the Appellant's conduct clearly indicated that she had no continuous intention of processing her appeal.

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

In respect of the merits of the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal. The Commission agrees with the decision of the Internal Review Officer dated January 22, 2003 which is attached hereto as Schedule "A" and which forms part of this decision.

The Commission therefore determines the Appellant failed to establish, on a balance of probabilities, that MPIC incorrectly terminated reimbursement of her expenses in respect of her Botox treatments as well as any other treatments MPIC was reimbursing the Appellant for.

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

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

The Commission, for these reasons, confirms the Internal Review Officer's decision dated January 22, 2003 and dismisses the Appellant's appeal.

Dated at Winnipeg this 7th day of August, 2009.

MEL MYERS, Q.C.