

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-176**

PANEL: Ms Laura Diamond, Chairperson
Dr. Sheldon Claman
Ms Jacqueline Freedman

APPEARANCES: The Appellant, [text deleted], was not present at the hearing and was represented by Mr. Anselm Clarke of the Claimant Adviser Office;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.

HEARING DATE: June 18, 2013

ISSUE(S): 1. Whether the Appellant is entitled to a Permanent Impairment benefit.
2. Whether the Appellant's Income Replacement Indemnity benefits were properly terminated effective May 7, 2006.

RELEVANT SECTIONS: Sections 110(1)(c), 127, 184.1(1) and 184.1(2) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was involved in a motor vehicle accident on September 11, 2002. A Notice of Appeal was filed by the Appellant on October 10, 2006 from a decision of an Internal Review Officer for MPIC dated July 20, 2006.

A second Notice of Appeal was filed by the Appellant on September 4, 2007, from a decision of an Internal Review Officer for MPIC dated June 8, 2007.

Both Notices of Appeal contained the Appellant's address in [text deleted].

The Appellant was represented by the Claimant Adviser Office. However, at a Case Conference Hearing held by the Commission on April 11, 2013, [text deleted] from the Claimant Adviser Office advised the Commission that although she had attempted to contact the Appellant, she had lost contact with her. She advised that the Appellant moved often and that although the Claimant Adviser Office had tried to contact the Appellant at numerous addresses, they had not been successful.

A hearing for the Appellant's appeal was then scheduled for June 18, 2013 at 9:30 a.m., at the Commission's office in Winnipeg.

The Commission's secretary further advised the Commission that:

1. A Notice of Hearing (a copy of which is attached hereto and marked as Exhibit "A") in respect of this appeal, dated April 25, 2013 was forwarded to the Appellant by Xpresspost at the address set out in her Notice of Appeal, [text deleted]. This correspondence was accepted and signed by someone other than the Appellant.
2. An Xpresspost Notice of Hearing was also forwarded to the last recent address obtained by the Commission for the Appellant from the Claimant Adviser Office at [text deleted]. This correspondence was returned marked "moved".

Counsel was also provided with a copy of a letter sent by the Claimant Adviser Office to the Appellant at the [text deleted] address, advising the Appellant that a hearing date had been set. A teleconference could be arranged if the Appellant wished to do so in advance. The appellant was requested to contact the Claimant Adviser Office or the Commission to confirm her interest in this matter.

The appeal hearing commenced on June 18, 2013 at 9:30 a.m. MPIC's legal counsel, Mr. Matthew Maslanka and a representative from the Claimant Adviser Office, Mr. Anselm Clarke, were present at the commencement of the hearing, but the Appellant did not attend or contact the Commission by telephone.

Mr. Clarke, for the Claimant Adviser Office, indicated that he had tried all the phone numbers on the Claimant Adviser file to try and reach the Appellant, but that the Claimant Adviser Office had not heard from her since [text deleted] sent her the letter of April 11, 2013.

Accordingly, the hearing convened without the Appellant's participation.

At the commencement of the hearing, MPIC's legal counsel submitted that the Appellant had been properly served with the Notice of Hearing pursuant to Section 184.1(1)(b) and Section 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.

Counsel submitted that since the Appellant had been properly served with a Notice of Hearing pursuant to the provisions of the MPIC Act, the Commission had jurisdiction to hear the merits of the appeal in order to determine whether or not the Appellant, on a balance of probabilities had established that MPIC had not properly assessed her entitlement to permanent impairment and Income Replacement Indemnity (“IRI”) benefits.

MPIC’s legal counsel further 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 the balance of probabilities, that the benefits awarded by MPIC had not been properly assessed.

Counsel referred the Commission to its previous decision on the issue of abandonment of an appeal in *[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 in 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 or for the delay;

3. there must be arguable grounds of appeal.

Counsel for MPIC addressed the three criteria. He noted that almost six years from the filing of the last Notice of Appeal by the Appellant no documentation had been provided and almost no communication had been received from the Appellant, even to her representative. Counsel submitted that the Appellant's failure to make contact with her representative or provide updates as to her whereabouts shows that she has displayed no continuous intention or has any intention to prosecute her appeal and has failed to meet the burden to do so in a reasonably diligent manner. As such, her appeal should be dismissed as abandoned.

Counsel also submitted that to MPIC's knowledge the Appellant has not provided any explanation for failing to pursue her appeal.

In regard to whether there were arguable grounds for the appeal, counsel submitted that in regard to her IRI benefits, the Appellant had been discharged from a Work Hardening Program through the [Rehabilitation (Rehab) Clinic] on May 27, 2005 and deemed fit to return to her determined employment at that time. Although she never returned to her pre-accident employment, in spite of her stated intention to do so, there was no information on the Appellant's file to contradict [Rehab Clinic's] assessment. The case manager correctly applied Section 110(1)(c) of the MPIC Act and determined that the Appellant's entitlement to IRI had ceased due her ability to hold her determined employment.

In regard to the Appellant's entitlement to permanent impairment benefits, counsel submitted that the medical information on the Appellant's file had been reviewed by MPIC's Health Care Services department on a number of occasions and, after a thorough review, the conclusion was

reached that there was no permanent impairment entitlement. The Appellant has presented no medical evidence to contradict this Health Care Services finding.

Accordingly, counsel submitted that the appeal should be dismissed as having been abandoned by the Appellant.

Discussion:

The MPIC Act provides:

Events that end entitlement to I.R.I.

[110\(1\)](#) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

- (a) the victim is able to hold the employment that he or she held at the time of the accident;
- (b) the victim is able to hold the employment referred to in subsection 82(1) (more remunerative employment);
- (c) the victim is able to hold an employment determined for the victim under section 106;
- (d) one year from the day the victim is able to hold employment determined for the victim under section 107 or 108;
- (e) the victim holds an employment from which the gross income is equal to or greater than the gross income on which victim's income replacement indemnity is determined;
- (f) the expiration of a time that is fixed under Subdivision 1 (sections 81 to 105);
- (g) the victim dies.

Lump sum indemnity for permanent impairment

[127](#) Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than \$500. and not more than \$100,000. for the permanent impairment.

The Commission finds that the Appellant has been properly served with a Notice of Hearing pursuant to Section 184.1 of the MPIC Act.

The Commission also finds that the legal principles set out by the Manitoba Court of Appeal in *Fegol v. Asper* relating to the issue of abandonment are relevant in this appeal to the issue of whether or not abandonment has occurred.

Following the filing of her Notice of Appeal, the Appellant did not file further evidence or documentation in support of her appeal. She lost contact with both her representative and the Commission, even by telephone. She failed to attend at the date scheduled for her appeal hearing even when her representative indicated to her by mail, that she could participate in the hearing by teleconference.

The Commission therefore concludes that the Appellant's conduct clearly indicates that she had no continuous intention of processing her appeal and has not provided any reasonable explanation to the Commission for this failure.

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, given her failure to provide any evidence to contradict the findings of [Rehab Clinic] and MPIC's Health Care Services team, either on her indexed file or at the hearing.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly assessed her entitlement to benefits.

In summary, the Commission concludes that the Appellant has abandoned her appeals for the following reasons:

1. There was not a continuous intention by the Appellant to prosecute the appeals from the time she filed her Notices of Appeal.
2. The Appellant did not provide a reasonable explanation for failing to process her appeals.
3. There were no arguable grounds for her appeals.

The Commission, for these reasons, confirms the Internal Review Officer decisions dated July 20, 2006 and July 8, 2007 and dismisses the Appellant's appeals.

Dated at Winnipeg this 31st day of July, 2013.

LAURA DIAMOND

DR. SHELDON CLAMAN

MS JACQUELINE FREEDMAN