

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-029**

PANEL: Ms Laura Diamond, Chairperson
Mr. Guy Joubert
Ms Sandra Oakley

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Anselm Clarke of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATE: February 9, 2012

ISSUE(S): Whether the Appellant has provided a reasonable excuse for failing to file his Application for Review within the 60-day time limit.

RELEVANT SECTIONS: Section 172(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 was injured in a motor vehicle accident on January 12, 2005. He was in receipt of Personal Injury Protection Plan ("PIPP") benefits, including Income Replacement Indemnity ("IRI") benefits.

The Appellant's case manager wrote to him on January 23, 2006, indicating that the information on the Appellant's file indicated that he was functionally able to perform the essential duties of

his self-employed position as of June 7, 2005. Accordingly, the case manager terminated his entitlement to IRI benefits as of June 6, 2005.

The case manager's decision letter was sent by registered mail on January 23, 2006 and was received in the Appellant's household. According to the Appellant, his teen daughter signed for the letter, and he did not receive it.

The Appellant filed an Application for Review dated March 17, 2009, indicating that he did not agree with the discontinuation of his IRI on June 7, 2005.

On November 17, 2009, an Internal Review Officer for MPIC considered the Appellant's Application and his request for an extension of time for filing the Application for Review. The Internal Review Officer concluded that although the Appellant's IRI benefits stopped coming in June of 2005, he did not seek a copy of the decision letter (which he admitted had been delivered to his household) until almost 2½ years later. The Appellant indicated to the Internal Review Officer that he had been very busy at the time the letter was issued, that the letter had been delivered not to him, but rather to his daughter, and that the lawyer that had handled his previous Internal Review file had left his law firm. The Internal Review Officer did not accept this as a reasonable excuse provided for failing to file the Application for Review in time. The significant 3 year period which had elapsed was not excused by the Internal Review Officer, and the Application for Review was dismissed.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at his appeal before the Commission. He explained that his benefits were first terminated pursuant to a case manager's decision dated April 9, 2005. He retained legal counsel around May 6, 2005 and sought an Internal Review of that decision. He was represented by a lawyer, [text deleted].

The Appellant indicated that although the case manager's decision of January 23, 2006 was sent by registered mail to his home, he did not receive it. He indicated that his daughter apparently signed for it, but that he never saw it. However, he also indicated that he recalled discussing the letter with his lawyer, [text deleted], although he could not remember when that had occurred.

The Appellant attended at an Internal Review Hearing dealing with the April 9, 2005 case manager's decision on April 12, 2006. He was represented by his lawyer. An Internal Review Decision was then issued on April 24, 2006 which overturned the case manager's decision of April 9, 2005 and returned the Appellant's file back to the case manager for determination of further entitlements.

The Appellant discussed this decision with his lawyer, who explained it to him. He then waited for somebody from MPIC to contact him to discuss his benefits.

The Appellant indicated that as of 2006, [Appellant's lawyer] was no longer practising private law. He received a letter indicating that [Appellant's lawyer] was no longer with his law firm and that he would be assigned a new lawyer. The Appellant indicated that he met with new counsel in approximately September 2006, and that the new lawyer accompanied him to a meeting with MPIC that fall.

At some point, in meeting with [text deleted] of MPIC to review the materials on his file, it was explained to the Appellant that the case manager's decision of January 23, 2006 was the obstacle to his receipt of benefits, as that letter concluded that he was able to work and not entitled to IRI benefits.

On March 17, 2009, the Appellant filed an Application for Review of the January 23, 2006 case manager's decision.

On cross-examination, the Appellant also explained the difficulty he had with the change of legal counsel. The Appellant testified that at this point he was not satisfied with his lawyers and was running out of money, so he contacted the Claimant Adviser Office for assistance.

The Appellant also indicated, on cross-examination and upon questioning by the panel, that [Appellant's lawyer] had explained the Internal Review Decision of April 24, 2006 to him and given him a copy to take home. However, when he did not receive any IRI or other benefits as a result, he "guessed" that [Appellant's lawyer] was "in the process". Although he did not receive any further IRI payments, the Appellant indicated that he was not familiar with these things and just left it with the lawyers, understanding that they were doing their job.

The Appellant indicated that it was not until he met with [text deleted] that he became aware of the January 23, 2006 decision, and that it was the reason he was not receiving IRI.

The Appellant maintained that he didn't "know what all this IRI stuff is" and that he must have misunderstood something. Even though he only received a very small cheque from MPIC and did not receive any more IRI benefits, he relied on his lawyers and assumed they "were in the

process". However, he did admit, on cross-examination, that when he was unhappy with amounts received or issues in case management letters, he did directly contact his case manager, and a superior, [text deleted], to make inquiries, even though he had a lawyer at the time. He indicated that he did not go to his lawyer to ask for clarification, because he no longer had any money to pay his legal bills.

Counsel for the Appellant reviewed prior decisions of the Commission which set out the factors which the Commission may consider in connection with an application for an extension of time to appeal. He reviewed [text deleted] (AC-07-13) and [text deleted] (AC-05-54).

Counsel conceded that in this case the length of the delay was significant. However, the reason the delay occurred was because the Appellant thought that all of the relevant information had been exchanged between MPIC and his legal counsel. Unfortunately, the letter of January 23, 2006 went only to him, received in his household and signed for by his [text deleted] year old daughter, without him seeing it. The Appellant did not see that letter until almost two years later, when it was brought to his attention in a separate meeting with MPIC. In addition, the Appellant had four different lawyers during that period of time, and there were a number of appealable issues being reviewed, adding to the confusion.

Accordingly, counsel for the Appellant submitted, there was ample opportunity for confusion, which explained the reason for the Appellant's delay. Counsel submitted that MPIC would not be prejudiced by the delay and would still be able to case manage the file.

The Appellant had not at any point waived the right to appeal. Rather, he had done everything possible, with the help of his lawyers, and then on his own, to try and have the issues resolved.

Counsel also submitted that the issue of the Appellant's IRI benefits was still an arguable issue to be determined. The Appellant was still seeing a chiropractor and required ongoing treatment. Therefore, he submitted that the request for the extension should be granted so that the Appellant could pursue his appeal for IRI benefits.

Evidence and Submission for MPIC:

Counsel for MPIC noted that although counsel for the Appellant had argued that the Appellant had believed all relevant information from MPIC would be going to his lawyer, it was important to note that the Appellant had never provided this evidence in his oral testimony. Rather, the Appellant testified that he was aware that the case manager's decision of January 23, 2006 was addressed only to him. His MPIC case manager sent the letter to his house and received confirmation, through his daughter's signature, that it had been delivered there. She submitted that MPIC could not have done anything more than that to ensure the Appellant received the letter.

Counsel for MPIC also noted that the facts provided to the Internal Review Officer and set out in the Internal Review Decision of November 17, 2009, showed that the Appellant told the Internal Review Officer that his lawyer had phoned him when the decision was issued, but at that time, he was too occupied to pursue it. Then he started working. On cross-examination, the Appellant did not deny this, and stated that he needed to go out and make money. He also confirmed, on cross-examination, that his memory was better at the time of the Internal Review Decision than it was when testifying before the Commission several years later.

Counsel for MPIC submitted that the Appellant must have known that his IRI benefits stopped coming in June of 2005, but did nothing about it. Then, even when he received a new copy of the decision letter in December of 2008, he did not file an Application for Review until approximately four months later, in March of 2009. He was asking for a finite amount of IRI benefits and it was not a case of needing to figure out whether he could work or what amounts he should be receiving. He did not need to wait for more information, as was the case in the [text deleted] decision (AC-05-54), where the Appellant had submitted that more time was needed to review the case and determine positions.

Counsel for MPIC also relied upon the reference in the Internal Review Decision of April 24, 2006, regarding the January 23, 2006 decision letter:

“The case manager issued another decision letter dated January 23, 2006 wherein he set out medical evidence indicating that [text deleted] had the functional capacity to return to his pre-accident employment as of June 7, 2005. He wrote that should his decision terminating benefits pursuant to Section 160 of the Act be overturned, your client would not be entitled to IRI beyond June 7, 2005 pursuant to Section 110(1)(a). I note that no Application for Review has been filed in relation to this decision. Please note that your client will therefore only be entitled to IRI to June 7, 2005.

This Internal Review Decision notified [Appellant’s lawyer] that the January 23, 2006 case manager’s letter existed and that it had not been appealed. The Appellant wanted the Commission to believe that [Appellant’s lawyer] gave him a copy of that Internal Review Decision letter and had a meeting to explain it to him, but that [Appellant’s lawyer] had skipped over that part. This, she submitted, was a very difficult position to believe and accept.

Further, the Appellant advised that he relied on his lawyers fully and that this was one of the reasons why he had not properly taken steps to deal with the January 23, 2006 case manager’s decision. However, the Appellant had shown that when he was unhappy he had taken it upon

himself to call his case manager's supervisor, [text deleted], to complain. Therefore, his statement that he relied on his lawyers alone was not a credible one.

Counsel for MPIC reviewed the Commission's decision in [text deleted] (AC-01-118) which reviewed the considerations for the Commission under an application to relieve against time limits under Section 172 of the MPIC Act. The criterion was also set out in [text deleted] (AC-07-12) and summarized as follows:

“Counsel reviewed the criteria to be used in determining the reasonableness of an excuse including:

1. the reasons for the delay;
2. the actual length of the delay compared to the 60 day limitation period of Section 172(2);
3. whether there has been any prejudice resulting from the delay;
4. whether there was any waiver respecting the delay;
5. and any other factors which argue to the justice of the preceding.”

In [text deleted] (AC-06-103), the Commission reviewed the Appellant's evidence regarding difficulty in securing legal representation. The Commission concluded that in spite of the Appellant's claims that he had difficulty in securing appropriate legal representation and difficulty with the representation firm called [text deleted], the Appellant had not provided a reasonable excuse for his failure to file an Application for Review in the 60 day period following the case manager's decision letter.

Counsel for MPIC submitted that the relevant section to be considered is Section 172 of the MPIC Act, which provides for a 60 day time limit for Applications for Review. She noted that the cases referred to by counsel for the Appellant involved cases under Section 174 of the MPIC Act (90 day time limit for appeal).

Counsel submitted that there would be significant prejudice to MPIC if the case manager's decision of January 2006 was now overturned, in February of 2012. The interest factor alone would be quite compounded. She submitted that the Appellant's position that there was still an arguable issue for IRI because the Appellant was still seeing a chiropractor, was irrelevant.

Further, she submitted that the onus is on the Appellant to establish a reasonable excuse for the delay. The Appellant knew by April of 2006, if not earlier, that the case manager's decision ending IRI benefits had been issued. Two months later, he received a cheque from MPIC which did not include further IRI benefits after June 2005. The onus was on the Appellant to follow-up and make sure he was getting the benefits to which he was entitled, and not just to assume that IRI benefits were going to appear because he had engaged a lawyer to deal with other issues.

Counsel for MPIC submitted that no reasonable excuse or explanation for the Appellant's failure to file an Application for Review on time had been provided and that the Appellant's appeal should be dismissed.

Decision:

The MPIC Act provides:

Application for review of claim by corporation

[172\(1\)](#) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

The onus is on the Appellant to show, on a balance of probabilities, that the Internal Review Officer, in her decision of November 17, 2009, erred in refusing to accept the Appellant's excuse for his delay in meeting time limits for filing an Application for Review.

The Commission has considered the evidence of the Appellant as well as the submissions of counsel for the Appellant and for MPIC and the decisions cited by them.

The panel finds that the length of the delay in filing the Application for Review was significant.

We do not find the excuse provided by the Appellant for this delay to be a reasonable one.

The Appellant testified that it was his understanding that any material received from MPIC would have gone to his lawyer, and that he could not understand why the letter of January 23, 2006 went only to him. That letter was received in his household and signed for by his daughter, and the Appellant testified that he had four different lawyers during the period of time between the case manager's decision letter and his filing of an Application for Review.

However, the Appellant did not deny that in 2009 he told the Internal Review Officer that his lawyer had called him when the decision was issued and he was too occupied to deal with it. He also asked the Commission to believe that his lawyer gave him a copy of the April 24, 2006 decision which referred to the case manager's decision of January 23, 2006, and held a meeting with him to explain it, while somehow skipping over the part of the decision dealing with the case management letter of January 2006. Having regard to the evidence before the Commission on the whole, we find that this is not a credible position.

The Commission finds that the evidence of the Appellant, overall, was confusing and inconsistent. We find that the Appellant has failed to meet the onus upon him of establishing, as he has alleged, that he did not understand the relevant portion of the Internal Review Decision of April 24, 2006 and that it was never explained to him by his legal adviser or advisers.

The Appellant failed to establish that he was not capable of seeking a review of the case manager's decision. As noted by the Commission in [text deleted] (AC-01-18):

“Section 172(1) of the MPIC Act requires that a claimant apply in writing to the corporation for a review of the decision within sixty (60) days of receipt of a decision from MPIC. This requirement is quite simple and requires only the ability of a claimant to read and write and to have the capacity of understanding when MPIC has rendered a decision denying a claimant a benefit under the MPIC Act.”

As noted by counsel for MPIC, although the Appellant claimed that he relied on his lawyers fully, he testified that when he had been unhappy he was quite capable of calling the supervisor, [text deleted], to complain. Therefore, his submission that he was relying on his lawyers to take care of everything between him and MPIC was simply not credible.

Based upon the Appellant's education and background, work history, oral testimony and demeanour at the hearing, the panel finds that the Appellant has failed to establish that he was not capable of filing an Application for Review, either on his own, or by instructing counsel to do so. Nor do we find that he was incapable of following through on the status of the matter.

The Commission also finds that the Appellant's submission that there is an arguable issue because he is still going for chiropractic care is not relevant to the issue at hand and also finds that the significant amounts which he alleges are owed by MPIC to him in the form of IRI benefits and interest, coupled with the significant amount of time which has gone by, do amount to prejudice to MPIC in regard to the management of his claim.

For all of these reasons, the Commission finds that the Appellant has failed to establish, on a balance of probabilities, that the Internal Review Officer erred in declining to accept his excuse for the delay in the filing of his Application for Review and for refusing to extend the time limits set out under Section 172 of the MPIC Act.

Accordingly, the decision of the Internal Review Officer dated November 17, 2009 is upheld and the Appellant's appeal dismissed.

Dated at Winnipeg this 29th day of March, 2012.

LAURA DIAMOND

GUY JOUBERT

SANDRA OAKLEY