

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF Appeals by [APPELLANT]  
AICAC File No.: AC-14-146, AC-14-166, AC-15-192**

**PANEL:** Laura Diamond, Chairperson  
Antoine Hacault  
Keith Poulson

**APPEARANCES:** The Appellant, [text deleted], appeared on his own behalf. Manitoba Public Insurance Corporation (“MPIC”) was represented by Matthew Maslanka.

**HEARING DATE:** July 10, 2023.

**ISSUE(S):** To determine whether the Commission has jurisdiction to hear the Appellant’s appeals which have been discontinued by Notices of Withdrawal.

**RELEVANT SECTIONS:** Section 174(1) and 182(3) 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 April 17, 2014.

He reported numerous injuries to MPIC including headaches, whiplash, sore right shoulder and upper arm, eye injury, dental injury and sore right leg.

As a result, the Appellant sought a variety of benefits from MPIC. From his case manager's decisions (CMD) he filed applications for review and received Internal Review Decisions (IRD) from MPIC. From these, he filed appeals with this Commission. Several of these appeals remain open with the Commission and subject to case management at this time.

When he filed his appeals, the Appellant was represented by the Claimant Advisor Office (CAO). His appeals requested the option of participating in mediation at the Automobile Injury Mediation (AIM) office and he attended mediation sessions with his CAO representative.

Several issues were not resolved at mediation. These included issues of Income Replacement Indemnity (IRI), permanent impairment (PI), medical expenses, employment classification and the ability to hold employment.

The following four issues arising from his appeals were resolved at mediation:

- 1) AC-14-134: dental treatment for tooth #48
- 2) AC-14-135: dental treatment
- 3) AC-14-157: reimbursement of Worker's Compensation Board (WCB) invoice
- 4) AC-14-158: dental treatment and x-rays

As a result of the resolution of these issues, a Memorandum of Agreement dated August 24, 2015 was signed and executed by the Appellant and the MPIC injury management coordinator who attended the mediation. The Appellant also signed and provided the Commission with Notices of Withdrawal of Appeal (NOW) for the resolved appeals. These were signed by the Appellant, witnessed by his CAO representative, and dated August 24, 2015. The NOWs were filed with the Commission and its appeal files in regard to these four issues were closed.

At case management conferences concerning the remaining appeals, the Appellant spoke of the withdrawn appeals but was advised these were no longer before the Commission.

The Appellant contacted Commission staff and indicated that he wished to rescind the NOWs for the four appeals resolved at mediation. The Commission asked the Appellant to provide his request in writing with accompanying reasons, which the Appellant provided on September 21, 2020. A copy was provided to Counsel for MPIC for comment and Counsel for MPIC responded on September 23, 2020, noting that the onus is on the Appellant to satisfy the Commission that he is entitled to such relief and suggesting that the Commission schedule a separate hearing date to hear the Appellant's evidence and the arguments of the parties on the issue.

A hearing was scheduled before a panel of the Commission to determine whether the Commission has jurisdiction to hear the appeals once they have been withdrawn by the Appellant. A jurisdictional Index was prepared by his Appeals Officer (AO) containing documentation relevant to the issue of the withdrawal of the appeals and the request to rescind the withdrawal. A copy was provided to the parties and the panel. The Table of Contents for this Index is attached hereto and marked as Schedule A.

The Index included the Appellant's written submission dated September 21, 2020 along with documents filed in support of his request to rescind the NOWs.

On April 22, 2021, counsel for MPIC provided a legal brief, with accompanying case law, setting out MPIC's position regarding the principles and factors the Commission should consider and apply when determining whether to set aside a NOW. A copy was provided to the Appellant and to the panel.

The hearing was scheduled to be held via teleconference on July 10 and 11, 2023 and a Notice of Hearing (NOH) was provided to the parties containing teleconference instructions.

However, on July 6, 2023, the Appellant attended at the Commission's offices to advise that he would be attending the hearing in person and to provide approximately 70 pages of additional documentation in support of his position.

It is the Commission's practice and policy to require that parties submit additional documentation more than 30 days prior to the hearing. Due to the late filing of the additional documents, a copy was provided to counsel for MPIC for comment. He was also advised that the Appellant intended to attend the hearing in person.

Counsel for MPIC did not oppose the admission of the late-filed documents and agreed to attend the hearing by videoconference (instead of the scheduled teleconference). The additional documents were provided to the panel and marked as Appendix A to the Index.

### **Issue**

The issue before the Commission was to determine whether it has jurisdiction to hear the appeals which were discontinued by the notices of withdrawal.

### **Documents**

The Index included correspondence to and from the parties along with the relevant IRDs, appeals, mediation Memorandum of Agreement and NOWs.

It also contained the Appellant's letter of submission dated September 21, 2020 wherein he set out the reasoning behind his request to have the NOW set aside.

Attachments to this submission letter were provided, including correspondence with the (WCB), medical information regarding his daughter's death, Human Rights Commission documents, sections of the Fatal Accidents Act and medical documents from Alberta.

Appendix A includes documentation in support of the Appellant's litigation against the Attorney General of Canada (regarding citizenship and immigration identity issues) in Alberta and to the Supreme Court of Canada.

At the outset of the hearing, the panel also provided the parties with copies of two Reasons for Decision from previous cases of the Commission relating to the Commission's jurisdiction to

hear appeals where NOWs were filed in *AC-13-112* and *AC-04-132*. The parties were provided an opportunity to review these Reasons for Decision, in case they wished to refer to them during their submissions. These cases were not referred to further by the parties during the hearing or by the panel.

### **Evidence of the Appellant**

The Appellant testified at the hearing and was cross-examined by counsel for MPIC.

#### Direct Examination

The Appellant advised that he has been living in [another Canadian province], but circumstances changed to allow him to be in Manitoba for this hearing. He explained that he has suffered a lot of hardship and difficulty in life over the last few years.

The Appellant explained that he came to Manitoba in [year] as a landed immigrant from [text deleted], settling with permanent residency until approximately [year], when he applied to be a Canadian citizen. He then encountered some issues with his identity, resulting in conflict and litigation with the immigration department of the federal government, which continue to this day.

He described difficulties he had after the MVA. Because of his MVA injuries, he was unable to properly function in his business, A1 Construction, which was the source of his employment and income. He also encountered business related legal issues with the WCB. As a result, he lost his connection to the business and was trying to function by working two other full-time jobs.

He had two daughters.

In July 2015 his older daughter, who was a [text deleted] year old student, died tragically in her bed, hours after being sent home from [hospital] emergency department. Investigations and an autopsy followed, preventing the family from burying their loved one for several months. He also filed a complaint with the Manitoba Human Rights Commission regarding the medical treatment

his daughter received. The death and its aftermath had a traumatic effect upon both the Appellant and his other daughter, who was [text deleted] years old at the time of her sister's death.

Struggling with the effects of this trauma, his younger daughter decided to move to [other Canadian province]. The Appellant asked her to stay in [Manitoba] so that they could work together through the challenges they faced. But his daughter was determined to move, so he followed her to live in [other Canadian province].

The Appellant explained that this was the background he was dealing with when he went with CAO representative to mediation to discuss his appeals. The mediation was scheduled long before his daughter's death, to be held in August 2015. He telephoned the CAO to advise them of daughter's passing. He testified that he expected that, in the circumstances, the mediation would be adjourned, because it was so close to the death of his daughter. He did not recall making this direct request of the CAO, and said he just expected that they would suggest it. They did not. When mediation proceeded as scheduled in August, he attended.

The Appellant testified regarding his mental and emotional condition at the time of the mediation. He explained that he loved his daughter, who was his heart and his life. He was in such poor condition that he was not there at the mediation in his mind. He had not even left his home following the death of his daughter and thought that the mediation appointment should have been cancelled, but it was not. He said that his grief was drawn out by the long delay in completing the autopsy and burying his daughter.

He remembered very little about the mediation session and said that if any questions were asked of him that day, he was not there in his mind to be able to answer the questions. His advisor told him to sign the documents and so he agreed to sign them, but this was not a proper way to deal with the circumstances and not fair to him. He was not even given time to think about the settlement agreement. He had thought that his advisor would represent him and support him in the whole appeal and was surprised when he did not. He believed his advisor owed him a greater duty.

The Appellant explained that once he moved to [other Canadian province] he reached out to the CAO and Commission offices to tell them the problem and why he had withdrawn the appeals. Nothing helped and that is why he is before the Commission now.

#### Cross- Examination of the Appellant

Counsel for MPIC confirmed with the Appellant that he attended mediation on August 24, 2015 with his CAO representative, an MPIC representative and the mediator.

When asked whether he was given an opportunity to speak, all the Appellant could recall was being asked his name and then leaving the rest to the CAO. While he agreed that the CAO made representations on his behalf, he did not agree that he understood what was said. He said that he did not understand what was going on as his mind was focused on what was going on in his personal life at the moment. He had a lot of things going on in his head during the period of the mediation hearing, but his CAO was there to direct him even though he did not understand what he was signing. Because of the condition he was in at the moment, and the life and death issues he was facing during his first experience with that type of sudden loss, that is where his mind was focused.

The Appellant confirmed that his signature did appear at the bottom of the mediation agreement. He said he was passed the paper but does not know if he read it clearly or understood what he was signing. His focus and mind were not there.

When asked whether the CAO explained what he was signing, he said he did not remember whether there was an explanation for the documents. He did not recall meeting with the CAO in person at his office or by telephone beforehand, in order to prepare for the mediation, or meeting with him privately during the scheduled mediation session.

The Appellant was asked why he waited until 2020 before telling the Commission, at a case conference for his remaining appeals, that he still wanted to appeal the dental and WCB invoice issues he had withdrawn. He said that he left the province in 2016 and after that was working on the matter by himself, over the phone. He had a lawyer for a time but he withdrew and the

Appellant had difficulty getting the file back. He was also dealing with the identity issues and had not been back to Manitoba since 2018. He said that even before he left Manitoba he took his concerns to the CAO and he thought they were going to work with him on the appeal issues, but they were not there for him.

The Appellant was not sure why some of his appeal issues had been withdrawn at mediation while others were not resolved.

### MPIC's evidence

MPIC did not call any witnesses and relied upon documentary evidence and cross-examination of the Appellant.

### Submissions

#### Submission for the Appellant

The Appellant submitted that the Commission should allow his request to set aside the withdrawal of his appeals.

The Appellant's letter to the Commission dated September 21, 2020 advised that:

*"I felt misled (sic) by the Claimant Advice (sic) office and was uncomfortable with their advice to withdraw. It was not made clear to me what the outcome of the issue would be.*

*I was not aware of the up to date medical information as well as the WCB issue (See included WCB and AI Building Maintenance Ltd.), other.*

*I asked the Commission or to consider the timeframe between the date July 09, 2015 sudden death of daughter [text deleted] to the mediation hearing, which at*

*that time I was not aware the schedule of mediation from the Claimant Advisor August 2015 my mind and thinking, actions were not correct due to my loss...*

*... This includes the medical treatment and wrongful death issue that the advice from [text deleted] (sic) to withdraw signed was wrong and contrary to my accident records both the business AI Building records."*

Before the Commission, he emphasized his continuous suffering from the MVA, his health issues and injuries, the loss of his business and the tragic loss of his daughter. Because of all this, he lost the ability to carry on. Along with his younger daughter, he suffered from trauma which was compounded by the struggles with his identity and immigration status.

His ability to make a living was compromised, but the mediation process did not work in his interest. Although he could not afford counsel to assist him with these issues, he suffered injuries and is here fighting for his rights and what he is entitled to.

#### Submission for MPIC

Counsel for MPIC addressed the issue of whether the four NOWs signed by the Appellant should be set aside and these appeals allowed to continue. He relied upon the case law reviewed in his legal brief to set out the principles and factors to be considered by the Commission in this regard.

These principles were considered by the Commission in *AC-04-104*:

- 1) a withdrawal is the serious and unilateral act of terminating a proceeding that is no longer in dispute or is worthy of prosecution;
- 2) if the expectations of finality engendered by a withdrawal are not strictly enforced, economy of the process will be lost and the process itself will become akin to a stay;

- 3) the party seeking the relief (invariably the Appellant) bears the onus of satisfying the Commission that a NOW should be set aside;
- 4) a NOW should only be set aside in presence of exceptional circumstances, so characterized because of the existence of a fundamental event that strikes at the root of the decision to withdraw;
- 5) the categories of exceptional circumstances are not closed, but include:
  - (a) an inadvertent withdrawal of the wrong appeal;
  - (b) a misapprehension of the appellant's instructions;
  - (c) procurement of the withdrawal by fraud;
  - (d) mental incapacity of the appellant at the time of the withdrawal; and
  - (e) repudiation of a settlement agreement requiring the appeal to be withdrawn.
- 6) where exceptional circumstances exist, the appellant must also establish that the appeal withdrawn has a reasonable prospect of success;
- 7) any prejudice that may result if the withdrawn appeal is resurrected should be considered and balanced against the prejudice that may otherwise result; and
- 8) the ultimate question is whether it is in the interests of justice to set aside the withdrawal and resurrect the appeal.

Counsel submitted that the main point to be considered is whether there are exceptional circumstances striking to the root of the decision to withdraw.

He acknowledged that the closest evidence of that in this case is the Appellant's claim of mental incapacity. However, he contrasted this with the medical evidence in *AC-04-104* where at least two doctors provided evidence and testimony that the Appellant was suffering from PTSD at the time of the withdrawal. No evidence of such incapacity, aside from his own testimony, was

provided to establish that the Appellant was suffering from some sort of mental incapacity when he participated in the mediation of 2015.

It is also worth noting that in the earlier case only a nine month period elapsed between the time the appeal was withdrawn and the request to reopen. A number of years went by between the Appellant's signing of the NOW and his raising the issue again at a case conference meeting in 2020, with no real explanation as to why it took so long for him to advise the Commission of his intention to proceed. One would have expected that the Appellant, once he realized that he had signed NOWs by mistake or without intent, would have advised the Commission earlier on that this was the situation. Instead, further case conference meetings transpired in the interim, before he made his intentions known.

Counsel submitted that there is evidence before the panel that the Appellant was able to attend with his representative and to participate in the mediation, ultimately signing the memorandum of agreement. There is no evidence before the panel that the CAO in any way coaxed him to sign or allowed him to enter into an agreement under some form of misapprehension.

While counsel expressed his condolences for the death of the Appellant's daughter, he submitted the evidence does not clearly establish that when the Appellant participated in mediation on August 24, 2015 his mental capacity did not allow him to appreciate what was discussed or ultimately decided upon at that mediation.

Rather, counsel submitted that the case before us was more akin to the situation in the case of *Sherwood v Cinnabar Brown Holdings Ltd.* 2021 BCCA 88 where, after signing a memorandum of agreement and notice of withdrawal, Cinnabar had a change of heart. Counsel submitted that the Appellant also had a change of heart in regard to pursuing his dental and WCB invoice claims and is attempting to now resuscitate the appeals. It was submitted that a change of heart does not rise to the level of circumstance required in order to exercise the discretion to set aside a withdrawal.

Counsel also submitted that the Appellant has not established a reasonable chance of success for the dental treatment claims. There was no evidence that they could be causally connected to the

MVA. Nor was any possible explanation presented as to why a WCB invoice should be covered by the MPIC personal injury provisions.

The claims are eight years old and revival attempted after five years. Although he did not submit evidence in this regard, counsel for MPIC submitted that there was considerable prejudice to MPIC in regards to the memory of witnesses and the availability of one of the Health Care Services consultant's, who has since retired from MPIC.

Counsel submitted that the Appellant has not met the burden upon him to establish that the Commission should exercise its discretion. Withdrawal of an appeal carries with it a serious expectation of finality. It is important to enforce that finality, particularly when it comes to mediation, which must be viewed as a serious process seeking a meeting of the minds. It would not be in the interests of justice to set aside the withdrawal in this matter.

The Appellant's request to set aside his withdrawals and allow the appeals to proceed should therefore be denied

### **Discussion**

The onus is on the Appellant to establish that factors and circumstances exist which would lead the Commission to exercise its discretion to allow his request to set aside his withdrawal of his appeals.

### **Legislation**

The provisions of the *MPIC Act* governing appeals to the Commission provide in part 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.

#### **Commission to determine its practice and procedure**

**182(3)** The commission shall determine its own practice and procedure and shall give full opportunity to the appellant and the corporation to present evidence and make submissions.

The panel generally agrees with the overall summary of the case law provided by counsel for MPIC. The Appellant in this case did not have legal representation or submit case law to advance a possible different legal perspective on this jurisdictional issue.

A withdrawal is a serious and unilateral act of terminating a proceeding and the expectation of finality engendered by a withdrawal should be strictly enforced, in order to protect effectiveness of the process. The party seeking the relief bears the onus of satisfying the Commission that a withdrawal should be set aside.

The Commission agrees that the interests of justice are an important consideration in such cases. We appreciate that there must be finality to the mediation process and that the withdrawal of an appeal following a mediated memorandum of agreement is determinative of the issue under appeal. MPIC should generally be entitled to rely upon that.

We also agree that an appellant's change of heart is not sufficient reason to set aside the withdrawal of an appeal. There must, as counsel submits, be exceptional and serious circumstances which strike at the root of the Appellant's decision to withdraw.

The Appellant's testimony, both on direct and in cross-examination, addressed his state of mind at the time. He described the trauma he experienced when his daughter died so suddenly and at such a young age, and his struggle to deal with this alongside the wait for her autopsy, the human rights complaint filed, the loss of his source of employment and income, and his younger daughter's decision to move to [other Canadian province].

He explained that he called the CAO to explain what had happened. He expected that the mediation would then be delayed, although he admitted that he did not make this specific request. When it was not, he went along with the CAO to the meeting but he could not recall very much about the mediation meeting. He did not recall preparing for the mediation with the CAO in advance or discussing the appeal issues privately with his representative during the mediation. All he recalled was being asked for his name.

The Appellant testified that, in the context of the stress and trauma he was experiencing, and because of the condition he was in while dealing with a life and death issue and focussed upon his daughter, his mind was not in the mediation. He was not able to understand what was going on.

For the most part, the panel found the Appellant's testimony with regard to these events to be credible and reliable. His evidence was not shaken on cross-examination or questioning from the panel, and no evidence was put forward to contradict his description of the events of July or the August mediation.

The panel notes that the Appellant did not provide expert medical evidence to corroborate his state of mind in the month following his daughter's death and at the mediation hearing. However, we find that the Appellant's evidence was credible on this point and enough to establish a picture of his state of mind at the mediation. The combination of stressors he experienced and the timing of events, including the death of his daughter, the long-awaited autopsy which necessitated a late burial, loss of his business and income, and his concern about his other daughter moving away, resulted in a state of shock, grief and trauma which prevented him from being fully present or attentive to the mediation. He lacked an understanding or awareness of what was transpiring in the meeting and the panel accepts the Appellant's evidence that he was not capable of understanding and consenting to the settlement arrived at.

The panel is not convinced that if we allow these appeals to proceed on the merits, MPIC would suffer sufficient prejudice to outweigh our findings regarding the Appellant's state of mind and inability to understand and consent to the mediated settlement. The Appellant has other appeals still open at the Commission. Although some of the medical consultants involved in the file may have since moved on or retired, the panel notes that the consultant dental opinions were paper reviews which did not involve examinations. These can still be used as evidence or as a basis to obtain an opinion from another dental consultant.

The panel is not prepared to hold the Appellant to a standard where he must prove at this point that the merits of his claims upon appeal present a reasonable chance of success. This is an analysis upon the merits which goes beyond the ability of the Appellant to provide or the Commission to

require at this stage of the administrative proceedings, in a forum which is meant to encourage a speedier and simpler form of access to justice than that expected in litigation before the Courts.

Rather, the panel has placed greater weight upon the circumstances surrounding the withdrawal and the Appellant's state of mind at the time.

Accordingly, the panel finds that the Appellant has established on a balance of probabilities that his state of mind in the months following the death of his daughter and during the mediation proceedings interfered with his ability to understand and provide full and informed consent to the settlement agreement and withdrawal documents. We find that these are exceptional and serious circumstances striking at the root of the decision to withdraw the appeals and have determined that the discretion of the Commission should be exercised to set aside the withdrawals, as requested by the Appellant, allowing the Appellant to proceed with these appeals on the merits before the Commission.

**Disposition**

The NOWs filed by the Appellant will be set aside and the Appellant's request to pursue the withdrawn appeals before the Commission is hereby granted.

Dated at the City of Winnipeg, in the Province of Manitoba, this 23<sup>rd</sup> day of August, 2023.

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**LAURA DIAMOND**

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**ANTOINE HACAULT**

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**KEITH POULSON**