

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-088**

PANEL: Laura Diamond, Chairperson

APPEARANCES: The Appellant, [text deleted], represented herself (but did not appear);
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Andrew Johnson.

HEARING DATE: November 18, 2021

ISSUE(S): Whether the Appellant has failed to diligently pursue her appeal.

RELEVANT SECTIONS: Section 182.1 and 184.1 of The Manitoba Public Insurance Corporation Act (the 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

The Appellant was injured in a motor vehicle accident (MVA) on December 30, 2011. A case manager's decision dated February 26, 2014 concluded that she no longer qualified to receive Personal Care Assistance (PCA) benefits based on her accident related injuries. The Appellant sought internal review of this decision with MPIC. An MPIC Internal Review Decision (IRD) was issued on May 5, 2014, upholding the case manager's decision.

On July 8, 2014, the Appellant filed a Notice of Appeal (NOA) from this IRD with the Commission. She was initially represented by the Claimant Adviser Office (CAO).

Following receipt of correspondence from the CAO, an appeals officer for the Commission wrote to the Appellant on November 18, 2016 indicating that the Commission had been advised that the CAO was no longer representing her with respect to her appeal and that they had closed their file. The appeals officer inquired as to whether the Appellant would like to proceed with her appeal. She was asked to contact the Commission office to advise who would be representing her, whether she had the indexed file of relevant documents and if she wished to submit any further evidence. She was also provided with a Notice of Withdrawal (NOW) form and advised that she could complete and forward it to the Commission office, if she no longer wished to proceed with her appeal.

The Appellant did not respond to this letter. Nor did she respond to subsequent letters dated February 18, 2017, and April 20, 2017 sent to her by the Commission to request information and discuss her appeal. A case conference hearing (CCH) was scheduled to discuss the matter by teleconference on July 25, 2017, but the Appellant did not attend.

The Appellant did not respond to subsequent letters from the Commission dated August 2, 2017, October 13, 2017, January 23, 2018, December 17, 2020, February 17, 2021, April 6, 2021 and July 6, 2021. Nor did she respond to any of the Commission's attempts to contact her by telephone.

As a result of the Appellant's failure to participate with or respond to the Commission, a hearing was scheduled for the Commission to consider whether the Appellant had failed to diligently pursue her appeal and whether the appeal should be dismissed.

On September 1, 2021, the Secretary to the Chief Commissioner attempted to contact the Appellant by telephone to schedule a hearing for November, but the Appellant advised that she was not available to discuss it and terminated the call. The hearing was then scheduled to proceed on November 18, 2021 @ 930 a.m.

Due to pandemic considerations, the hearing was scheduled to proceed by teleconference.

Notice of Hearing

A Notice of Hearing (NOH) dated September 1, 2021 was prepared by Commission staff, setting out the time, date and details for the hearing. It included instructions and telephone numbers to join the hearing remotely by telephone.

The NOH with details and instructions for the scheduled teleconference hearing was sent to the Appellant by regular mail to the address provided by her in the NOA. It was accompanied by a letter of the same date from the Commission setting out the difficulties it had encountered in trying to schedule the Failure to Pursue hearing with her and explaining the scheduling of the hearing. The regular mail was not returned and deemed to be received by the Appellant, pursuant to s. 184.1 of the MPIC Act.

How notices and orders may be given to appellant

184.1(1) Under sections 182, 182.1 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 NOH, along with the letter of September 1, 2021 and a copy of the Failure to Pursue indexed file (containing documents relevant to the hearing) were also sent to the Appellant by Canada Post Xpresspost. Delivery tracking documentation from Canada Post Xpresspost advised that following an unsuccessful attempt to deliver the item with a notice left for pick up, a final attempt at delivery to the recipient was made on September 10, 2021, but the item was refused by the recipient and returned to sender.

The NOH was deemed to be delivered by regular mail and the hearing proceeded.

Issue

The issue before the Commission was whether the Appellant had failed to diligently pursue their appeal.

Disposition

Following a review of the documentary evidence on file and the submission of counsel for MPIC, the Commission finds that the Appellant has failed to diligently pursue their appeal and that the appeal should be dismissed.

The Hearing

The hearing commenced by teleconference at 9:30 a.m. on November 18, 2021. Counsel for MPIC was in attendance. The Appellant was not on the line. A grace period of 15 minutes was provided, but when the Appellant did not attend by 9:45 a.m., the hearing proceeded in her absence. The Commission heard submissions from counsel for MPIC. The Appellant did not subsequently contact the Commission to explain her absence or to request an adjournment of the hearing. In making its decision, the Commission considered the documentary evidence on file and the submission for counsel for MPIC.

Documentary Evidence

The indexed file for the Failure to Pursue hearing contained the NOA filed by the Appellant along with a handwritten summary of her reasons for appealing the IRD.

It also contained correspondence to the Appellant from the Commission:

- Advising that the CAO had withdrawn representation and requesting that she contact the Commission to advise who would be representing her, whether she had received a copy of her file from the CAO and whether she would be submitting further evidence. A NOW was also included, should she not wish to proceed with the appeal. (November 18, 2016)

- Advising that the Commission had made unsuccessful attempts to contact her by mail and by phone and asking the Appellant to contact the Commission within one month or a case conference would be scheduled to discuss the appeal. (February 18, 2017)
- Advising that several attempts had been made to contact the Appellant by telephone, with no response and that a case conference may be scheduled. (April 20, 2017)
- Advising that the Appellant had been scheduled to attend a case conference by teleconference on July 25, 2017, but that she had not participated. Instead she answered her phone only to advise that it did not work and to stop calling, before hanging up. She was advised that the case conference had continued in her absence, and that further medical reports had been identified by counsel for MPIC which would require her authorization to obtain. She was provided with a Medical Authorization Release form which she was asked to execute and return within 6 weeks. (August 2, 2017)
- Advising that 10 weeks had elapsed since the Appellant was provided with the release form, which was not returned, and that the hearing would be set down for hearing absent further medical information. (October 13, 2017)
- Advising that several unsuccessful attempts had been made to contact the Appellant and that, at the request of counsel for MPIC the matter would be held in abeyance until further notice. (January 23, 2018)
- Confirming that in a telephone conversation with her new appeals officer, the Appellant had advised that she no longer wanted to continue her appeal and would like to close her file. A NOW was attached for her to complete and return to the Commission. (December 17, 2020)
- Enclosing a NOW form for completion and return to the Commission. (February 17, 2021)

- Summarizing the history of attempts to contact the Appellant and discuss the status of her appeal. The Appellant was notified that if she did not contact the Commission to take steps to pursue her appeal within 2 months, or provide an explanation as to why she was unable to do so, then her appeal would be scheduled for hearing to determine whether she had failed to diligently pursue the appeal and whether the Commission would dismiss the appeal. (April 6, 2021)
- Advising that the Appellant had not provided any further information or been in contact with the Commission and setting out the provisions of s 182.1(1) of the MPIC Act. The Appellant was advised that the Commission would schedule a hearing date to determine whether she had failed to diligently pursue her appeal pursuant to that section and that the Secretary to the Commissioners would contact (or attempt to contact) the parties to schedule a hearing date. (July 6, 2021)

In addition to these documents in the indexed file, the Commission reviewed service and tracking information for the NOH, as referred to above.

Submission for MPIC

Counsel for MPIC submitted that the appeal should be dismissed pursuant to s.182.1(1) of the MPIC Act.

He reviewed past decisions of the Commission to identify the factors which the Commission should consider in this case. These included:

- 1) Did the appellant receive proper notice of the hearing?
- 2) If so, did the appellant failed to pursue or diligently pursue their appeal?
- 3) If so, did the appellant provide an adequate explanation for their failure?

4) Despite the above, is there some reason why the appeal should or should not be dismissed in whole or in part?

Notice

Counsel submitted that the Appellant had received proper notice of the hearing. The NOH was sent with a letter dated September 1, 2021 to the Appellant, by regular mail. The NOH was sent to the address provided on the Appellant's NOA as provided to the Commission. Therefore, the NOH was sent in compliance with the requirement in s. 184.1(1)(b) of the MPIC Act to send notice by regular mail to the address provided.

According to s. 184.1(2) of the MPIC Act, notice sent by regular mail in accordance with s. 184 (1)(b) is deemed received on the fifth day after the date of mailing, unless it is established that, acting in good faith, the appellant did not receive it until a later date, because of accident, illness or other cause beyond that person's control.

The Appellant provided no evidence to establish that she did not receive the NOH and as such the Commission should conclude that the Appellant received proper notice of the hearing and may continue to consider the remaining issues, notwithstanding the absence of the Appellant from the hearing.

Failure to Diligently Pursue

Counsel submitted that the Appellant had failed to diligently pursue their appeal. He reviewed discussion by the Commission regarding the meaning of diligence in several previous cases.

In *AC-17-179*, the Commission defined diligence as careful and persistent application of effort.

In *AC-15-008*, the Commission, at page 11, described careful and persistent application of effort. Diligence was defined as careful and steady application to one's work or duties, showing care and effort. The Commission described a two-step process where the onus is on the Appellant to show they diligently pursued their appeal or to establish that they had good reasons for their failure to do so.

In *AC-13-143*, at page 12, the Commission noted that section 182.1(1) does not require a consideration of the merits of an appeal.

In this case, it was submitted that the Appellant had failed to diligently pursue the appeal and that this was apparent upon a review of the documents in the indexed file. The Appellant had commenced the appeal on July 8, 2014. Over the following seven years she missed numerous deadlines and failed to provide information as requested.

The Commission wrote to her on November 18, 2016 indicating that the CAO was no longer representing her and inquiring as to whether she wished to proceed with her appeal. The Commission asked her to either return the enclosed NOW form or to contact the Commission if she would like to continue with her appeal. No contact was made.

On February 18, 2017, the Commission sent a further letter to the Appellant requesting that she contact the Commission to discuss her appeal, but did not receive a response. When the Commission telephoned the Appellant on February 28, 2017, she hung up and further attempts to connect with her were unsuccessful. An April 20, 2017 letter from the Commission setting out its attempts to contact her by telephone and by letter, but no response was received.

On June 1, 2017, a case conference was set for the matter to be discussed on July 25, 2017. The Appellant was scheduled to appear by teleconference and five attempts were made to telephone her, but she did not participate. When missing documents were identified, the Commission indicated that it was prepared to write to her doctor to request the relevant information but that it required signed authorization from her to do so. This form was provided to the Appellant by letter dated August 2, 2017, but no response was received.

Further correspondence was sent to the Appellant on December 17, 2020 and February 17, 2021, but she did not respond to the Commission.

MPIC submitted that the preceding evidence clearly indicates that the Appellant has failed to diligently pursue their appeal, or for that matter, to pursue it at all.

Nor has the Appellant provided a reasonable excuse for her failure to pursue the appeal. In fact, counsel for MPIC submitted, the Appellant has failed to provide any communication whatsoever despite numerous requests from the Commission to do so. The available evidence supports a complete lack of attention and interest by the Appellant in this appeal. The letter of December 17, 2020 shows that at one point she even indicated that she no longer wished to proceed with her appeal.

In conclusion, MPIC submitted that the Appellant has failed to diligently pursue this appeal and that she has not provided a reasonable excuse for the delays that have occurred in this matter. He therefore submitted that this appeal should be dismissed pursuant to section 182.1(1) of the MPIC Act.

Discussion

The MPIC Act provides:

Dismissal for failure to pursue appeal

182.1(1) Despite subsection 182(1), the commission may dismiss all or part of an appeal at any time if the commission is of the opinion that the appellant has failed to diligently pursue the appeal.

Opportunity to be heard

182.1(2) Before making a decision under subsection (1), the commission must give the appellant the opportunity to make written submissions or otherwise be heard in respect of the dismissal.

Informing parties of decision

182.1(3) The commission must give the appellant and the corporation a copy of the decision made under subsection (1), with written reasons.

The Commission has reviewed the documentary evidence as well as the submission of counsel for MPIC.

The Commission concurs with his submission that the Appellant has shown a lack of attention to or interest in this appeal. She has indicated, through her lack of response and action, and by her words on the rare occasion when she did engage with the Commission, that she does not intend to pursue the appeal. The evidence confirms that she has not applied careful and persistent care and effort to the progress of the appeal. No reason has been provided for her failure to do so.

As a result, the Commission finds that the Appellant has failed to diligently pursue their appeal.

The appeal shall therefore be dismissed.

Dated at Winnipeg this 20th day of December, 2021.

LAURA DIAMOND