

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-055**

PANEL: Ms Jacqueline Freedman, Chair
Mr. Trevor Anderson
Mr. Brian Hunt

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation (“MPIC”) was
represented by Ms Jaime Rosin.

HEARING DATE: October 11, 2018.

ISSUE(S): Whether the Commission will grant the Appellant an
extension of time to file his Notice of Appeal.

RELEVANT SECTIONS: Sections 174 and 196 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

Background:

[Text deleted] (the “Appellant”) had a workplace accident on August 17, 1994. As a result of the workplace accident, he was entitled to benefits under The Workers Compensation Act of Manitoba.

On November 16, 2006, the Appellant was involved in a serious motor vehicle accident (“MVA”). As a result of the MVA, he was entitled to Personal Injury Protection Plan (“PIPP”) benefits under the MPIC Act.

The Appellant received a letter (the “Joint Decision Letter”) dated March 22, 2016, from the Workers Compensation Board of Manitoba (“WCB”), which stated as follows:

Pursuant to subsection 196(1) of *The Manitoba Public Insurance Corporation Act*, Manitoba Public Insurance and the Workers Compensation Board have made a joint decision concerning their respective responsibility for wage loss benefits payable as a result of your workplace accident of August 17, 1994 and your motor vehicle accident of November 16, 2006.

Manitoba Public Insurance and the Workers Compensation Board have jointly agreed that income replacement benefits payable between February 15, 2009 and December 31, 2012 are a result of your motor vehicle accident of November 16, 2006, and are therefore the responsibility of Manitoba Public Insurance. We have also agreed that any loss of earning capacity you have incurred from January 1, 2013 to present is a result of your workplace accident of August 17, 1994, and therefore the responsibility of the Workers Compensation Board.

The Workers Compensation Board resumed active management of your workers’ compensation claim on March 21, 2016.

You may appeal this joint decision under section 196(1) of *The Manitoba Public Insurance Corporation Act* within 90 days after receiving this letter, or such other time as the appellate body allows.

Copies of subsections 196(1) and 196(2) of *The Manitoba Public Insurance Corporation Act* are enclosed for your reference.

Subsection 196(2) of the MPIC Act provides that a joint decision made by MPIC and the WCB may be appealed either to the Commission or under The Workers Compensation Act within 90 days after receiving it, or within such further time as the body to which the appeal is made may allow.

On January 9, 2017, approximately 10 months after receiving the Joint Decision Letter, the Appellant filed an Application for Review with MPIC in respect of the Joint Decision Letter. The Internal Review office considered his Application for Review and responded by letter dated January 13, 2017, as follows:

On further reflection it appears that your right to appeal the joint decision of March 22, 2016 is to either:

- 1) File an appeal with the WCB, or
- 2) File a Notice of Appeal with the Automobile Injury Compensation Appeal Commission.

It does not appear that under section 196(1) and 196(2) there is an Internal Review. As such, we will be closing our file in the Internal Review Office.

On May 17, 2018, approximately 16 months after receiving the letter from the Internal Review office, and approximately 26 months after receiving the Joint Decision Letter, the Appellant filed a Notice of Appeal with the Commission in respect of the Joint Decision Letter. The Appellant, being outside the 90 day appeal period provided for in subsection 196(2), asked the Commission for an extension of time for filing his Notice of Appeal pursuant to subsection 196(2) of the MPIC Act.

Issue:

The issue which requires determination on this appeal is whether the Commission will grant an extension of time to the Appellant in order to allow him to file a Notice of Appeal in respect of the Joint Decision Letter dated March 22, 2016.

Decision:

For the reasons set out below, the Commission grants an extension of time to the Appellant in order to file a Notice of Appeal, to appeal the Joint Decision Letter dated March 22, 2016.

Legislation:

The relevant provisions of the MPIC Act are as follows:

Corporation to advise and assist claimants

150 The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

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.

Where person entitled under Workers Compensation Act and this Part

196(1) Where a person is receiving compensation under either this Part or *The Workers Compensation Act* and, because of another bodily injury, the person becomes entitled to compensation under the other,

(a) the corporation and the Workers Compensation Board shall

(i) make a joint decision distinguishing between the bodily injury attributable to the accident in respect of which compensation is payable under this Part and the bodily injury for which compensation is payable under *The Workers Compensation Act*, and

(ii) pay compensation in proportion to the attribution of the person's bodily injuries; and

(b) the corporation or the Workers Compensation Board, as the case may be, shall continue to pay the compensation until the joint decision is made.

Person may appeal under either Act

196(2) The corporation or the Workers Compensation Board shall give written notice of the joint decision made under subsection (1) to the person, and the person may appeal the joint decision either to the commission or under *The Workers Compensation Act* within 90 days after receiving the notice or within such further time as the body to which the appeal is made may allow, and the decision made on the appeal is binding under this Part and *The Workers Compensation Act*.

Corporation and W.C. Board to make agreement

196(3) The corporation and the Workers Compensation Board shall make an agreement respecting the procedure to be followed for claims by a person referred to in subsection (1).

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his request for an extension of the 90 day appeal period. He explained that after his workplace accident, he received wage loss benefits from the WCB. Those benefits ceased in 2001. He had back surgery in 2005, after which his back pain went away and he stopped taking pain medication for his back. After that, he was able to work heavy equipment and felt that he “had his life back”. He did not believe that he was receiving any benefits from the WCB at the time of the MVA.

Because of the MVA, the Appellant was admitted to hospital on February 15, 2009, and he was in the hospital for almost a year. The MVA shattered the previous fusions that had been done in his back and he had to wear a back brace. There were complications that occurred in the hospital and he was left with permanent damage. The Appellant said that he is not the same as he was prior to the MVA and he is suffering every single day. He takes a lot of medications, which are very expensive. He used to be a heavy mechanic and truck driver, able to work in confined spaces, but he can't do that anymore. He worked from morning to night to provide for his family, but after he

was in the hospital for a year, his family business went under. He suffered from depression and anxiety. In addition, he was not self-sufficient at home and required help from other people.

The Appellant said that his MPIC case manager phoned him to tell him that the WCB would be taking over his case, but then she went on leave for an extended period and he could not reach anyone else at MPIC who could give him answers regarding his case. When he got the Joint Decision Letter, he was confused, because he was expecting a letter from MPIC, not a letter from the WCB. The Appellant then tried to talk to someone at the WCB, and he told them he disagreed with his case being switched from MPIC to the WCB, because he did not believe that his injuries had healed to his pre-MVA condition. He had four different WCB case managers, who continuously asked him to provide additional information, which he did; however, this served to delay things. In addition, he was told that there had been an overpayment and that he wasn't eligible to appeal the switch from MPIC to the WCB until the overpayment was resolved. The resolution took nine months, and in the end it turned out that there had been no overpayment.

The biggest concern that the Appellant had was that he couldn't get information. His wage loss benefits were cut by 45% and his medication costs were no longer covered when his case was switched from MPIC to the WCB. He ultimately contacted the MPIC Fair Practices office, as well as the Manitoba Ombudsman's office, who directed him to file his Notice of Appeal with the Commission. The Appellant acknowledged that he was in receipt of CPP disability payments. If the Commission grants an extension of time to allow him to file his Notice of Appeal, and he were to be successful in reinstating his MPIC income replacement indemnity benefits, the Appellant undertook to repay and/or resolve any overpayment issues arising from his receipt of those CPP disability payments.

Evidence and Submission for MPIC:Evidence:

Counsel for MPIC did not call any witnesses, but did question the Appellant on cross-examination. She confirmed that the Appellant received the Joint Decision Letter. He understood the main point of the letter, that his case was being switched from MPIC to the WCB, because his MPIC case manager had called him to tell him that. The Appellant said that he did not read the Joint Decision Letter carefully, and he was not sure that the 90 day deadline registered with him. He explained that he takes medication to sleep and again at four or five in the morning; he is groggy when he wakes up. He did not think that the sections of the MPIC Act that are referred to in the Joint Decision Letter were enclosed with that letter. He did not look at them online because he is “not a computer person”.

When questioned by counsel regarding whether he ever saw the provisions of subsection 196(2) outlining an appeal to the Commission, the Appellant responded that he did not see those provisions. He said he spoke to his MPIC case manager, but did not recall ever contacting the Commission before filing his Notice of Appeal. He mentioned his contact with the Fair Practices office and the Ombudsman.

Counsel referred the Appellant to the letter he received from the Internal Review office, in response to his Application for Review. He acknowledged that he received the Internal Review letter, but said that he didn't read it very carefully. Counsel pointed out that the letter directed him to either

file an appeal with the WCB or with the Commission. The Appellant responded that he didn't read that part of the Internal Review letter; he was trying to deal with this matter through MPIC. In addition, he had many personal matters to deal with at that time (January, 2017), including flooding in his yard, and he needed to take care of his family. When questioned why he never contacted the Commission, the Appellant responded that he didn't even know what the Commission was until he reached the Ombudsman and was given some direction.

Counsel questioned the Appellant regarding the MVA. She asked whether he immediately advised the WCB when he first received PIPP benefits from MPIC. He responded that he did not get in contact with the WCB, because he was not receiving any benefits from the WCB at the time of the MVA.

Submission:

Counsel noted that the Appellant's Notice of Appeal was filed 26 months after the March 22, 2016, Joint Decision Letter. In considering whether to grant an extension of time, the Commission has previously considered various factors, including the reasons for the delay, the length of the delay, whether there has been any prejudice or waiver, and the overall justice of the proceedings. Counsel submitted that all of these factors point to the conclusion that the extension should not be granted.

The biggest factor in this case, counsel argued, is the length of the delay. The Joint Decision Letter was issued on March 22, 2016. Ten months later, the Appellant filed an Application for Review with the Internal Review office. Sixteen months later, he filed his Notice of Appeal with the Commission. The Appellant was aware of the 90 day deadline in the Joint Decision Letter, but he didn't meet it. When he was advised by the Internal Review office of what steps to take, he didn't take those steps for a full 16 months. Filing a Notice of Appeal is a very simple process. It is very

similar to filing an Application for Review, something that the Appellant demonstrated he was capable of doing. Further, the Appellant acknowledged that he didn't even properly pay attention to either the Joint Decision Letter or the letter from the Internal Review office.

There was a period of two years and four months between the Joint Decision Letter and when the Notice of Appeal was filed. Even taking into account the Internal Review letter, 16 months is still a significant delay. It has been held in many decisions that this length of delay is significant. Regarding the Appellant's reasons for this delay, he testified that when his case was initially transferred back to the WCB, approximately nine months of time was taken up with resolving an overpayment. This administrative delay could be considered to explain the initial time period, before the Appellant filed his Application for Review. However, this would not explain the next time period, the 16 months between the Internal Review letter and the filing of the Appellant's Notice of Appeal.

Counsel submitted further that wilful ignorance of the process cannot constitute a valid excuse. The Appellant said he did not read the correspondence. Counsel argued that the Internal Review letter was "a courtesy from MPIC", to advise the Appellant where to file his appeal, because there is no internal review from the Joint Decision Letter. Clearly, the Appellant had the capacity to take action, even if he were depressed or anxious, because he was able to file an Application for Review with MPIC. Therefore, this cannot constitute a reasonable excuse for his delay.

There is an inherent prejudice to MPIC in a delay of 26 months. Further, there is specific prejudice here, counsel argued, because the Appellant's claim has been managed by the WCB and not by MPIC. In particular, counsel noted that there is an issue of an overpayment, and MPIC may be prejudiced in its ability to recover funds. Counsel acknowledged that she was referring to issues

in respect of which there was no material before the panel. However, she noted that as part of the agreement between the WCB and MPIC referred to in the Joint Decision Letter, there would be certain matters that would need to be resolved if the Appellant's Notice of Appeal were permitted to be filed at this late stage. When questioned by the panel regarding whether there was any concern in connection with the management of the Appellant's claim, counsel acknowledged that the Appellant's claim has been continuously managed since the date of the Joint Decision Letter, albeit by the WCB rather than MPIC. Counsel submitted that MPIC would be concerned that the claim has not been managed to MPIC's standard.

Counsel acknowledged that there is no significant factor in this case with respect to waiver.

The factor of the overall justice of the proceedings is instructive in this case, counsel argued. She submitted that here, the Appellant has been receiving benefits throughout; there is simply a dispute with respect to the amount of benefits, as the WCB acknowledges coverage. As contemplated by the MPIC Act, the joint decision was made and the Appellant remains entitled to coverage, currently from the WCB. If the Appellant is granted the extension of time and his appeal at the Commission goes forward, counsel pointed out that it would be MPIC's position that he has recovered from his MVA-related injuries. As indicated in the Joint Decision Letter, a decision had been made that he was at his pre-MVA status.

In summary, there was a significant delay here, and the Appellant did not read the letters which gave specific instructions. Wilful ignorance, or a decision to not take advantage of his resources when he was clearly capable, should not be considered a reasonable excuse for failing to file a Notice of Appeal for over 16 months. Added to this is the prejudice to MPIC, and the fact that the Appellant would not be denied coverage, because he is in receipt of WCB benefits. Counsel

submitted that, on balance, the Appellant has not shown that he should be granted the extension of time, and there would be an inherent injustice in allowing wilful ignorance to constitute a reasonable excuse for failing to file a Notice of Appeal within the 90 day time period. Counsel submitted that the Commission should not grant the extension of time.

Discussion:

In this case, the Appellant's Notice of Appeal was not received by the Commission within 90 days after he received the Joint Decision Letter dated March 22, 2016. Accordingly, he has asked the Commission to exercise its discretion to allow an extension of time for him to file the Notice of Appeal, which was received by the Commission on May 17, 2018, approximately 26 months after the 90 day deadline.

The discretionary power granted to the Commission under subsection 196(2) of the MPIC Act to extend the time for appealing a joint decision of MPIC and the WCB is fairly broad, being "within such further time as the body to which the appeal is made may allow". This appears to be the first time that the Commission has considered the provisions of subsection 196(2) of the MPIC Act. However, in exercising its discretion under subsection 174(1) (set out above), which contains almost identical language in connection with the discretion to extend the time to file an appeal, the Commission has considered various relevant factors, such as:

1. The reasons for the delay;
2. The actual length of the delay compared to the 90 day time limit;
3. Whether there was any waiver respecting the delay;
4. Whether there has been any prejudice resulting from the delay; and
5. Any other factors which argue to the justice of the proceeding.

The panel considers that those factors are equally applicable to the analysis here.

In making our decision, as set out below, the panel has carefully reviewed all of the documentary evidence filed in connection with this appeal. We have given careful consideration to the testimony of the Appellant and to the submissions of the Appellant and counsel for MPIC. We have also taken into account the provisions of the relevant legislation and applicable case law.

Reasons for and Length of the Delay

In his testimony, the Appellant was clear that he always disputed what he referred to as “the switch” of his case from MPIC to the WCB. He said that the reason for his delay in filing his Notice of Appeal with the Commission is that he had difficulty getting information. When his MPIC case manager phoned him to tell him that the WCB would be taking over his case, he was expecting a letter from MPIC, and when he got the Joint Decision Letter, he was confused because it was from the WCB and not from MPIC. He tried to reach his MPIC case manager but she was on leave for an extended period. He tried to talk to someone at WCB, and it was at that point that he was told that there has been an overpayment and he wasn’t eligible to appeal the switch from MPIC to the WCB until the overpayment was resolved. This resolution took nine months.

Counsel for MPIC acknowledged that this administrative delay at the WCB could be considered to explain the initial time period of 10 months, from the date of the Joint Decision Letter until the time the Appellant filed his Application for Review with MPIC. The panel agrees, and finds that the period of time from March 22, 2016 to January 9, 2017, should not be considered to be a delay for which the Appellant is responsible. However, the Appellant then received a letter from MPIC’s Internal Review office dated January 13, 2017, and it was not until 16 months later that he filed his Notice of Appeal with the Commission. Counsel for MPIC argued that 16 months is still a significant delay.

The Appellant acknowledged on cross-examination that he did not read either the Internal Review letter or the Joint Decision Letter carefully. He testified that he was confused as to how to dispute the switch of his case from MPIC to the WCB, and that he continually sought advice and direction, finally going to MPIC's Fair Practices office and the Manitoba Ombudsman. Counsel for MPIC argued that the Appellant's wilful ignorance should not be permitted to constitute a reasonable excuse for his delay. Further, counsel argued that the Appellant was capable of filing an Application for Review and he should have been similarly capable of filing a Notice of Appeal.

The panel has considered the argument of counsel for MPIC in light of the Joint Decision Letter and the letter from the Internal Review office and has rejected MPIC's argument. We do not find that the Appellant was being wilfully ignorant or that he disregarded the provisions of the Joint Decision Letter. Rather, we find that the Joint Decision Letter did not contain sufficient detail so as to allow the Appellant to easily understand his appeal rights and the nature of the changes to his PIPP benefits.

We note that the Joint Decision Letter (quoted above), while referring to a "loss of earning capacity", does not contain any details regarding what PIPP benefits under the MPIC Act were being changed or terminated as a result of the change in responsibility from MPIC to the WCB. Further, and more importantly, the Joint Decision Letter, while referring to the relevant provisions of the MPIC Act, and possibly even enclosing them, does not contain any language that would allow a layperson to meaningfully understand how to exercise their appeal rights. For example, the Joint Decision Letter does not even refer to the appellate body or bodies to which the Appellant could direct his appeal. In contrast, almost without exception, an Internal Review decision typically issued by MPIC contains the following provision:

APPEAL RIGHTS

If you are unsatisfied with this decision, you have ninety (90) days within which to appeal in writing to the Automobile Injury Compensation Appeal Commission, which Commission can be reached at:

301 – 428 Portage Avenue
Winnipeg, MB R3C 0E2

Telephone Number: 945-4155
Fax Number: 948-2402
Toll Free: 1-800-282-8069

Please note that the Commission operates independently from the Manitoba Public Insurance Corporation and its decisions are binding on MPIC subject to the appeal provisions of Section 187 of *The Manitoba Public Insurance Corporation Act*.

Further, an Internal Review decision also typically contains the following provision, which might assist a layperson in filing a Notice of Appeal:

CLAIMANT ADVISER OFFICE

If you need assistance in appealing this decision to the Commission, you can contact:

Claimant Adviser Office
200 – 330 Portage Avenue
Winnipeg MB R3C 0C4

Telephone Number: 945-7413 or 945-7442
Fax Number: 948-3157
Toll Free: 1-800-282-8069, Ext. 7413

The Claimant Adviser Office operates independently of both MPIC and the Commission and is available to you at no charge.

As indicated, the Joint Decision Letter, which is quoted above, did not contained such provisions. The Internal Review letter, also quoted above, did advise the Appellant to either file an appeal with the WCB or file a Notice of Appeal with the Commission, but did not provide any of the

contact information set out in the provisions above, which might have greatly assisted the Appellant. Under section 150 of the MPIC Act, MPIC has a duty to advise and assist claimants. As noted above, the Appellant testified that he continued to seek advice from his former MPIC case manager and his WCB case managers regarding how to dispute the Joint Decision Letter, and it was not until receiving advice from the Manitoba Ombudsman's office that he understood how to file his Notice of Appeal with the Commission. The panel accepts the Appellant's testimony as a reasonable explanation for the 16 month delay, particularly in light of the wording of the Joint Decision Letter and the letter from the Internal Review office.

Waiver and Prejudice

Counsel for MPIC acknowledged that there is no significant factor in this case with respect to waiver, and the panel agrees.

With respect to the factor of prejudice, counsel for MPIC argued that there is an inherent prejudice to MPIC in a delay of 26 months, and that there is specific prejudice here, because the Appellant's claim has been managed by the WCB and not by MPIC. However, the panel notes that this is not a situation where an appellant's claim has been unmanaged. Here, the Appellant has been under the care and management of the WCB; his claim has been continuously managed since the date of the Joint Decision Letter. While counsel for MPIC suggested that MPIC may be concerned that the claim has not been managed to MPIC's standard, the panel finds that this suggestion is not of sufficient weight to constitute a prejudice to MPIC.

Counsel for MPIC also referred to an issue of an overpayment, and the fact that MPIC may be prejudiced in its ability to recover funds. The Appellant also addressed a possible overpayment issue in his testimony. He acknowledged that he was in receipt of CPP disability payments. The

Appellant undertook that if the Commission grants an extension of time to allow him to file his Notice of Appeal, and if he were to be successful in reinstating his MPIC income replacement indemnity benefits, he would repay and/or resolve any overpayment issues arising from his receipt of those CPP disability payments. Unfortunately, this is a matter in respect of which there was no documentary evidence before the panel. Therefore, although the panel accepts the sincerity of the Appellant's stated intention, the panel cannot make a finding on this point.

Justice of the Proceedings

In her submission, counsel for MPIC pointed out that if the Appellant were able to file his Notice of Appeal and this matter proceeded to a hearing, it would be MPIC's position that the Appellant had recovered from his MVA-related injuries. She noted that pursuant to the terms of the Joint Decision Letter, the WCB and MPIC had made a decision that the Appellant was at his pre-MVA status. The Appellant disputed this, stating in his testimony that he is not the same as he was prior to the MVA and that he is no longer able to work heavy equipment and he is no longer pain-free.

The panel has considered this issue and has determined that, based on the nature of the dispute between the parties, the justice of the proceedings militates in favour of a consideration of the merits of the appeal by the Commission.

Conclusion

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 panel finds that the weight of the factors leads us to exercise our discretion in favour of extending the time limit set out in subsection 196(2) of the MPIC Act.

Disposition:

Accordingly, the Commission will, under subsection 196(2) of the MPIC Act, extend the time limit within which the Appellant may file his Notice of Appeal to appeal the Joint Decision Letter dated March 22, 2016, to the Commission.

Dated at Winnipeg this 6th day of December, 2018.

JACQUELINE FREEDMAN

TREVOR ANDERSON

BRIAN HUNT