

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-91**

PANEL: Mr. Mel Myers, Q.C.

APPEARANCES: The Appellant, [text deleted], participated in the hearing by way of Teleconference. [text deeted] was represented by Ms Virginia Hnytka of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: August 19, 2009

ISSUE(S): Extension of time to file a Notice of Appeal

RELEVANT SECTIONS: Section 174(1) 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] received an Internal Review Decision from MPIC a few business days after it was sent on August 14, 2008. The Appellant, within 90 days after receipt of the Review Decision from MPIC, is entitled to appeal the Review Decision to the Commission. The time for filing a Notice of Appeal, pursuant to Section 174(1) of the MPIC Act would have expired in mid-November 2008. However the Appellant first sought to appeal the Decision on December 30, 2008, which is a period of approximately six weeks after the 90 day period expired.

The Appellant made an application to the Commission for an extension of time pursuant to Section 174(1) of the MPIC Act in order that he may appeal the decision of the Internal Review Officer dated August 14, 2008.

The Appellant provided the Commission with an undated document setting out two reasons why he was late in filing his appeal:

“One reason why I was late in responding to this appeal is due to my head injury of short term memory loss. The second reason due to the lateness of this appeal is because I am still awaiting the letter from [Appellant’s doctor] office that will be clear about being off from Nov 16/06 to Nov 16/08, because this type of injure (sic) takes 2 yrs to heal.”

On March 11, 2009, the Appellant provided the Claimant Adviser Office with a further explanation of his delay in filing a Notice of Appeal:

“I am writing to explain why my appeal paperwork was delayed. I have been working as a [text deleted]. This dual position has me working from 6am to 9pm most days and I am on call most if not all weekends. With the ongoing pain, sleep disturbances, tingling, numbness and weakness resulting from the MVA injuries, I have very little energy or time to look after personal work. Also, my friend, [Appellant’s former partner], is no longer helping me with my appeal work or rehab paper work. She always ensured that everything was done properly and on time. Without her assistance, I am left to my own devices. My organizational skills are not what they were prior to incurring the moderate brain injury that resulted from the MVA. It often interferes with my ability to get things done outside of the daily routine. My work partner keeps me on track at work but I do not have anyone any longer to help me with unfamiliar or detailed activities such as paperwork.

Over the past fall and winter, I was dealing with some family issues [text deleted]. These matters also made it impossible for me to prioritize the appeal paperwork as I can not handle too much at one time.”

[Text deleted], legal counsel for MPIC sent a letter on May 26, 2009 to the Commission objecting to an extension of time being granted for the Appellant's appeal. Mr. Scaletta stated:

“It is not at all clear how any of these reasons – alone or in combination – would interfere with his ability to complete and submit the brief one-page Notice of Appeal form within the statutory appeal period.”

As a result, a Case Conference was set by the Commission for August 19, 2009 to determine whether or not the Commission would grant an extension of time permitting the Appellant to file a Notice of Appeal.

Case Conference Hearing:

The relevant provision in respect of the Appellant's application for an extension of time to file a Notice of Appeal is Section 174(1) of the MPIC Act which states:

Appeal from review decision

[174\(1\)](#) A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

Ms Virginia Hnytko of the Claimant Adviser Office appeared on behalf of the Appellant who participated in the conference by teleconference. Ms Danielle Robinson appeared as legal counsel for MPIC.

The Appellant testified by that:

1. Prior to the motor vehicle accident he worked full-time [text deleted], was involved in sports and had no memory problems whatsoever.

2. Both in his personal and professional life he was very well organized.
3. After the motor vehicle accident he testified that he suffered from short term memory loss, was constantly in a great deal of pain and was unable to organize his daily activities and relied on his partner, [Appellant's former partner], to assist him in carrying out his daily duties.
4. Subsequently he separated from [Appellant's former partner] and moved to [text deleted].
5. He no longer had the support of [Appellant's former partner] in assisting him in carrying out his daily duties.
6. He worked as an assistant to a maintenance person and due to his memory problem was able to carry out his duties under the direction of a maintenance person.
7. The brain injury he suffered in the motor vehicle accident interfered with his ability to get things done effectively during the course of his every day activity.
8. After the motor vehicle accident it was very difficult for him to sleep; he would sleep for two hours and be awake for three or four hours and had constant pain such as headaches, numbness and tingling.
9. At the time he received the Internal Review Decision he was undergoing a great deal of personal stress in his life [text deleted].

[Appellant's former partner] attended the hearing and testified on behalf of the Appellant.

[Appellant's former partner] [text deleted] was in a common-law relationship with the Appellant off and on for a period of 12 years. She testified that:

1. Prior to the motor vehicle accident, the Appellant was organized, very active and was without any memory loss difficulties.

2. After the motor vehicle accident she was required to organize the daily activities of the Appellant and without her assistance he would not be able to function.
3. She organized his daily routines ensuring that he took his medicines in a timely fashion and that he attended all of his doctors' appointments.
4. He suffered from short-term memory loss.
5. The Appellant was often in a great deal of pain and had difficulties in sleeping.

MPIC did not call any witnesses.

Submissions:

In her submission to the Commission, Ms Hnytka pointed out that the Appellant's testimony as to his short-term memory loss and his irregularity in sleeping and his pain were corroborated by the testimony of [Appellant's former partner]. Ms Hnytka further submitted that there was ample evidence before the Commission to demonstrate that the Appellant had a reasonable excuse for failing to file the Notice of Appeal within the 90 day period.

Ms Robinson, counsel for MPIC, relied on the psychological reports of [Appellant's neuropsychologist] and [MPIC's psychologist] to support that the Appellant's cognitive impairments arising from the motor vehicle accident did not involve short-term memory loss but related only to his visual memory (i.e. recalling individual faces in black and white photos). As well, she submitted that the Appellant continued to be below average in one type of visual construction in working with a picture of a high degree of detail.

MPIC's legal counsel also referred to a report from [MPIC's psychologist] dated July 2, 2009 who had reviewed [Appellant's neuropsychologist's] reports. [MPIC's psychologist] is the psychological consultant for MPIC's Health Care Services and he reported that:

“...[Appellant's neuropsychologist] concluded that the claimant was left with two very specific visually-based deficits: a type of visual memory and a type of visual construction. The deficit in visual construction is not relevant to the referral question. With regard to the deficit in visual memory, [Appellant's neuropsychologist's] test results indicated that the claimant had a deficit in recalling individual's faces from a series of black and white photos. [Appellant's neuropsychologist] commented on the implications of this deficit. He indicated that it would likely have an impact on the claimant's “domestic and vocational life” in that the claimant would occasionally forget visual information, and in particular faces...” (underlining added)

[MPIC's psychologist] also indicated in his report:

“The writer had an opportunity to review the Notice of Appeal completed by the claimant and dated December 30, 2008. After having reviewed the content of the appeal, it is the writer's opinion that there were no findings on the neuropsychological tests (i.e., no cognitive barriers) that would suggest that the claimant would be incapable of completing said appeal without assistance....”

“In a report dated February 25, 2008, [Appellant's neuropsychologist] also commented on the claimant's memory. At that time, the claimant was complaining of having difficulties with forgetfulness and had suggested that this was interfering with his ability to complete course work because he was forgetting the material. [Appellant's neuropsychologist] noted that the claimant's memory was generally functional and speculated that the claimant's forgetfulness was related to other factors rather than cognitive difficulties alone including, for example, poor sleep patterns and possibly the side effects of medication. In [Appellant's neuropsychologist's] opinion, based on that report and his previous report of August 31, 2007, the claimant's test results suggested that he had the potential for completing his course work. Although there were still a few cognitive impairments as of his February 2008 report, he was expected to be functional and he did not anticipate that the claimant would need any vocational restrictions on his cognitive skills.” (underlining added)

[MPIC's psychologist] concluded;

“Based upon the results of the neuropsychological testing and [Appellant's neuropsychologist's] opinion provided in his various reports up to and including April 25, 2008, it is the writer's opinion that there is insufficient evidence to support that the claimant had a cognitive impairment which would have affected his memory or any other aspects of his cognitive functioning to the extent that he would be unable to complete the Notice of Appeal in a timely manner. There is no evidence that the claimant has short term memory loss with the exception of his memory for black and

white photos of faces, and there is no evidence on neuropsychological testing to indicate the claimant would have difficulty with organizational skills.”

Discussion:

The Commission notes that [Appellant’s neuropsychologist] in his report dated February 25, 2008 stated:

“At the current time, there is modest improvement in a few functions, although one nonverbal memory deficit continues. It is likely that the difficulties that he and [Appellant’s former partner] described are not simply due to the cognitive difficulties alone, but potentially due to the poor sleep patterns that he is describing over the past several months (e.g. averaging 3 hours a night), as well as the possibility of side effects upon his cognition from ongoing Tylenol 3 use or other medications, which can certainly have a sedating effect.” (underlining added)

[Appellant’s neuropsychologist] also stated:

“However I felt that he was not yet ready to tackle management level positions in sales in light of the combination of sleep disturbance, and difficulty in pain coping.” (underlining added)

In a report two months later, dated April 25, 2008, [Appellant’s neuropsychologist] concluded that the Appellant continued to have two visually based deficits. He further noted that the Appellant was reporting the continuation of occasional frustrations with his memory.

[Appellant’s neuropsychologist] further stated:

“[the Appellant] is therefore left with a permanent, highly specific impairment in his nonverbal memory. This is likely felt to have an impact upon his domestic and vocational life. The implications of this would be occasional forgetfulness of visual information. This would include faces, but this is partly offset by the fact that he was normal on another test of facial memory...” (underlining added)

[Appellant’s neuropsychologist] further stated:

“[The Appellant] may also have occasional vulnerability to forgetting of other visual information, simply because the results are indicating his memory is not 100% reliable...” (underlining added)

An examination of [MPIC's psychologist's] opinion indicates that he narrowly focused on the memory problems the Appellant had in respect of black and white photos of faces. As a result, [MPIC's psychologist] concluded that there was no evidence the Appellant would have difficulty with organizational skills.

The Commission notes that [MPIC's psychologist's] opinion is based on a paper review while [Appellant's neuropsychologist] had the opportunity of personally interviewing the Appellant in assessing his credibility prior to preparing his psychological opinion. As a result [Appellant's neuropsychologist] had the opportunity of assessing the Appellant's domestic and vocational life prior to providing his opinion as to the impact that the Appellant's loss of memory had. For these reasons the Commission gives much greater weight to the opinions of [Appellant's neuropsychologist] than it does to that of [MPIC's psychologist].

[Appellant's neuropsychologist] In his report stated that:

1. The Appellant's memory deficits had an impact on his domestic and vocational life and "the implication of this would be occasional forgetfulness of visual information".
2. The Appellant would have the occasional vulnerability to forgetting other visual information simply because the results are indicating his memory is not 100% reliable.
3. The Appellant's continuing pain and inability to sleep would also have an impact on his professional life.

The Commission finds that [Appellant's neuropsychologist's] opinion supports the Appellant's testimony that after receiving the case manager's decision he forgot to file the Notice of Appeal until six weeks after the 90 day period had expired.

As well, the testimony of [Appellant's former partner], the former common-law wife of the Appellant, corroborates the Appellant's testimony that after the motor vehicle accident he suffered from short term memory loss and had difficulty in carrying out many of the essential duties of every day life.

On page 4 of the Internal Review Decision, it states:

“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:

Room 301 – 428 Portage Avenue
Winnipeg, MB R3C 0E2

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*.”
(underlining added)

The Commission finds that having regard to the testimony of the Appellant and [Appellant's former partner] and the reports of [Appellant's neuropsychologist] dated February 25, 2008 and April 25, 2008, the Appellant has established on a balance of probabilities that he did not have a 100% reliable memory and occasionally could forget visual information. The Commission finds that the Appellant, after examining the Internal Review Decision requirement of filing a Notice of Appeal within 90 days of receipt of the Internal Review Decision, that he forgot to do so until six weeks had elapsed after the 90 day period had expired.

For these reasons the Commission finds that the Appellant has satisfied, on the balance of probabilities that he has provided a reasonable explanation for failing to file the Notice of Appeal in the 90 day period permitted by the provisions of Section 174(1) of the MPIC Act. As a result, the Commission will extend the period of time within which the Appellant may appeal the Internal Review Decision dated August 14, 2008.

Dated at Winnipeg this 3rd day of September, 2009.

MEL MYERS, Q.C.