

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-078**

PANEL: Ms Laura Diamond, Chairperson
Mr. Paul Johnston
Ms Nikki Kagan

APPEARANCES: The Appellant, [text deleted], did not appear at the hearing;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Ashley Korsunsky.

HEARING DATE: February 23, 2015

ISSUE(S): Whether the Appellant is responsible to reimburse \$2,082.99
MPIC for overpayment of Income Replacement Indemnity
benefits.

RELEVANT SECTIONS: Section 184.1 and 189 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 August 11, 2008. As a result of her injuries she was in receipt of Income Replacement Indemnity ("IRI") benefits and classified as a non-earner, having recently been laid off from her employment as a waitress. A 180 day determination was conducted in which she was determined into the position of waitress, effective February 8, 2009, resulting in bi-weekly IRI payments of \$577.12. Her gross yearly employment income ("GYEI") was determined to be \$21,320.00 and the Appellant continued to receive bi-weekly IRI payments in accordance with this GYEI of \$21,320.00 until August 29, 2013.

As a result of an investigation in 2012 and 2013, the Appellant's case manager determined that she had provided false or inaccurate information to MPIC regarding her injuries and failed to notify MPIC about a change in her functional status. Accordingly, her IRI was terminated pursuant to Section 160(a) of the MPIC Act, effective July 18, 2013. Her case manager also found that her IRI should be terminated effective July 18, 2013 because she was able to hold employment determined under Section 106 of the Act and that Section 110(1)(c) would prevent her from continuing to receive benefits.

The Appellant sought an Internal Review of the case manager's decision.

On January 7, 2014, an Internal Review Officer upheld the case manager's decision and dismissed the Application for Review. No appeal was filed in regard to this Internal Review decision.

However, the Appellant's IRI payments continued to be paid to her until August 29, 2013. Applying the end date for IRI benefits for July 18, 2013, MPIC reconciled the Appellant's IRI for the period of July 19, 2013 to August 29, 2013, resulting in an overpayment of \$2,082.99.

On October 4, 2013, the Appellant's case manager wrote to her advising of the overpayment and advising that her file had been referred to the Special Accounts Department for recovery of the overpayment.

The Appellant sought an Internal Review of this decision of the case manager dated October 4, 2013.

In an Internal Review decision dated January 7, 2014, the Internal Review Officer found that:

“Since there were no calculation errors in the reconciliation of payments from July 19, 2013 to August 29, 2013, the only genuine issue is whether you knowingly provided

false or inaccurate information to MPI (section 160(a) of the *Act*), or alternatively, failed to advise of a change in your condition (section 149 of the *Act*).

For the reasons outlined in IR decision 13-526, which supplement this decision, I find that you are required to reimburse MPI the amount of \$2,082.99 because you were not entitled to those excess payments.

In doing so, I rely upon section 189(1) of the Act which outlines MPI's entitlement to reimbursement for excess payments:

Corporation to be reimbursed for excess payment

189(1) Subject to sections 153 (payment before decision by corporation), 190 and 191, a person who receives an amount under this Part as an indemnity or a reimbursement of an expense to which the person is not entitled, or which exceeds the amount to which he or she is entitled, shall reimburse the corporation for the amount to which he or she is not entitled.

Therefore, I am confirming the case manager's decision of October 4, 2013."

It is from this decision of the Internal Review Officer that the Appellant has now appealed. The issue which requires determination is whether the Appellant is responsible to reimburse MPIC in the amount of \$2,082.99 for overpayment of her IRI benefits.

Preliminary and Procedural Background:

On February 23, 2014, the hearing of the Appellant's appeal was convened at 9:45 a.m. Counsel for MPIC was present at the hearing. The Appellant did not appear at the hearing. The panel allowed the Appellant a 15 minute grace period before commencing the appeal hearing.

The history of the Appellant's file was reviewed, beginning with her filing of the Notice of Appeal on May 12, 2014. As the Notice of Appeal did not meet the time limits set out within the MPIC Act for the filing of appeals, an Appeals Officer from the Commission wrote to the

Appellant and spoke with her by telephone, requesting that she provide her reasons for the late filing of the appeal by June 16, 2014. However, the Director of Legal Services for MPIC's legal department did not oppose extending the time for the Appellant to file her Notice of Appeal. The Commission wrote to the Appellant on June 4, 2014 granting her the additional time to file her Notice of Appeal.

On June 5, 2014 the Commission received a request from the Appellant to proceed with the Automobile Injury Mediation ("AIM") process. On July 30, 2014 the Commission was advised by AIM that the Appellant did not proceed with the mediation process and the appeal would be returned to the Commission.

On September 18, 2014, an Indexed file containing relevant documents from the Appellant's file was prepared and the Commission attempted to arrange delivery. However, the phone number which the Appellant had provided was out of service. The Appeals Officer then sent a letter dated September 19, 2014, requesting that the Appellant contact the Commission. On October 14, 2014, the Appellant signed for receipt of the documentary Index. On November 13, 2014, the Appeals Officer wrote to the Appellant requesting that she contact the Commission and advising that if no response was received by December 5, 2014, a hearing would be scheduled. The letter of November 24, 2014 was returned to the Commission marked "Moved".

The Appeals Officer obtained an alternate address from MPIC and sent a letter to the Appellant at the new address provided, on November 27, 2014. On December 9, 2014 that letter was returned to the Commission marked "Moved – Unknown".

The Appeals Officer conducted “Google” searches for the Appellant and attempted to contact previous employers. She also requested MPIC to provide updates, in an attempt to find an address for the Appellant. These investigations were not successful.

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

On January 9, 2015, a Notice of Hearing for February 23, 2015 at 9:30 a.m. was sent to the Appellant. The Notice of Hearing was sent by regular mail and Xpresspost to both of the initial addresses set out on the Appellant’s Notice of Appeal. The Notice of Hearing was also sent by both regular mail and Xpresspost to an additional address in [text deleted] (which MPIC had provided as a new address for the Appellant on November 27, 2014).

The Notice of Hearing sent by Xpresspost to the [text deleted] address was accepted and signed for at that address on January 14, 2015. Canada Post provided a copy of the scanned delivery date and signature of the recipient of the item, dated January 14, 2015. The last name of the signature is “[Appellant’s surname]”, but the signature does not appear to match the signature of the Appellant which the Commission has on its file.

The MPIC Act provides the manner in which notices and orders may be given to the Appellant:

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

(a) personally; or

(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 Commission's Notice of Hearing provided that the date and time of the hearing are firm; postponements will only be granted under extraordinary circumstances.

The Commission finds that pursuant to Section 184.1(1) and (2) of the MPIC Act, the Appellant is deemed to have received notice of the Commission's hearing scheduled for February 23, 2015.

The Commission is aware of the possibility that the Appellant did not receive formal notice of the appeal hearing held on February 23, 2015. However, at no time has the Appellant provided any change of address information to the Commission. As a result, and due to the lack of contact from the Appellant, the Commission determined that it would proceed with the hearing on February 23, 2015, in the absence of the Appellant, and hear submissions from counsel for MPIC.

Thereafter, the panel deliberated and reached a decision regarding the Appellant's appeal.

Submission for the Appellant:

The Appellant filed a Notice of Appeal which the Commission received on May 12, 2014. The Notice of Appeal stated:

"I cannot attend Mediation, because of my physical & mental condition. A copy of my Application for Review of Injury Claim Decision has been sent to you on April 04/2014".

The Appellant's Application for Review objected to the Appellant being blamed for not returning IRI cheques, stating that when she questioned [text deleted]:

“She said just bring me the last pay cheque & that it will be fine. Then she phone (sic) & said I had to repay everything back. At MPI you have staff assigned to terminate these cheques, this is not my job to keep track of. You were in a hurry to terminate my income then it is the case manager's job on (sic) whoever work (sic) in that department. Assuming she did not do her job professionally she is responsible for her mistakes & she should stop accusing me because it's her mistake.”

No further evidence was filed by the Appellant and she was not present at the hearing to provide testimony or submissions on her behalf.

Submission for MPIC:

Counsel for MPIC explained that, arising out of a motor vehicle accident of August 11, 2008, the Appellant had been in receipt of IRI benefits. However, following investigation, the Appellant's case manager provided her with a decision letter dated July 17, 2013 terminating her Personal Injury Protection Plan (“PIPP”) benefits as a result of the provision of false and inaccurate information under Section 160(a) of the MPIC Act, failure to advise MPIC of functional changes in status pursuant to Section 149 of the MPIC Act and her ability to hold employment pursuant to Section 110(c) of the MPIC Act.

The Appellant's IRI benefits ended on July 18, 2013, but due to an administrative error on MPIC's part regarding a failure to make an entry in the direct deposit system, the Appellant ended up receiving three additional payments, to August 29, 2013. That amounted to an overpayment of \$2,082.99.

The case manager's decision dated October 4, 2013 confirmed the overpayment and sought reimbursement from the Appellant for the overpayment, pursuant to Section 189 of the MPIC

Act. The Appellant filed an Application for Review of both the case manager's decisions. Internal Review decisions were issued. The Internal Review decision regarding the Appellant's termination of benefits was not appealed. However, the October 4, 2013 decision confirming overpayment and the January 7, 2014 Internal Review decision which upheld it are the subject of this appeal.

Counsel for MPIC submitted, however, that the Appellant had abandoned her appeal. She referred to criteria which the Commission has considered in the past, developed by the Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115, in determining whether an appeal for that Court had been abandoned.

Counsel submitted that the Appellant had failed to demonstrate any intent to prosecute her appeal, since it was filed 34 days outside of the 90 day window provided for the filing of appeals. Even since she had been properly informed of the hearing through correspondence and the Notice of Hearing, the Appellant had not made any further contact with the Commission and she had failed to appear at the hearing. Counsel submitted that MPIC was not aware that the Appellant had provided any explanation for failing to pursue her appeal any further.

Counsel also addressed the question of whether there were arguable grounds for the Appellant's appeal. She noted that the onus was on the Appellant to establish, on a balance of probabilities, that the Internal Review Officer erred in finding the reimbursement owed under Section 189 of the MPIC Act. That section permits MPIC to receive reimbursement if a claimant receives an amount to which they are not entitled. It was unfortunate that an administrative error had occurred resulting in the overpayment. However, it was MPIC's position that it was not relevant where fault lay for the overpayment. It does not have to be the Appellant's fault in order for

MPIC to be entitled for reimbursement for overpayment and whether the Appellant knew that the payments were in error is not relevant, as Section 189 of the MPIC Act does not speak to fault or knowledge. All that is required is for MPIC to show that the Appellant was not entitled to those benefits. The Appellant must show, on a balance of probabilities, that her case falls into the enumerated exclusions under Section 189. She has not. In the alternative, the Appellant must show, on a balance of probabilities that she never received those payments or that she was still somehow entitled to the benefits. She has done neither.

Accordingly, counsel submits that the Appellant had not met the onus upon her of showing, on a balance of probabilities, that the Internal Review Officer had erred in the decision of January 17, 2014. The Appellant had shown no further intention to pursue her appeal and the appeal should be dismissed as having been abandoned and for the Appellant's failure to meet the onus upon her, on a balance of probabilities that the Internal Review Officer had erred.

Discussion:

The MPIC Act provides:

Time limitation for recovery of payment

189(2) The corporation may commence an action to recover an amount to which it is entitled to be reimbursed

- (a) within two years after the day the amount is paid to the person;
- (b) where the amount is paid as a result of fraud, within two years after the day the fraud is first known or discovered by the corporation; or
- (c) where the victim is convicted of an offence as provided for in section 161.1, within two years after the day of the conviction.

The onus is on the Appellant to show, on a balance of probabilities, that she was not responsible to reimburse MPIC in the amount of \$2,082.99 for overpayment of her IRI benefits.

A review of the evidence before the panel has established that the Appellant did receive the disputed amount. The Appellant was not entitled to receive the amount pursuant to the case manager's decision of July 17, 2013. The Internal Review decision of January 7, 2014 which upheld this was not the subject of any appeal by the Appellant.

As counsel for MPIC submitted, the Appellant has not established that her case falls into the enumerated exclusion sections under Section 189. Nor has she established that she never received the disputed payments or that she was somehow entitled to those benefits, which represented IRI for the period between July 19, 2013 and August 29, 2013.

Accordingly, the panel finds that the Appellant has failed to establish on a balance of probabilities, that the Internal Review Officer erred in finding that she is responsible to reimburse MPIC in the amount of \$2,082.99 for overpayment of her IRI benefits. Accordingly, the Appellant's appeal is dismissed and the decision of the internal Review Officer upholding the repayment, dated January 7, 2014, is hereby upheld.

Dated at Winnipeg this 2nd day of April, 2015.

LAURA DIAMOND

PAUL JOHNSTON

NIKKI KAGAN