

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-040

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Leona Barrett
Mr. Wilf De Graves

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing.
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.

HEARING DATE: March 29, 2012

ISSUE(S): Whether Permanent Impairment benefits have been properly assessed and calculated; and

Whether Personal Injury Protection Plan ("PIPP") benefits were properly terminated, effective December 10, 2007 pursuant to section 160(d),(e),(f) of The Manitoba Public Insurance Corporation Act ('MPIC Act').

RELEVANT SECTIONS: Section 127, 160(d),(e),(f), 184.1(1), and 184.1(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 41/94 of Manitoba Regulation

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 Appeal hearing commenced at 9:30 a.m. on March 29, 2012. MPIC's legal counsel, Mr. Matthew Maslanka, was present at the time of the hearing, but the Appellant did not appear.

MPIC's legal counsel submitted the Appellant had been properly served by a Notice of Hearing pursuant to section 184.1(1)(b) and 184.1(2) of the MPIC Act.

The Commission noted that the Notice of Hearing dated February 13, 2012 stated that:

1. The hearing would take place on March 29, 2012 to determine whether or not the appeal had been abandoned and whether the appeal should be dismissed on the merits.
2. The Appellant would have the opportunity to make submissions as to whether or not he had abandoned his appeal and to make submissions in respect of the merits to his appeal.
3. If the Appellant did not attend the hearing, the Commission could consider that the Appellant had abandoned his appeal and alternatively, the Commission would proceed with the hearing of the appeal to issue its final decision.

The Notice of Appeal was filed on April 25, 2008.

- On August 28, 2008, the Commission's Appeals Officer forwarded the index to the Claimant Adviser Office who was representing the Appellant.
- On August 24, 2010, the Claimant Adviser Officer advised the Appeals Officer the Appellant was waiting for a referral to a specialist.
- On November 8, 2010 the Appeals Officer requested an update from the Claimant Adviser Officer.

- On Jan 28, 2011, the Claimant Adviser Officer notified the Commission's Appeals Officer that the Appellant had just moved to [text deleted] and would be in contact with the Claimant Adviser Officer once he had settled.
- On March 9, 2011 the Appeals Officer contacted the Claimant Adviser Officer who advised that he forwarded a letter to the Appellant in mid-February and had been unable to speak to him.
- On April 27, 2011 the Appeals Officer contacted the Claimant Adviser Officer who advised that he had been in contact with the Appellant as to the status of his appeal.
- On May 25, 2011 the Appeals Officer spoke to the Claimant Adviser Officer who advised that the Appellant had moved to [text deleted], that his home was damaged [text deleted] and that the Appellant would be in touch with the Claimant Adviser Officer in September 2011.
- On September 29, 2011, the Appeals Officer contacted the Claimant Adviser Officer who advised that he sent a letter to the Appellant on September 12, 2011 and was awaiting a reply.
- On October 28, 2011 the Claimant Adviser Officer advised the Appeals Officer by email that he was having trouble contacting the Appellant and that the Claimant Adviser Office may be closing its file.
- On November 23, 2011 the Appeals Officer received an email from the Claimant Adviser Officer advising that:
 - a) They will be closing the Appellant's file.
 - b) A registered letter was sent to the Appellant.
 - c) The letter was not picked up by the Appellant and was returned by Canada Post.

d) Once the letter was returned by Canada Post, the Claimant Adviser Officer would be closing their file.

- On December 28, 2011, the Claimant Adviser Officer advised the Appeals Officer that the Claimant Adviser Office was closing their file.
- The Appeals Officer discussed the status of this Appeal with a Deputy Commissioner who instructed the Appeals Officer to contact the Appellant by letter in order to determine the status of the Appeal.
- The Appeals Officer wrote a letter to the Appellant on January 5, 2012 requesting a response to this letter.
- This letter was sent to the Appellant's last address in [text deleted] and to the Appellant's address on the Notice of Appeal being [text deleted].
- On February 6, 2012 the Appeals Officer discussed the status of this appeal with a Deputy Commissioner who instructed the Appeals Officer to set this appeal down for hearing and as a result, the hearing was set for March 29, 2012 at 9:30 am at the Commission's office in Winnipeg.
- The Commission's secretary advised the Commission that:
 1. On February 13, 2012, the Commission sent the Notice of Hearing to the Appellant by regular mail (a copy of which is attached hereto and marked as Exhibit "A") at [text deleted] being the last known address of the Appellant as provided by the Appellant to the Claimant Adviser Office. This was not returned by Canada Post.

2. The Notice of Hearing (Exhibit “A”) was also forwarded by Canada Post by Xpresspost to the Appellant’s address at [text deleted] being the last known address as provided by the Appellant to the Claimant Adviser Office.
3. Canada Post returned the above mentioned Xpresspost letter (Exhibit “A”) to the Commission marked “unclaimed”.

Appeal Hearing

The appeal hearing commenced on March 29, 2012 at 9:30 a.m. The Appellant did not attend at that time but MPIC’s legal counsel, Mr. Matthew Maslanka was present at the commencement of the hearing.

At the commencement of the hearing, MPIC’s legal counsel submitted that the Appellant had been properly served with a Notice of Hearing pursuant to Section 184.1(1)(b) and 184.1(2) of the MPIC Act, which provides as follows:

How notices and orders may be given to appellant

184.1(1) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant

...

(b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.

When mailed notice received

184.1(2) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person’s control.

The Notice of Hearing (Exhibit A) advised the Appellant that the subject of the hearing was to determine whether he had abandoned his appeal and that if he did not attend the hearing the Commission could consider whether or not he had abandoned his appeal, or alternatively the Commission may proceed with the hearing of his appeal and issue a final decision.

Service of the Notice of Hearing

MPIC's legal counsel further submitted that since the Appellant had been properly served with a Notice of Hearing by mail, pursuant to the provisions of the MPIC Act, that the Commission had jurisdiction to determine whether the Appellant had abandoned his appeal or alternatively proceed with the hearing of the appeal on its merits and issue a final decision.

The Commission finds that:

1. The Appellant had been properly served with the Notice of Hearing by mail in accordance with Section 184.1(2) of the MPIC Act.
2. The Commission had jurisdiction to hear whether the Appellant had abandoned his Appeal and, if there was no abandonment, to determine the merits of the Appeal.

Abandonment of Appeal

The Commission received a written submission from MPIC's legal counsel who he asserted that the Appellant abandoned his appeal. The written submission stated:

“The Commission has considered the issue of Abandonment of an Appeal in several decisions, notably [text deleted] (AC 06-71) and [text deleted] (AC 04-71). In those

decisions, the Commission adopted the criteria set out by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115, when determining whether an appeal before that Court had been abandoned. The criteria to be considered 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.”

Continuous Intention to Prosecute The Appeal

MPIC’s legal counsel in his written submission stated:

“The Notice of Appeal was filed on April 25, 2008.

The Appeals Officer couriered the index to the Appellant via the CAO on August 28, 2008.

With no activity on the Appeal, the Appeals Officer contacted the CAO on August 24, 2010 and was advised that the Appellant was awaiting a referral to a specialist. At this point the Appeal had been pending over two years.

From this time, periodic updates were provided by the CAO upon request by the Appeals Officer. In this period, the CAO communicated to the Appeals Officer that the Appellant was difficult to get a hold of. There were no proactive attempts made by the Appellant or his representative to advance his Appeal through the Commission.

The CAO attempted to contact the Appellant by letter on September 12, 2011 but he did not receive a reply. On the basis that it had lost contact with the appellant, the CAO closed its file and returned the index to the Commission on December 28, 2011.

It is MPI’s understanding that there has been no contact from the Appellant following the letter sent to the Appellant by the Appeals Officer on January 5, 2012.

It is therefore MPI’s submission that the Appellant’s failure to confirm that he intends to pursue his Appeal suggests that he has displayed no continuous intention nor has any intention to prosecute his Appeal. It is the Appellant’s responsibility to pursue his Appeal in a reasonably diligent manner and it is obvious that he has not done so. MPI is aware of no evidence to suggest a reason for the Appellant’s delay or evidence pointing

towards a continuous intention to prosecute his Appeal. As such, he has failed to meet his burden and his Appeal should be dismissed as abandoned.”

The Commission agrees with this submission from MPIC that the Appellant did not demonstrate a continuous intention to prosecute his appeal.

Reasonable Explanation for the Failure to Prosecute the Appeal

MPIC’s legal counsel in its written submission stated:

“To MPI’s knowledge, the Appellant has not provided any explanation for failing to pursue his Appeal. He has therefore not met the requirement to provide a reasonable explanation for his failure to prosecute his Appeal and as such his Appeal should be dismissed as abandoned.”

The Commission agrees with MPIC’s submission. The Appellant has not provided a reasonable explanation for his failure to prosecute his appeal.

Arguable Grounds for the Appeal

MPIC’s legal counsel in his submission stated:

“The index provides two grounds for the Appellant’s Appeal. MPI submits that as the Appellant has failed to raise a reasonable argument in his Notice of Appeal and has not provided any other evidence to support his position that the Internal Review Decision was incorrect, there are therefore no arguable grounds for Appeal and his Appeal should be dismissed. It is trite to state that the Appellant has the burden of establishing on a balance of probabilities that the Internal Review Decision was incorrect.

With respect to the Permanent Impairment benefit, this issue was not raised by the Appellant in the Notice of Appeal. As such, the Commission has no evidence before it to contradict the findings of [Appellant’s physiotherapist] that formed the basis for the assessment for Permanent Impairment award that was ultimately paid to the Appellant. MPI submits that as no contradictory evidence has been provided, the Appellant would likely not succeed on this issue.

With respect to the termination of PIPP benefits pursuant to Sections 160(d), (e) and (f) of the MPIC Act, as articulated in both the Internal Review Officer's decision and the Case Manager's decision, the Appellant presented a lengthy history of non-compliance with the rehabilitation process. It was therefore within the jurisdiction of MPI pursuant to Section 160 to terminate his compensation. Non-compliance is readily apparent by the consistency of the Appellant's actions during the rehabilitation process. As the Appellant has not provided any evidence to contradict this evidence, MPI submits that the termination of benefits would likely have been upheld on Appeal."

The Commission agrees with MPIC's submission that there is ample evidence for MPIC to terminate the Appellant's compensation pursuant to Section 160 of the MPIC Act.

The Commission also agrees with MPIC's legal counsel that the Commission does not have jurisdiction to determine the Appellant's complaint in respect of the Permanent Impairment Benefit Award since the Appellant did not raise this matter in his Notice of Appeal.

Upon review of the documentary evidence of this appeal and upon a review of the Internal Review Officer's decision, the Commission agrees with the submission of MPIC's legal counsel that the Appellant has not provided evidence that the termination of his "PIPP" benefits would likely have been upheld on appeal.

The Commission, having regard to the documentary evidence on file, the submission of MPIC's legal counsel and to the criteria leading to abandonment as set out in decisions in *[text deleted]* (supra) and the decision of the Manitoba Court of Appeal in *Fegol v. Asper* (supra), determines that the Appellant has abandoned his appeal.

The Commission dismisses the Appellant's appeal and therefore the decision of the Internal Review Officer dated March 19, 2008 is confirmed.

Dated at Winnipeg this 16th day of April, 2012.

MEL MYERS, Q.C.

LEONA BARRETT

WILF DEGRAVES