

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-19-125**

PANEL: Pamela Reilly, Chairperson

APPEARANCES: The Appellant, [Text Deleted] was self represented. Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Matthew Maslanka (“Counsel”).

HEARING DATE: April 18, 2023.

ISSUE: Whether the Appellant failed to pursue her appeal diligently.

RELEVANT SECTIONS: Sections 182(3) (4), 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:

On June 21, 2017, the Appellant was driving on the highway when she lost a tire, causing her vehicle to hit the pavement and gradually come to a halt (“the MVA”). On November 1, 2017, the Appellant signed her Personal Injury Protection Plan (“PIPP”) intake form in which she reported MVA-related back-pain, very painful right knee, sore arms (that had

improved), and headaches. She reported that she worked as a [text deleted], but her employer laid her off in September 2017, due to a shortage of work.

On October 23, 2018, the Appellant's case manager issued a decision ("the CMD"), which considered MPIC's Health Care Services ("HCS") opinion that the MVA did not cause the Appellant's current complaints. The CMD therefore denied the Appellant's request for Income Replacement Indemnity ("IRI") benefits and Personal Care Assistance ("PCA").

On December 4, 2018, the Appellant requested that MPIC's Internal Review Office review the CMD. On June 18, 2019, the Internal Review Office issued its decision ("the IRD"), which had considered an independent medical examination report, and dismissed the Appellant's Application for Review.

On July 30, 2019, the Commission received the Appellant's Notice of Appeal ("NOA") in which the Appellant also requested the option of mediation with the Automobile Injury Mediation Office ("AIM Office"). On February 24, 2021, the AIM Office advised the Commission that the parties had completed mediation and returned the appeal file to the Commission for processing.

The Commission compiles an Indexed File of documents (the "Indexed File") relevant to the appeal, and sends this to the parties. On May 21, 2021, the Commission utilized Xpresspost to deliver the Indexed File to the Appellant, which Canada Post returned with the notation "refused/moved". On June 24, 2021, the Commission spoke with the Appellant who stated that she had moved, and provided a new address. On June 30,

2021, the Commission again utilized Xpresspost to deliver the Appellant's Indexed File to her new address.

On August 26, 2021, the Commission spoke to the Appellant to advise it would be sending an HCS Report to the Appellant. She advised that she had received the Indexed File, which the Commission encouraged her to review and then advise whether she planned to submit further information. On September 23, 2021, the Commission contacted the Appellant for an update at which time the Appellant advised she planned to retain counsel. The Commission advised it would follow-up in two weeks.

On October 7, 2021, the Commission spoke to the Appellant who said that she would speak to a lawyer 'when she had time'. The Commission requested an update from either the Appellant or her lawyer by October 29, 2021 to discuss the next steps in the appeal. The Appellant responded that she 'would not be pushed to do anything' and would act, 'when she was ready'.

The Commission scheduled a Case Conference Hearing ("CCH") for May 19, 2022 at 9:30 a.m. and sent a Notice of Case Conference Hearing ("NOCCH") dated April 1, 2022 to the Appellant, which included teleconference instructions. The Commission Chair and MPIC Counsel attended the CCH; however, the Appellant did not appear. After waiting 15 minutes to allow time for the Appellant to attend, the CCH proceeded without her.

On May 24, 2022, the Commission mailed a letter to the parties that outlined the history of the Commission's attempts to move the appeal forward. The letter quoted the *MPIC*

Act section 182.1(1), “Dismissal for failure to pursue appeal”, and explained that the Appellant may provide an explanation as to why she may be unable to pursue her appeal. The letter advised that if the Appellant did not respond within six (6) months, the Commission would schedule a Failure to Pursue Hearing (“FTP Hearing”).

On February 17, 2023, the Commission scheduled an FTP Hearing for April 18, 2023 and utilized Xpresspost to deliver the FTP Notice of Hearing (“FTP NOH”) to “[text deleted]”. On March 15, 2023, Canada Post returned the FTP NOH with notations on the Commission’s addressed envelope of “[text deleted]”. The Canada Post Xpresspost return label contained the notations, “FROM: [text deleted]” and “Reason...unclaimed.”

On April 17, 2023, the Commission spoke with the Appellant and confirmed the FTP Hearing date. The Commission also utilized email to send the FTP NOH and ten (10) documents to the Appellant, which the Commission may consider in her FTP Hearing.

Issue:

The Commission must decide whether the Appellant failed to pursue her appeal diligently, and if so, whether the Commission will dismiss the appeal.

Decision:

The Commission finds, on a balance of probabilities, that the Appellant has failed to pursue her appeal diligently and therefore dismisses the Appellant’s appeal.

The Hearing:

Because of safety considerations arising from the pandemic, and with written notice to the parties, the Commission conducted the FTP Hearing by teleconference.

In preparation for FTP hearings, the Commission compiles an FTP Indexed File, which contains all documents relevant to the FTP Hearing. The documents constitute evidence that either party may rely upon at the hearing. The Commission numbers these documents for ease of reference by the parties and the Panel. Attached to these reasons and marked as Schedule "A" is a copy of the FTP Indexed File Table of Contents.

Preliminary Discussions:

The Appellant attended the FTP Hearing via teleconference. The Commissioner referred the Appellant to documents (dated May 24 and December 1, 2022) in the FTP Indexed File that the Commission had addressed to "[text deleted]". The Commissioner asked the Appellant if this was her correct address. The Appellant replied, "Yes. It's [text deleted] and the street address is [text deleted]."

The Commissioner asked when the Appellant received the ten (10) documents in the FTP Indexed File. She said she did not know. The Commissioner asked if she had read the ten (10) documents that the Commission had emailed to her, and she responded that she had not. She said that she had put them with "all of the other documents" the Commission had sent her. The Appellant volunteered that she had "that April 1 letter". (The Reasons will comment further on this statement.)

The Commissioner explained that this hearing would consider whether she had failed to pursue her appeal diligently, and if so, whether the Commission should dismiss her appeal. The Commissioner explained that “diligent” meant whether the Appellant had made a careful, steady and persistent effort to pursue her appeal. The Commissioner asked again if the Appellant was ready to proceed today and speak to that issue, given that she may have only recently received the documents. The Appellant replied “yes”.

The Commissioner explained to the Appellant that her explanation on the issue would be evidence and therefore, under oath. Further, MPIC Counsel may have questions to ask her. The Commissioner administered an affirmation to the Appellant.

The Commissioner noted that the Appellant had filed her NOA in July 2019 in which she had described her reasons for appealing MPIC’s decisions to the Commission. The Commissioner explained that for this hearing, the Appellant should not focus on MPIC’s conduct, but focus on what careful and persistent efforts she had made to pursue her appeal, since the time she filed her NOA. The Appellant said that she understood.

Appellant Testimony:

The Appellant’s description of her efforts to pursue her appeal was, “Not much because I have no money”. She said that she is struggling with her health. She said that MPIC does not care that she has been honest with them about her health. She said she is not trying to defraud MPIC and she has bills to pay.

The Commissioner commented to the Appellant that, having heard the Appellant's statements about MPIC, she should continue to speak about what steps she had taken to pursue her appeal at the Commission. The Appellant replied, as follows:

Well, I just gave up. I just tried to get a lawyer and I can't find a lawyer that will help me...I just felt I wasn't getting anyone to help me. I hit a dead end whenever I tried, so I just gave up.

The Commission invited the Appellant to make any concluding remarks to summarize her position. The Appellant said, "No, I think I'll just keep fighting with autopac until I get somewhere."

The Commissioner explained that she had completed the process with MPIC and this was her chance to pursue the matter with the Commission, which was a separate office. Further, the Commissioner again asked if she understood that this hearing would decide whether the Commission should dismiss her appeal, which would end her right to pursue the MPIC decisions she appealed. The Appellant responded, "Well, go ahead. I'll still fight. I'll get a lawyer sooner or later."

MPIC submissions:

Counsel submitted that the issue involves section 182.1(1) and whether the Commission should dismiss the Appellant's appeal because she had failed to pursue it diligently. Counsel reviewed some factors that the Commission has considered in prior decisions on this issue, as follows:

- 1) That a consideration of s.182.1(1) does not deal with the merits of the appeal.
- 2) The focus is whether the Appellant failed to pursue her appeal diligently.

- 3) Diligence means showing a careful, steady and persistent effort.
- 4) The onus is on the Appellant to show diligence.

During Counsel's submissions, the Appellant interrupted and angrily stated that she was not going to listen saying, "You guys aren't going to help me. If you're going to dismiss, then go ahead." The Commissioner advised the Appellant that she had the right to respond to Counsel's comments once he had finished. The Appellant angrily responded, "No, I'm not going to listen to this. I'm done with this."

The Commissioner advised that the hearing would proceed to allow Counsel to complete his submission, and then allow her time to respond. The hearing proceeded, at which point the Appellant immediately said, "I don't have time for this" and left the teleconference. The Commissioner instructed Counsel to continue.

Counsel reviewed the documents in the FTP Indexed File, as well as the Appellant's testimony, and submitted that the evidence supported a conclusion that the Appellant had failed to pursue her appeal diligently. Although the Appellant had appeared at the hearing to provide an explanation, it was not sufficient. She provided no evidence that she had taken any substantive steps to pursue her appeal.

Counsel submitted that the onus is on the Appellant to show that she diligently pursued her appeal. Counsel requested that the Commission dismiss the appeal for failure to pursue diligently.

Legislation:

The applicable sections of the *MPIC Act* and Regulations are as follows:

Commission to determine its practice and procedures

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

Hearing may be conducted orally or in writing

182(4) The Commission may conduct a hearing orally, including by telephone, or in writing or partly orally and partly in writing.

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.

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.

Issue:

The Commission must decide whether the Appellant has failed to pursue her appeal diligently and if so, whether the Commission should dismiss the appeal.

Discussion:

Section 182.1(1) of the *MPIC Act* grants the Commission authority to dismiss an appeal at any time, if the Commission determines an appellant has failed to pursue the appeal diligently. This section does not require the Commission to consider the merits of the appeal. The Commission finds that the word “diligently” requires some evidence of careful, steady and persistent effort. The onus is on the Appellant to show, on a balance or probabilities, that she has not breached s.182.1(1).

The Commission obtained an updated address from the Appellant after Canada Post returned documents in June 2021. The Commission re-sent documents to the Appellant’s new address, [text deleted], which she confirmed receiving.

The Commission noted that the only ‘letter’ sent by the Commission dated “April 1”, was the April 1, 2022 NOCCH, which notified the Appellant of her May 19, 2022 CCH. The Commission utilized Xpresspost and addressed the NOCCH to, “[text deleted]” [my emphasis]. There is no evidence that Canada Post returned this package as “unclaimed.” Further, the Appellant admitted at the hearing that she received the ‘April 1 letter’. The Commission finds that the Appellant received the April 1, 2022 NOCCH.

The Commission noted that the address on the FTP NOH is also “[text deleted]”. The documentary evidence shows that Canada Post returned the FTP NOH with the notations that the package was from “[text deleted]” and returned because it was “unclaimed”. Given the Appellant’s acknowledgment of receipt of prior mail deliveries, the Commission

finds that the FTP NOH likely arrived at the Appellant's postal box, notwithstanding the lack of space between the box number and the street address.

The Appellant admitted that she had the FTP NOH and documents and was prepared to proceed, notwithstanding her comment that she had not read the documents. Therefore, the Commission finds that it has complied with section 184.1(1), and the Appellant received proper notice of the FTP Hearing.

The Appellant's statements made during Counsel's submissions are similar to the October 2021 evidence in the FTP Indexed File, in which she responded to Commission enquiries with statements that she would retain counsel when she 'had the time', 'would not be pushed to do anything', and would 'do it when she [was] ready.' The Commission finds that since filing her NOA in July 2019, the Appellant has not made much effort to pursue her appeal since AIM returned her file to the Commission in February 2021.

The Commission finds that the Appellant also received notice of the May 19, 2022 CCH, and chose not to attend. Further, there is no evidence that Canada Post returned the May 24, 2022 letter, which warned the Appellant that the Commission might dismiss her appeal pursuant to s.182.1 (1). A reasonable appellant seeking to pursue their appeal would respond to such a warning letter. The Commission accepted the Appellant's admission that she had given up on her appeal and therefore had not done much to move her appeal forward.

The Commission is satisfied that the Appellant understood the purpose of, and potential consequences arising from, the FTP Hearing. The Commission finds that the Appellant's statements, her failure to attend the CCH, and her neglect in accepting Commission documents all demonstrate her failure to make a clear, steady and persistent effort to move her appeal forward.

Disposition:

The Commission finds, on a balance of probabilities that the Appellant has failed to pursue her appeal diligently. Consequently, in accordance with s. 182.1(1), the Commission dismisses the appeal.

Dated at the City of Winnipeg, in the Province of Manitoba, this 1st day of May, 2023.

PAMELA REILLY