

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-18-057**

PANEL: **Karin Linnebach, Chairperson
Sandra Oakley
Leona Barrett**

APPEARANCES: **The Appellant, [text deleted], was represented by Michael Kredentser of the Worker Advisor Office; Manitoba Public Insurance Corporation (MPIC) was represented by Alexandra Miles.**

HEARING DATE: **February 13, 2019**

ISSUE(S): **Extension of time to file a Notice of Appeal.**

RELEVANT SECTIONS: **Section 174 of The Manitoba Public Insurance Corporation Act (MPIC Act).**

Reasons for Decision

Background:

The Appellant was injured in a motor vehicle accident (MVA) on July 31, 2006. (The Appellant asserts the accident date was July 30, 2006 but MPIC documentation states July 31, 2006. However, the date of the MVA has no bearing on this appeal). After the MVA, the Appellant received benefits from MPIC, including Income Replacement Indemnity (IRI) and Personal Care Assistance (PCA) benefits. The Appellant's IRI ceased in 2007. In 2009, the Appellant contacted MPIC and reported that she had developed epilepsy and reduced left shoulder range of motion and numbness in her hands and legs. The Appellant's case manager issued a decision on her claim on March 19, 2010 (the March 2010 decision), which concluded that the medical evidence did not

support a direct and probable relationship between the onset of seizure activity (epilepsy) and the MVA. The case manager also concluded that the medical information did not support that the Appellant's MVA injuries prevented her from performing her pre-accident employment.

The Appellant contacted MPIC in 2014 and 2015. On September 16, 2015, the Appellant's case manager issued a decision denying further entitlement to IRI and PCA benefits (the September 2015 decision). On November 10, 2015, the Appellant's legal counsel submitted an Application for Review of the September 2015 decision. The Internal Review Decision (IRD) dated March 15, 2016 (IRD 15-719) addresses entitlement to IRI and PCA benefits due to a diagnosis of "possible bilateral adhesive capsulitis of the shoulders". The Appellant filed an appeal of IRD 15-719 with the Commission on April 8, 2016, indicating that she was represented by the Claimant Adviser Office (CAO) and that she wished to proceed with mediation. The Appellant's Notice of Appeal form states that "my medical conditions like arms/shoulder pain and head injury and effects not taken into consideration by MPI and caused by MVA".

The Appellant filed an Application for Review of the March 2010 decision in 2017. While the Application for Review is dated February 16, 2017, it is undisputed that MPIC did not receive the application until May 17, 2017. In her application, the Appellant stated that she was not satisfied with the March 2010 decision because she sustained a head injury and loss of consciousness in the MVA. On June 30, 2017, the Internal Review Office denied the Application for Review on the basis that the Appellant failed to provide a reasonable excuse for the late filing of her application.

IRD 047957-A states:

"The Application for Review was received on May 17, 2017. It is clearly (almost 7 years) out of time. With due respect, I am unable to understand the rationale in the lapse of time

between when the case manager's decision was issued and when MPI received the Application. One would question why you did not pursue this matter earlier, especially if you are disputing your ability to hold employment and essentially your entitlement to Income Replacement Indemnity ('IRI') benefits.

I am not prepared to extend the time for you to seek a review because the decision you are seeking a review of was issued in March 2010. The delay in this case is far too long and there is no reason that I can see from the file which would provide any excuse for you not applying in time."

The Internal Review Decision further stated:

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: 204-945-4155
Fax Number: 204-948-2402
Toll Free: 1-855-548-7443

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

The Appellant did not make application in writing to appeal IRD 047957-A within 90 days from the date the decision was received by the Appellant. On May 28, 2018, the Commission received a Notice of Appeal from the Appellant stating that she was not satisfied with IRD 047957-A because she sustained a head injury in the MVA.

As the Notice of Appeal was filed outside the 90-day time period within which to file her appeal with the Commission, the Appellant was required to provide reasons for her late filing. A letter

signed by the Appellant providing an explanation for the delay in filing was received by the Commission on June 14, 2018. It states:

“The major reason of the delay was brought by a miscommunication between me and the claimant adviser office as I was previously represented by Chad Panting who had been away from the office. Although I have received a notice for a new claimant adviser, there was confusion on my end as a product of my injury.

I wish to communicate my desire to proceed and extend the time within which to file the Notice of Appeal. I have been gathering additional evidentiary information to back my case and my current health status which was not addressed during and after my accident has been interfering in my daily life. Also, as a result of the accident, I have been battling with confusion, mental fatigue, memory issues, and chronic headaches that make it challenging to deal with all the paperwork that comes with the appeal.”

The Appellant’s reasons were provided to counsel for MPIC, who then indicated that it is MPIC’s position the reasons provided were not a reasonable explanation for the late filing. Given the late filing of the Appellant’s appeal and MPIC’s position on the late filing, this hearing was scheduled to determine whether the Commission will grant the Appellant an extension of time to file her Notice of Appeal.

Decision:

For the reasons set out below, the Commission will not exercise its discretion to grant an extension of time for the Appellant to file a Notice of Appeal of IRD 047957-A.

Evidence:

The Commission heard testimony from the Appellant and the Acting Director of the Claimant Adviser Office (CAO). MPIC called no witnesses. Documentary evidence was provided, which included documents concerning the mediation of IRD 15-719. Respecting the sanctity of mediation and the mediation process, the Commission does not normally admit evidence regarding

mediation. However, given the unique facts and issues in this case, the agreement of the parties and that the mediation concerned a separate appeal, this evidence was admitted.

The Appellant

The Appellant believed that she first contacted the CAO three or four years ago. She stated she was referred to the CAO by the [text deleted] Association because she was seeking help for her seizure disorder. She remembers she approached the CAO about trouble she was having with her arm and because she has post-traumatic epilepsy from a head injury. She remembers events but things are “very mixed up”. She usually remembers dates and numbers. She stated that she struggles every day and “blocks the pain out”. She acknowledged that she sought the CAO’s help to appeal IRD 15-719, which concerns entitlement to IRI and PCA due to shoulder problems. The Appellant’s assigned claimant adviser was Chad Panting (CP).

When she first met with CP, she brought whatever documents she had from MPIC. She acknowledged that some of the mail was open and some was not. She doesn’t remember when she first brought IRD 15-719 to CP or how many times she met with him or called him. She acknowledged that she doesn’t open a lot of mail. She stated that she doesn’t retain what she reads even when reading it over and over. She then stated that she did open IRD 15-719 and gave it to CP to read.

She remembers being told by CP that the CAO could only assist her with issues addressed in IRD 15-719. With respect to pursuing benefits for her head injury, she was advised to contact her case manager. She remembers contacting her case manager as advised. She believes she completed

the Application for Review with CP's assistance and that they walked the application over to drop it off at MPIC's security desk together. She initially stated that they dropped it off the day she signed it. When it was pointed out that the Application for Review was dated February but not stamped received by MPIC until May, she stated that this does not make sense to her and she "cannot remember anything". She remembers meeting with CP and the former director for the CAO on June 15, 2017. She believes they discussed the head injury at that time. She also acknowledged meeting with the CAO in August and September 2017.

The Appellant did not recall receiving any correspondence from MPIC after she filed the Application for Review. She stated that she would just bring correspondence from MPIC to CP's office. She did not recall receiving a copy of IRD 047957-A, but acknowledged her handwriting is on the decision filed with the Commission. She confirmed her correct address is on the decision. When asked whether IRD 047957-A was one of the documents she provided to CP, she said it "would have been", but did not recall when she gave it to him. She does not recall what she discussed with CP other than CP saying that all the reviewer did was copy the original decision. She remembers telling him that MPIC wrote the date of the accident wrong. She was under the impression that CP was helping her with this decision. She does not recall what steps she took in the 90 days after she received the decision.

The Appellant acknowledged that she chose to participate in mediation on her appeal of IRD 17-519, which was already filed with the Commission. However, while she was aware that the mediation concerned her arm, she asserted that a purpose of mediation was to address her head

injury and seizures. She claimed the only reason she went to mediation was to address her head injury and seizures.

The Appellant does not recall what happened to her appeal after mediation or whether she had conversations with CP after mediation. It was pointed out that the CAO's records show she had contact with the CAO in January 2018. She was asked to explain the time gap between mediation, which took place on September 7, 2017, and this January 2018 contact. She stated she was waiting for direction on "where to go and what doctor to see". She then stated that she didn't recall.

She stated that CP was not available a lot of time and was away from work a lot. In response to the question from counsel for MPIC about whether she ever contacted the CAO about appealing IRD 047957-A, the Appellant stated that there were many time lapses with the CAO because of CP's health condition and she did not phone all the time, but phoned on the days she really needed help.

The Appellant stated she was diagnosed with post-traumatic epilepsy. She is bothered by noises including the clicking of pens or keys on a keyboard. She indicated she is at risk of having a grand mal seizure, especially if there is a delay in taking her medication.

The Appellant was asked about her daily functioning. She indicated that she lives with her sister in the city and has a farm with her common law spouse. The Appellant was asked to describe her functioning on her "good days". She indicated that she drives out to [text deleted] or [text deleted] or back to the city. She shops. She stated she does everything in 45 minute intervals. She does not

go to places with too many people or too many sounds. She does, however, go to bingo and wears earplugs when there. She watches the screen to get the numbers. She pays her bills using her smartphone and her sister is able to help her if she needs assistance.

Her sister did not help her with her appeal because she was getting assistance from CP. In response to the question whether her spouse assists her with activities of daily life such as grocery shopping, she stated that if there is something she cannot do, she has developed a support group. For example, if she needs help shovelling or doing heavy lifting she will ask her spouse or sister to help her. She confirmed that she attends her medical appointments by driving herself to her appointments.

The Appellant stated that she did not prepare the letter she signed providing her reasons to the Commission for late filing. She asserted that this was prepared when she met with the Acting Director of the CAO and her new claimant adviser.

Janelle Pariseau (JP)

JP first started working with the CAO in September 2015 as a claimant adviser and has been the Acting Director since April 2018. JP explained the CAO's recordkeeping and the initial intake process. JP explained that day-to-day management of a file is done by the assigned claimant adviser. If a claimant already has an open file with the CAO, the claimant is directed to see their assigned claimant adviser with respect to any new IRD. Every IRD needs a separate file. All documents are required to be date-stamped when received by the CAO.

If a claimant adviser is away from the office, the file is sometimes reassigned. JP was unable to speak to whether there was a standard practice regarding file reassignment under the former Director, but indicated that reassignment typically depended on the length of the claimant adviser's absence and whether anything "urgent" is pending on the file such as an upcoming mediation, a case conference or hearing. She agreed that a 90-day appeal period would be considered "urgent". JP stated that standard practices were not followed with respect to the Appellant's file with the CAO. While a copy of IRD 047957-A was found in the Appellant's file, there is no mention or record made that the CAO had received it. It was simply found without a date stamp in the claimant's file. JP confirmed that CP was the assigned claimant adviser and, despite CP being away from the office for extended periods of time, the file was not reassigned until May 2018.

JP completed the intake interview with the Appellant when she first came to the CAO. JP's notes from that interview were passed on to CP and the expectation was that CP would have reviewed these notes. The notes show that the Appellant expressed concern about her head injury and seizures. The Appellant told JP that she was referred to the CAO by the [text deleted] Association. However, JP acknowledged that the CAO never received a direct referral from the association and that it was the claimant who contacted the CAO.

With respect to her memory and cognition, JP indicated that the Appellant seemed scattered in conversation and told JP that she was confused and had trouble remembering things. JP was asked to comment on her observations of the Appellant's capacity to understand procedures and stated that she noted confusion at intake and that the Appellant appeared "not to be clear". JP confirmed that the IRD which was appealed, IRD 15-719, related to the arm and shoulder injury and not a

head injury. JP confirmed that if issues arose with a claimant that were not addressed in an IRD, the claimant would be referred to MPIC case management for a decision. The CAO is able to assist the Appellant on that issue once they receive an IRD.

JP acknowledged that CP's file notes show that he had undertook to do research or investigation on post-traumatic epilepsy despite this issue not being addressed in IRD 15-719. JP acknowledged that sometimes matters beyond the scope of a particular IRD can be addressed in mediation.

JP acknowledged that it was not normal for claimant advisers to help claimants write letters and respond to correspondence and that delivering correspondence to MPIC would not be done on a regular basis. She agreed with the Appellant's counsel that it was reasonable for the Appellant to conclude that the CAO was assisting her with an appeal concerning her head injury.

JP confirmed that CP was in and out of the office for periods of time commencing in 2016. CP was absent between July 10 and August 8, 2017, between mid September 2017 and the middle of November 2017, the end of December 2017 until the middle of February 2018 and April 10 to July 3, 2018. She acknowledged that the Appellant's file was not reassigned until May 2018. She acknowledged that another staff member would have access to CP's mail when he was out of the office. JP confirmed that CP is still employed by the CAO.

JP indicated that the handwritten notes in the margins of the copy of IRD 047957-A that was provided to the Commission are in CP's handwriting.

Medical Evidence on the Appellant's Cognitive Impairment

The Appellant asserted she was referred to the CAO by the [text deleted] Association. In the Appellant's testimony and in her letter outlining her reasons for late filing, the Appellant indicated she was confused, had mental fatigue, memory issues and chronic headaches. The Appellant was not able to remember events and details about events when testifying. Counsel for the Appellant took the position that the Appellant is a vulnerable individual who is cognitively impaired. Counsel asserted that as a result of her cognitive impairment, the Appellant did not understand IRD 047957-A and the process to appeal. MPIC took the position that there is no medical evidence supporting that the Appellant has any cognitive issues.

In her reasons for late filing, the Appellant indicated that she had been gathering "evidentiary information to back my case and my current health status". She indicated her current health status has been interfering in her daily life. The CAO's file notes also reference attendance to various health care providers, including neurologists. However, no medical evidence was filed with the Commission supporting that the Appellant has any cognitive impairment. Given the absence of medical documentation supporting cognitive impairment, the panel asked the Appellant and her counsel whether they would like to adjourn the hearing before closing argument to provide the Commission with medical documentation that supports the Appellant's position.

After a recess for the Appellant to discuss with her counsel, the panel was advised that the Appellant would not be providing any further documentary evidence to the Commission and would be proceeding with closing argument.

Submission for the Appellant:

Counsel for the Appellant submitted that, based on the totality of the evidence, both oral and documentary and consideration of the relevant factors surrounding the delay, the Appellant has provided a reasonable excuse for her failure to appeal IRD 047957-A within the 90-day time limit set out in Section 174 of the MPIC Act. As such, the Appellant asked the Commission to exercise its discretion to extend the time within which the Appellant may appeal IRD 047957-A.

Counsel submitted that the length of delay in this case, 8 months after expiry of the 90-day appeal period, is not a particularly significant delay when considered alongside the other relevant factors surrounding the delay in this case, particularly prejudice and the reasons for the delay.

The Appellant is not aware of any unusual prejudice resulting from the delay that would interfere with MPIC's ability to address the appeal. The facts and issues relevant to an appeal of IRD 047957-A have not changed since the expiry of the 90-day appeal period.

Counsel submitted there is no clear or explicit waiver respecting the delay, but stated there may have been implicit waiver of the delay by MPIC. He referred to correspondence following the mediation of IRD 15-719 that MPIC was aware of the Appellant's intent to proceed with appeals on other issues than the shoulder injury, which was the subject of IRD 15-719. In email correspondence, the mediator references "other appeals (one that is in process and one that is planned)" and counsel submitted it is reasonable to conclude that an appeal of IRD 047957-A was one of the "other appeals" referenced. Further, there is indication that the Appellant's seizure disorder was addressed at mediation.

Counsel submitted that the most important factor to consider in this case is the reasons for the delay. The Appellant is a vulnerable person who was referred to the CAO by the [text deleted] Association. She approached the CAO for help with the appeals process that she could not understand and navigate on her own due to her confusion, mental fatigue and cognitive issues. Counsel asserted that these cognitive issues were noted throughout the file and were apparent in communications with the Appellant.

Counsel submitted that the Appellant's main issue she wanted help with was her head injury and seizure disorder. She raised this in her first interactions with the CAO. JP's intake notes as well as the CAO's action plan report document this and she consistently raised this throughout her communications with the CAO, including CP.

Counsel referred to a telephone record dated February 14, 2017 where it was documented that the Appellant did as instructed by the CAO and called her case manager to discuss her head injury. The case manager stated that he had already made a decision on this issue and reissued the March 2010 decision which stated, in part, that there was no probable causal relationship between her seizure disorder and the MVA.

Despite the fact that her head injury and seizures were not part of IRD 15-719, CP undertook to conduct research regarding post-traumatic seizure disorder and contact a neuropsychologist to inquire about obtaining a report. CP assisted the Appellant in completing an Application for Review of the March 2010 case manager's decision. CP also arranged to meet with the Appellant to assist her in preparing a response to MPIC's letters concerning the late filing of the Application

for Review. However, due to a lack of clear and consistent record keeping, it is unclear whether or not this meeting occurred and it does not appear that a response was ever submitted. On June 6, 2017, CP contacted a neuropsychologist on the Appellant's behalf. Unfortunately, it is unknown what came of this correspondence. On June 15, 2017, the Appellant met with CP and the then Director of the CAO. Notes of this meeting show that they discussed the Appellant's head injury and seizures and the possibility of scheduling an assessment with a neuropsychologist.

Counsel acknowledged that these events all preceded the issuance of IRD 047957-A. However, counsel submitted that they are important because they led the Appellant to believe that the CAO was assisting her to appeal the issue of her head injury and seizures. Based on all of the circumstances, this was not an unreasonable conclusion for her to reach, particularly given her vulnerability due to her cognitive issues. She had exhibited a clear intention to appeal this decision as evidenced by her consistently raising this issue with the CAO and the CAO took numerous actions to assist her in advancing this appeal.

Counsel submitted that following the June 15, 2017 meeting, there are significant gaps in the evidence on the CAO's file. These gaps are due to apparent lapses by the CAO to follow their own procedures with respect to document and file management as well as the adviser assigned to the file being absent for considerable periods of time, including most of the time within the 90 days.

While IRD 047957-A was mailed to the Appellant's address, the Appellant had difficulty opening and understanding mail from MPIC as a result of her cognitive issues and stated that she would typically take any MPIC mail and give it to CP, who was her support.

Counsel submitted that the evidence shows the Appellant brought IRD 047957-A to the CAO, but she unfortunately does not recall when she did this. However, the CAO did not follow their own procedures with respect to the handling of IRD 047957-A and there is no record of when it was received. Furthermore, there is no record of an intake being conducted or the decision being discussed with the Appellant as would be the standard practice.

In preparation for mediation, the Appellant met with CP on August 9, 2017. While the notes of that meeting are unclear, the Appellant's epilepsy was discussed. As indicated, the Appellant's seizure disorder was discussed at mediation. The Appellant was told to seek a referral to a neurologist if she was appealing this decision. Counsel submitted this served to further the Appellant's mistaken understanding that this mediation was all a part of the process for her to appeal the decision regarding her head injury and seizures and there is no indication that the CAO took any steps to address this misunderstanding.

After mediation and during the remainder of the 90-day appeal period, CP was away from the office for a prolonged period of time and there does not appear to have been anyone assigned to cover the file in his absence. There is no record of the Appellant contacting the CAO until January 2018. However, given the other apparent lapses in record keeping by the CAO and since no-one was covering for CP during his absence, the Appellant may well have attempted to contact their office. Furthermore, CP had previously told the Appellant to wait for him to contact her regarding updates because he was busy and it was difficult to get work done if she called him requesting updates.

It was not until a new claimant adviser was assigned to the Appellant's file in May of 2018 that IRD 047957-A was discovered by the CAO. Once this was realized, the Appellant took prompt action to advance her appeal and attempted, as best as she could, to explain the delay.

The Appellant relied, to her detriment, on the CAO to help her navigate the appeals process and advance her case. The primary reason for the delay in this case is the CAO's apparent lapses in procedures, services and communications. In turn, this led to miscommunications and misunderstandings, which may have also contributed to the delay. Counsel submitted that the Appellant should not be prejudiced by the CAO's lapses or the resulting miscommunication and misunderstandings, particularly given her level of vulnerability as a result of her cognitive issues.

Submission for MPIC:

The Notice of Appeal of IRD 047957-A was filed eleven months after the IRD was issued and eight months after the appeal period elapsed. Counsel for MPIC submitted that eight months is quite a long time and therefore the delay in filing is substantial.

Counsel submitted that the Appellant did not provide a reasonable excuse for not filing her appeal within the appeal period. While the Appellant asserted that she has cognitive difficulties and therefore relied on the CAO, the Appellant provided no medical evidence or documentation regarding any cognitive issues that would prevent her from following up with the CAO about filing the appeal documents or taking her own actions to ensure her appeal was filed.

IRD 15-719 was issued March 15, 2016. The Appellant filed an appeal of IRD 15-719 with the Commission on April 8, 2016. There is no information that anyone other than the Appellant filed that appeal. The Appellant asserted she was referred to the CAO by the [text deleted] Association but there are no documents supporting such a referral and JP confirmed that there was no direct referral from the association. This demonstrates that the Appellant was able to take action with respect to the appeal of IRD 15-719 within a fairly short time, knowing that the 90-day clock was running. The Appellant has therefore demonstrated an ability to meet the 90-day deadline in the past. Counsel submitted that the Appellant also had the ability to do so with respect to IRD 047957-A, but failed to do so.

Counsel acknowledged that there may have been some confusion for the Appellant when dealing with the CAO. However, mediation regarding the appeal of IRD 15-719 took place on September 7, 2017 and the Appellant did not again contact the CAO until January 2018, four months later. Counsel submitted it is not reasonable if there is a pending appeal not to make any attempts to contact the CAO to see what the status is.

The Appellant's evidence was that she acknowledged receiving IRD 047957-A, but didn't read it. She made a note on the document regarding the MVA date so had to have opened it. Counsel submitted that, absent any cognitive disability, it is not reasonable to fail to read a document addressed to you even if you were obtaining advice. One would want to see if the decision was overturned or upheld. The Appellant failed to take those steps.

Counsel for the Appellant suggested that, given the lapses of record keeping on the file, it is possible the Appellant did contact the CAO before January 2018. Counsel for MPIC disagreed with this assertion and submitted that the evidence of JP was that a notation in the file log would be made if a claimant's contact with the CAO had to do with a substantive issue.

Counsel acknowledged that CP's absence from work is a factor in this case in that he could not take proactive steps if he was not at work. However, there is no indication that the Appellant even tried to contact the CAO between the completion of mediation in September 2017 and January 2018. CP's absence during that time would have more weight had the Appellant tried to contact him. It appears there was an email to the Appellant in March 2018 regarding the outcome of mediation, but it doesn't appear that CP and the Appellant discussed the appeal of IRD 047957-A. Counsel noted that CP was not called as a witness.

Counsel submitted that a factor for the panel to consider in this case is the likelihood of success on the merits of the appeal. IRD 047957-A found that the Appellant failed to provide a reasonable excuse for filing her Application for Review nearly seven years after the deadline within which to seek review. Counsel submitted a seven-year delay is clearly unreasonable. Therefore, the likelihood of success of an appeal of IRD 047957-A is slim and this should count against the Appellant being granted an extension of time to appeal.

In summary, counsel submitted that it was not reasonable for the Appellant not to be proactive regarding her appeal. Taken in totality, the Appellant has not provided a reasonable excuse of waiting eight months to appeal.

The Appellant's Reply Submission:

Counsel reiterated that the Appellant did make attempts to appeal by taking IRD 047957-A to her representative at the CAO. Counsel reiterated that the evidence of JP was that practices weren't being followed by the CAO with respect to the appeal of IRD 047957-A. Counsel reiterated that the Appellant's support network with respect to this appeal was the CAO and she relied on them to her detriment. While the delay in appealing was over eight months, the evidence was that the Appellant filed her appeal with the CAO within two weeks of the CAO discovering the error. Counsel submitted that extending the time within which to appeal would give the Appellant the opportunity to bring forward her medical when addressing the merits of the appeal.

Discussion:

Section 174 of the MPIC Act provides as follows:

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.

Pursuant to Section 174 of the MPIC Act, the Commission has the discretionary power to extend the time for appealing an IRD. In exercising its discretion, the Commission has considered various relevant factors, such as:

1. The actual length of the delay compared to the 90-day time period as set out in Section 174 of the MPIC Act.
2. The reasons for the delay.
3. Whether there has been any prejudice resulting from the delay.

4. Whether there was any waiver respecting the delay.
5. Any other factors which argue to the justice of the proceeding.

In AC-13-152, the Commission also considered the Supreme Court of Canada decision in *R. v. Roberge*, 2005 SCC 48 which sets out considerations for an extension of time. In paragraph 6 of its reasons, the Court stated:

The power to extend time under special circumstances in s. 59(1) of the Act is a discretionary one. Although the Court has traditionally adopted a generous approach in granting extensions of time, a number of factors guide it in the exercise of its discretion, including:

1. Whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
2. Whether counsel moved diligently;
3. Whether a proper explanation for the delay has been offered;
4. The extent of the delay;
5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
6. The merits of the application for leave to appeal.

The ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.

The panel finds that the actions of counsel, in this case the CAO, and the merits of the Appellant's appeal are additional factors which argue to the justice of the proceeding.

IRD 047957-A was issued June 30, 2017. The IRD is marked as being sent priority post. The Appellant provided no evidence as to when she received the IRD. Allowing a reasonable time for delivery, the 90-day period within which to appeal expired around the beginning of October 2017. The Notice of Appeal was not received by AICAC until May 28, 2018, nearly eight months after the expiry of the 90-day period and nearly eleven months after it was issued. The panel agrees with counsel for MPIC that this is not an insignificant delay.

There is no evidence of any unusual prejudice which might interfere with MPIC's ability to address this appeal. While counsel for the Appellant suggested there may be implicit waiver of the delay by MPIC given discussions through the mediation process, the panel does not find evidence of waiver.

The difficulty for the panel when considering the reasons for the delay provided by the Appellant is that the Appellant failed to remember any details about what steps she took to appeal the decision. While she believes she provided IRD 047957-A to the CAO, she couldn't say when and whether she provided any instructions to CP or anyone else at the CAO about assisting her to file an appeal. The letter to the Commission signed by the Appellant outlining the reasons for late filing states that "the major reason of the delay was brought by a miscommunication between me and the claimant adviser office". However, the Appellant was unable to provide any details of any communication with respect to the filing of the appeal. The Appellant repeatedly stated she could not remember.

Counsel for the Appellant portrayed her as a vulnerable individual and attributed her inability to answer questions and provide any details on her communications with her claimant adviser on her cognitive impairment. However, when asked to describe her abilities, the Appellant confirmed that, on “good days”, she is independent in her activities of daily living. She drives in the city and to communities outside of the city, she shops, she pays her bills using her smartphone, she goes to bingo and she attends her medical appointments on her own.

The Appellant has provided no medical documentation that she has a cognitive impairment or any other medical condition that impacts her ability to remember events and answer questions. The panel notes there are several references to medical practitioners in the documents, including neurologists, and that CP tried to refer the Appellant to a neuropsychologist. In the absence of medical documentation, the panel is unable to reconcile her inability to provide any information on what transpired between herself and the CAO regarding her appeal with her ability to function in daily life. The panel notes that the Appellant stated she was at risk for a grand mal seizure, suggesting her seizures are not controlled, yet continues to hold a driver’s licence.

The panel found the Appellant to be evasive and lacking in credibility with respect to her inability to remember. In response to the question from counsel for MPIC about whether she ever contacted the CAO about appealing IRD 047957-A, the Appellant did not answer this direct question. Rather, the Appellant stated that there were many time lapses with the CAO because of CP’s health condition and she did not phone all the time, but phoned on the days she really needed help. The panel notes that at no point in her testimony did the Appellant take any personal responsibility for the late filing.

The panel is mindful that mistakes were made at the CAO. The evidence is that IRD 047957-A was found on the Appellant's file unstamped when a new claimant adviser was assigned to assist the Appellant. The panel accepts that the IRD should have been date stamped to show when it was received by the CAO. The panel also accepts that there should have been either electronic or paper file notes indicating that the decision was received by the CAO. Once received, the file notes should address what instructions were given or what actions would be taken with respect to IRD 047957-A. There are no such notes.

The evidence shows that CP was absent from the office for significant periods between the date IRD 047957-A was issued and the date the Notice of Appeal was filed. The Appellant's file was not reassigned to another adviser until May 2018. However, despite CP's absence, the CAO's file notes show that CP and the Appellant met to prepare for mediation of the appeal of IRD 15-719 and that mediation took place. The file notes also show that, on numerous occasions, CP and the Appellant discussed her position that she suffered a head injury in the MVA and is permanently impaired as a result of this injury. The notes show CP was considering what medical evidence would be needed to support the Appellant's position and even faxed medical consent forms to a neuropsychologist. It appears that the Appellant's seizure disorder was discussed at mediation. Strangely, there are no notes indicating that CP was aware IRD 047957-A was issued. There was no suggestion made by the Appellant or JP that it is the claimant adviser's responsibility to track the issuance of an IRD. The evidence of JP was that the CAO is able to assist an Appellant on an issue once they receive an IRD.

Counsel for the Appellant referred to three small notations on the copy of IRD 047957-A found in the Appellant's file and JP stated that she believed these notations were in CP's handwriting. CP was not called as a witness. The panel finds it difficult to conclude, on a balance of probabilities, that the handwriting is CP's, given that the notations are very brief, are printed and contain numbers. In any event, there is no evidence before us that the Appellant provided IRD 047957-A to CP during the 90 appeal period.

The evidence shows that the Appellant also had direct contact with the then Director of the CAO, both face to face and over the telephone. A file note indicates that the Director spoke with the Appellant on January 9, 2018 and that the Appellant stated she had not heard from CP since mediation. Reference is again made to the Appellant's assertion that she suffered a head injury in the MVA. However, there is no indication that the Appellant ever discussed having received IRD 047957-A and wanting to appeal with the Director. The notes indicate the Director was going to review the Appellant's file and call her the next week with the plan. There are no further notes in the file from the Director. It seems strange that the Director did not discover IRD 047957-A in the file at that time had she reviewed the file as indicated. This Director was also not called as a witness.

The panel agrees with counsel for MPIC that the Appellant demonstrated the ability to appeal to the Commission in a timely manner when she appealed IRD 15-719. The panel also agrees with counsel for MPIC that the Appellant did not act reasonably in this case by failing to be proactive to ensure she appealed IRD 047957-A. The panel also notes that the claimant adviser who

discovered IRD 047957-A in the Appellant's file and was assigned to assist the Appellant at the time she filed her Notice of Appeal was also not called as a witness.

A final relevant factor in this case is the likelihood of success on the merits of the appeal. In IRD 047957-A the Appellant's Application for Review was dismissed because the Appellant failed to provide a reasonable excuse for filing her Application for Review nearly seven years after the deadline within which to appeal. The panel finds that the appeal has questionable merit given the significant delay in filing her Application for Review. IRD 047957-A notes that the Appellant contacted MPIC in 2015 regarding the mobility in her arms. The Appellant was represented by legal counsel at that time yet no Application for Review of the March 2010 decision was filed at that time. Despite contact with MPIC over the years, that the Appellant's IRI was terminated in 2007 and that she had retained legal counsel, the Appellant did not seek review of the March 2010 decision until the spring of 2017.

Disposition:

Based on the foregoing and considering the factors as a whole, the Commission finds that the Appellant has not provided a reasonable excuse for her failure to appeal IRD 047957-A within the 90-day time limit set out in the MPIC Act. Accordingly, the Commission will not extend the time limit within which the Appellant may appeal IRD 047957-A dated June 30, 2017 to the Commission.

The Commission notes that the Appellant is always able to bring forward new medical evidence for consideration by MPIC. Subsection 171(1) of the MPIC Act addresses the ability of MPIC to make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

Dated at Winnipeg this 23rd day of May, 2019.

KARIN LINNEBACH

SANDRA OAKLEY

LEONA BARRETT