

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-04-71**

PANEL: Mr. Mel Myers, Q.C.

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: April 27, 2009

ISSUE(S):

1. Ongoing entitlement to Income Replacement Indemnity ("IRI") which ended March 31, 2004.
2. Entitlement to PIPP funding for two prescription medications – Gabapentin and Tylenol #3 – after October 3, 2003.

RELEVANT SECTIONS: Sections 110.1(c) and 110.2(c) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 5(a) of Manitoba Regulation 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 27, 2004 in respect of an Internal Review decision relating to entitlement to IRI benefits and entitlement to PIPP funding for two prescription medications. The Notice of Appeal contained the Appellant's address as [text deleted].

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

1. In the month of April 2005, the Appellant had contacted the Appeals Officer and advised her that her new address was [text deleted].
2. In the month of May 2005, an Index with all relevant material in respect of the appeal was couriered to the Appellant at [text deleted].

Between the months of May and September 2005 the Appellant contacted the Appeals Officer and advised her that there were further documents that she wished to add to the Index but these documents were never received.

During the month of October 2005 the Appeals Officer attempted to reach the Appellant at her telephone number that was provided to the Appeals Officer by the Appellant in April 2005. However, the Appeals Officer reported that this telephone number was no longer in service.

As a result, the Appeals Officer sent a letter to the Appellant at [text deleted], asking the Appellant to contact the Commission to discuss her appeal. The Appeals Officer received no reply from the Appellant.

In the month of December 2005 the Appeals Officer attempted again to telephone the Appellant with the telephone number she was provided by the Appellant, but the Appeals Officer reported that this number was still not in service.

In the month of April 2006 the Appeals Officer again attempted to telephone the Appellant at the telephone number she was provided with by the Appellant, but reported that the telephone number is still not in service.

The Appeals Officer sent a fax to MPIC to obtain the current correct contact information in respect of the Appellant. MPIC advised the Appeals Officer that the Appellant's address is [text deleted] and her telephone number was [text deleted].

In the month of October 2008 the Appeals Officer sent a letter to the Appellant at the address provided by MPIC, [text deleted], requesting the Appellant to contact the Commission and included a Notice of Withdrawal form for the Appellant to execute. The Appeals Officer reported that she received no response to her letter sent in the month of October 2008.

In the month of November 2008 the Appeals Officer telephoned the Appellant at the telephone number provided by MPIC [text deleted] but the Appeals Officer reported that this number was not in service.

As a result the Appeals Officer contacted MPIC to obtain recent information in respect to the Appellant but was advised by MPIC that there was no change in the contact since April 2006. As well the Appeals Officer searched Canada 411 online and contacted all five [text deleted] names without any success.

In the month of December 2008 the Appeals Officer's letter of October 2008 was returned to the Commission marked "moved, address unknown". The Appeals Officer contacted [text deleted]

to obtain recent contact information for the Appellant but was advised that they have had no contact with the Appellant since December 2003.

On May 5, 2009 the Commission issued a Notice of Hearing which stated:

“The Commission has fixed:

Date: Friday, the 19TH day of June, 2009
Time: 9:30 a.m.
Place: 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

for the hearing of the 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 both regular mail and Xpresspost to the Appellant at the following three addresses:

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

A report from a member of the Commission’s staff indicates that the Notices of Hearing that were sent by regular mail were not returned to the Commission. In respect of the Xpresspost mail, the Notices of Hearing were refused by the recipients at both of the [text deleted]

addresses. In respect of the address on [text deleted], the Commission staff member advised that the Post Office reported that the Appellant was not located at this address.

The Commission notes that the address at [text deleted] was the address which was indicated in the Appellant's Notice of Appeal dated April 27, 2004, while the other two addresses on Talbot Avenue are addresses where the Commission had information that the Appellant had lived in the past.

The Commission finds 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 June 19, 2009 on May 11, 2009.

Hearing:

The hearing commenced on Friday, June 19, 2009 at 9:30 a.m. Ms Danielle Robinson, MPIC's legal counsel, attended the hearing; the Appellant did not. The Commission requested Ms Robinson to make a submission in respect of the issue of abandonment of the appeal and as well to make a submission in respect of the merits of the appeal.

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 the IRI nor was she entitled to PIPP benefits for the funding of two prescription medications.

The Appellant had been involved in a motor vehicle accident on May 9, 2002 and as a result of

her injuries sustained in the motor vehicle accident was in receipt of IRI benefits. As well, MPIC funded the Appellant's cost in respect of two medications for pain relief.

On October 8, 2003 the case manager had written to the Appellant indicating that the medical evidence received by MPIC did not identify a medical condition related to the accident which would justify the Appellant continuing to be absent from work. Medical information reviewed by MPIC indicated that the Appellant's double vision was a condition which predated the motor vehicle accident by at least six years. Under the circumstances the case manager invoked the provisions of Sections 110(1)(c) and 110(2)(c) of the MPIC Act and terminated the Appellant's entitlement to IRI benefits effective March 31, 2004.

The case manager also indicated that the Appellant's medication was not "medically required" for treatment of conditions which were causally related to the motor vehicle accident. As a result, MPIC's reimbursement for payment of two medications was terminated. The Appellant filed an application for review dated October 8, 2003. The Internal Review Officer conducted a hearing on December 8, 2003 and issued a decision on February 6, 2004 confirming the case manager's decision and dismissing the appeal.

The Appellant filed a Notice of Appeal on April 27, 2004 stating that she was still in chronic pain on the right side of her head from the motor vehicle accident injury and that she gets so sick from this condition.

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 finds, based on the evidence before the Commission that the only action the Appellant took in pursuing the appeal was:

1. to file the Notice of Appeal dated April 27, 2004, which the Commission received on May 3, 2004;
2. to contact the Appeals Officer in the month of July 2004 and April 2005 to provide the Appeals Officer with her new addresses;
3. between the months of May and September 2005 the Appellant contacted the Appeals

Officer and advised her there were further documents she wished to provide to add to the index but the Appeals Officer did not receive these documents

The Commission finds that the Appellant had no further contact with the Commission after the month of September 2005 and she took no further steps to contact the Commission to make appropriate arrangements to proceed with her appeal.

The Commission finds that:

1. the Appellant had an obligation after September 2005 to contact the Commission to make appropriate arrangements to proceed with her appeal and she failed to do so;
2. the Commission's office took all reasonable steps by telephone and by letter to contact the Appellant in order to set a date for the appeal hearing, but was unable to reach her.

Decision:

The Commission therefore concludes that the Appellant's conduct clearly indicated that she had no continuous intention of processing her appeal after the month of September 2005. She indicated to the Appeals Officer that she intended to file further documents with the Commission to be added to the index material but failed to do so.

The Commission also finds that the Appellant had not provided any reasonable explanation to the Commission before 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 for the following reasons:

1. In respect of the termination of the Appellant's IRI benefit, the Appellant had failed to

establish, on the balance of probabilities, that her double vision which prevented her from returning to work did not predate the motor vehicle accident by at least six years. The medical evidence did not identify any condition related to the motor vehicle accident of May 2, 2002 which would justify the Appellant's continued absence from work. In these circumstances, the Internal Review Officer was correct in confirming the case manager's decision to invoke Sections 110(1)(c) and 110(2)(c) of the Act to terminate the Appellant's entitlement to IRI by the end of March 31, 2004.

2. In respect of the termination of the Appellant's entitlement to MPIC's funding for two prescription medications, Gabapentin and Tylenol #3, after October 2003, the Internal Review Officer correctly determined that these medications were not medically required for the treatment of conditions in accordance with Section 5(a) of Manitoba Regulation 40/94. The Internal Review Officer concluded that the medication in question only provided short term relief of symptoms for pain or headaches, but were not medically necessary because these medications were not expected to lead to a resolution of the complaint or conditions being treated.

The Commission therefore determines that the Appellant failed to establish, on a balance of probabilities, that MPIC incorrectly terminated her IRI benefits and reimbursement for the cost of the two medications.

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 February 6, 2004 and dismisses the Appellant's appeal.

Dated at Winnipeg this 23rd day of June, 2009.

MEL MYERS, Q.C.