

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-72**

PANEL: **Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Ms Sharon MacDonald**

APPEARANCES: **The Appellant, [text deleted], was represented by Ms Nicole Napoleone of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.**

HEARING DATE: **November 26, 2008**

ISSUE(S): **Extension of time to file 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 injured in a motor vehicle accident on November 17, 1994. She was also involved in other accidents in April 1996, November 1996, December 1998 and October 2001.

The Appellant was in receipt of Personal Injury Protection Plan benefits, including Income Replacement Indemnity Benefits, and for psychological treatment, medication, and needling treatment. The Appellant's case manager wrote to her on May 31, 2004 terminating her Income Replacement Indemnity Benefits effective May 23, 2004. She also received a letter dated July

30, 2004 terminating her psychological treatments, and a further letter dated September 10, 2004 terminating funding for the cost of medication and needling treatments.

The Appellant sought an internal review of these decisions from her case manager. On June 20, 2005 the Internal Review Officer for MPIC provided an internal review decision upholding the case manager's decisions and dismissing the Appellant's applications for review.

The Appellant filed a Notice of Appeal from the Internal Review Officer's decision dated July 28, 2008. The Notice of Appeal was filed outside of the time limits established by Section 174(1) of the MPIC Act within which to file appeals of Review decisions to the Commission.

The Appellant requested that the Commission exercise its discretion to allow the Appellant to file her Notice of Appeal outside of the time limit, pursuant to Section 174 of the MPIC Act.

MPIC has opposed the Appellant's request for an extension of time for filing her appeal.

Evidence and Submission for the Appellant

The Appellant testified at the hearing into her request for the 90 day extension. She indicated that when she received the internal review decision of June 20, 2005, she was disappointed and immediately knew she wanted to appeal it.

She testified that she had read an article in the [newspaper], and seen a flyer in a local community newspaper regarding [text deleted], who acted as a representative for individuals challenging MPIC decisions. He operated under the company name [text deleted].

Although the Appellant was aware of the existence of the Claimant Adviser Office at that time, she indicated that she had been under the mistaken impression, due to things she had read in the newspaper, that the Claimant Adviser Office was funded by MPIC, and so she felt that [text deleted] was a better, more independent option for her.

The Appellant met with [text deleted] on September 1, 2005. She explained the issue and signed several forms for him. She also gave him a cheque, which she indicated was cashed the next day. Based upon her meeting with [text deleted], the Appellant testified that she found him kind, understanding and knowledgeable and that she trusted him. He set out a three part plan to file her appeal, contact MPIC regarding the medications which were covered and to go over all her paperwork and organize it chronologically.

The Appellant testified that she was aware that September 16, 2005 was approaching the 90th day within which to file her appeal, so she phoned the Commission on that day and asked if they had received anything. When she was told they had not, she took down the Commission's fax number and phoned [text deleted]. She told him she was concerned and he said he would call her back. A few minutes later, he called her back and said that he had phoned the Commission, spoken with [text deleted] (the executive director of the Commission at the time) and had faxed in her appeal, as [Commission's Executive Director] had stayed past hours so that he could file the appeal in time. He assured her that the appeal had been filed and that she had not missed the deadline. The Appellant testified that she did not call the Commission back to confirm, as the speed of the return phone call which she received from [text deleted], as well as his assurances, made sense, and she trusted him.

The Appellant testified at the time she thought that he had filed her appeal. However, she has since found out that this was not the case. She described the efforts she had made to pursue [text deleted], and the difficulties she had getting ahold of him, until finally she found that his office phone had been disconnected and learned that he had been accused of fraud and was being investigated both by the police Commercial Crimes Unit and the insurance council.

As a result, the Appellant filed a Small Claims Court action against [text deleted]. A hearing was set for [text deleted] but the Appellant testified that [text deleted] did not appear. She testified that he still had all of her paperwork regarding the appeal, and she still has not obtained that paperwork from him.

The Appellant then testified that in June of 2007 she was involved in another motor vehicle accident. While she was recovering from this, she received a telephone call from the Claimant Adviser Office following up on a request for information she had made some time before. This prompted her to attend a meeting at the Claimant Adviser Office in late July of 2008.

When meeting with the Claimant Adviser she told them that she had filed an appeal of the June 20, 2005 Internal Review Decision. However, when the Claimant Adviser Office attempted to get a copy of this from the Commission, they discovered, and advised her, that the appeal had never been filed. The Appellant testified that she was shocked to learn this, because she had thought “that was the one thing that he had done”.

She also testified that even prior to meeting with the Claimant Adviser Office, she had periodically phoned the Commission as a courtesy, to let them know that she was still pursuing the matter and trying to receive answers from [text deleted]. In her view, she was just keeping

the Commission office up-to-date on the issue and her appeals, and no one at the Commission ever questioned the reasons for her telephone calls, or told her that she did not have an appeal filed.

When asked on cross-examination why, after she had read and heard about [text deleted's] difficulties, she was not concerned about whether her own appeal had been filed, the Appellant indicated that while of course she wished she had inquired, it had not occurred to her at the time, as she had trusted [text deleted's] assertion that the appeal had been filed.

The representative for the Appellant submitted that the Appellant had missed the relevant time limit, but that the Commission should exercise its discretion to consider relevant factors in relieving against the time limits under Section 174 of the Act. She noted that the Appellant had been assured by [text deleted] that the Notice of Appeal had been filed with the Commission on time, and this information was never corrected for her until she attended at the Claimant Adviser Office in July of 2008.

The Appellant's representative referred to the Commission's decision in [text deleted] (AC-07-13) where the Commission found that, due to the actions of her solicitor, the Appellant was not responsible for any delay in filing the Notice of Appeal, having accepted the argument that she should not be prejudiced by the negligent actions of her previous counsel who had failed to protect her interests in the matter.

The Appellant's representative submitted that the situation in the [text deleted] case mirrors the Appellant's case. She had been told that all communications with the Commission would go through her representative, so she was not really expecting any communication from them.

It was also noted that limited prejudice would be suffered by MPIC by the delay, since some of the Appellant's PIPP benefits had been re-instated as a result of her subsequent motor vehicle accidents. As well, she had self-managed her own rehabilitation, attending a community health care clinic and paying for her own medications, as prescribed by her doctors.

The Appellant's representative submitted that the Appellant never waived her right to proceed with the appeal and had full intent of filing an appeal which, in fact, she truly believed had been filed.

It was submitted that the issues involved in the appeal had merit and should be heard by the Commission.

Submission for MPIC

Counsel for MPIC reviewed the five factors that the Commission considers when exercising its discretion regarding the extension of time limits under Section 174(1).

In reviewing the length of the delay, he noted that the time period set out in the MPIC Act was 90 days, and the Appellant had not filed her appeal until 37 months after the decision. This delay is 10 times the statutory period, which is a significant period.

He noted that the reasons given for the delay were two-fold. Although the Appellant was aware of the existence of the Claimant Adviser Officer, she had not believed it to be independent, contrary to an express statement set out in the letter from the Internal Review Officer. As well, the Appellant indicated that she trusted [text deleted] and thought he was looking after things. All this may not have been unreasonable for a period of time. However, in early 2006, the

Appellant had learned that [text deleted] was facing fraud charges. At some point, she could no longer credibly assert that she believed he had taken certain actions on her behalf.

Counsel for MPIC submitted that it was not reasonable for the Appellant to cling to the belief that [text deleted] had done something for her, when the evidence was piling up that he had not done anything. In fact, the Statement of Claim filed by the Appellant in Small Claims Court against [text deleted] indicated that no services had been provided by him.

Counsel also argued that there was prejudice to MPIC created through the Appellant's delay in filing her Notice of Appeal, as the decisions and issues go back to mid-2004. MPIC would now be in a position of having to backfill and assess her entitlements in an evidentiary vacuum. Counsel submitted that the Internal Review Officer's decisions were very well supported and that MPIC had never waived the 90 day time period for filing an appeal. Accordingly, the Appellant's request for an extension of time for filing her appeal should not be allowed by the Commission.

Discussion

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.

Requirements for appeal

[174\(2\)](#) An appeal of a review decision must be made in writing and must include the claimant's mailing address.

The panel has reviewed the factors which the Commission takes into account in exercising its discretion under section 174(1) of the Act, as well as the [text deleted] (supra) decision referred to by the representative for the Appellant.

The panel has reviewed the documentary evidence on file and the evidence of the Appellant. We found her to be a credible witness, largely unshaken on cross-examination. Her testimony was convincing in regard to her belief that an appeal had been filed by [text deleted], in spite of the difficulties which she later encountered with him. Her explanation of the events of September 16, 2005 which led her to believe that, at least, her appeal had been filed by him, as well as her evidence regarding her subsequent updates to the Commission, led the panel to find that the Appellant did believe that her Notice of Appeal had been filed.

The Appellant had exhibited a clear intent to challenge the internal review decision, and actively pursued this with [text deleted]. She relied to her detriment on what was later discovered to be the fraudulent misrepresentations of [text deleted], and the panel does not believe she should be prejudiced by his actions.

Therefore, upon a consideration of the totality of the evidence, both oral and documentary, and upon a consideration of the relevant factors surrounding the delay, the Commission finds that the Appellant has provided a reasonable excuse for her failure to appeal the Internal Review Officer's decision to the Commission, within the 90 day time limit set out in Section 174 of the MPIC Act. As a result, the Commission will extend the time limit within which the Appellant may appeal the internal review decision dated June 20, 2005.

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

Laura Diamond

Neil Cohen

Sharon Macdonald