

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-12**

PANEL: Ms Laura Diamond, Chairman
Dr. Patrick Doyle
Ms Mary Lynn Brooks

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms Kathy Kalinowsky.

HEARING DATE: January 10, 2008

ISSUE(S): Whether the Appellant provided a reasonable excuse for
failing to file his Application for Review of the Case
Manager's decision of 18 Nov 03 within the 60-day time limit.

RELEVANT SECTIONS: Sections 172(1) and (2) of The Manitoba Public Insurance
Corporation Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY
AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S
PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION
HAVE BEEN REMOVED.**

Reasons For Decision

The Appellant was injured in a motor vehicle accident on September 26, 2003. He fractured his jaw, lost some teeth and hurt his elbow and hip. He returned to work on November 18, 2003 and, as a result, his income replacement indemnity benefits were terminated pursuant to Section 110(1)(a) of the MPIC Act.

However, following his return to employment, the Appellant's security job was terminated, after one day.

Subsequent investigations of the Appellant's condition involved assessments by [text deleted], a neurologist who reported that the Appellant has a normal neurological examine.

Another assessment by [text deleted] a neuropsychologist, identified some cognitive issues. [Appellant's neuropsychologist] reported on June 14, 2004, November 26, 2004 and June 3, 2005.

The Appellant filed an Application for Review of his case manager's decision ending his IRI benefits on August 25, 2006. He indicated that he had not been aware that he had a possible concussion, or that he had the right to seek review of the case manager's decision, and indicated that he had been waiting for the conclusion of [Appellant's neuropsychologist's] findings before seeking a review.

On October 12, 2006, an Internal Review officer for MPIC found that he was not satisfied that the Appellant's explanation for failing to file an application within 60 days of the decision terminating his benefits was convincing.

It is from this decision of the Internal Review officer that the Appellant has now appealed.

Evidence and Submission for the Appellant

The Appellant gave evidence at the appeal hearing. He testified that he had been unaware that there was an appeal process from the case manager's decision. He also described the issues that

he had been going through after the accident, including cognitive difficulties resulting from a concussion, and neurology and neuropsychological examinations.

He also described his difficulties with bowel problems, and a hip replacement surgery in September of 2005.

All of these conditions led to a lot of stress for him. When he combined this with his lack of awareness of the appeal and review processes, he submitted that he was not able to file his Application for Review within the proper time period.

Submission of MPIC

Counsel for MPIC submitted that there was no reasonable excuse for the Appellant's failure to meet the time limits.

In response to the Appellant's submission that his concussion was not diagnosed until later, and therefore, he was precluded from filing his application for review in time, counsel for MPIC submitted that it was not clear that the Appellant had suffered a concussion, as none of the ER reports, or reports from his family doctor, physiotherapist or neurologist indicated that there was a loss of consciousness.

Although that [Appellant's neuropsychologist] concluded that, due to the fact that the Appellant's jaw suffered such injuries, loss of consciousness was possible, the results of performance assessments were within the average range of functionality. In any event, according to a subsequent assessment in October 2004, all the Appellant's neuropsychological functions were within normal limits.

Counsel for MPIC submitted that there was neither a psychological nor mental health impediment that would provide a reasonable excuse for the Appellant to have missed his limitation period by more than two and half years. The Appellant had even, during that time, continued to work as self-employed [text deleted].

Counsel reviewed the criteria to be used in determining the reasonableness of an excuse including:

1. the reasons for the delay;
2. the actual length of the delay compared to the 60 day limitation period of Section 172(2);
3. whether there has been any prejudice resulting from the delay;
4. whether there was any waiver respecting the delay;
5. and any other factors which argue to the justice of the proceeding.

Counsel for MPIC submitted, that given the wording of the MPIC Act, the first criteria listed should be emphasized and weighed dramatically more than the other criteria. She submitted that the appeal of [the Appellant] should be accordingly be dismissed and the decision of the internal review officer upheld.

Discussion

Application for review of claim by corporation

172(1) A claimant may, within 60 days after receiving notice of a decision under this Part, apply in writing to the corporation for a review of the decision.

Corporation may extend time

172(2) The corporation may extend the time set out in subsection (1) if it is satisfied that the claimant has a reasonable excuse for failing to apply for a review of the decision within that time.

The onus is on the Appellant to establish a reasonable excuse for failing to file his application for review within the statutory limitation period.

The panel has reviewed the evidence of the Appellant, as well as the submissions of the Appellant and Counsel for MPIC.

In the panel's view there were several points during the period between the case manager's decision of November 18th, 2003 and the Appellant filing his application for review on August 25, 2006, when the Appellant might have become aware of a potential to challenge the case manager's decision, and acted upon it.

The first occasion arose when the Appellant saw [Appellant's neurologist], who provided a report dated March 16, 2004. Although [Appellant's neurologist] could not find any significant physical or neurological defect, he did set out the Appellant's subjective complaints and recommended that the Appellant should not be entitled to drive for period of approximately nine weeks.

The Appellant testified at the hearing that this removal of his driver's license caused a significant amount of stress, which contributed to the factors which interfered with his failure to file the application for review.

The Appellant then saw [Appellant's neuropsychologist], initially in June of 2004. [Appellant's neuropsychologist] recognized and reported some cognitive impairments. Still however, the Appellant did not seek to challenge the case manager's decision at that point.

The Appellant saw [Appellant's neuropsychologist] again, resulting in a report dated November 26, 2004. [Appellant's neuropsychologist] reported that the Appellant was demonstrating some

cognitive improvement, while recognizing some mild perseveration, which he believed was secondary to the concussion. Still the Appellant did not seek to challenge the case manager's decision at this point.

The final report from [Appellant's neuropsychologist] on June 3, 2005 indicated that the Appellant had made a full recovery in all of the neuropsychological functions that were assessed.

The Appellant still made no move to file an application for review at that point. This continued for over a year, until August of 2006.

The Appellant submitted that between June 2005 and July 2006, other stresses relating to the necessity for a hip replacement surgery and bowel resection prevented him from filing an application for review. The panel recognizes that the Appellant has suffered from several stressors, primarily the effects of the concussion, hip difficulties and bowel problems. However, this still does not remove the onus from the Appellant of filing an Application for Review for such a long period of time.

Although the Appellant argued that he was unaware of the time requirements for filing an appeal, the panel notes that the potential for challenging the decision, and the possibility of a connection between the concussion and the income replacement benefits were pointed out to him at different points. For example there are several references to these issues in the case manager's letter of November 18, 2003, notes of a conversation between the Appellant and the case manager on October 1, 2003, and conversations with the case manager on April 5, 2006. There are also several references in [Appellant's neuropsychologist's] report.

Still the Appellant failed to pursue an application for review.

The panel is of the view that, while there may have been periods where the Appellant's condition or the stresses upon him interfered with his ability to file an application for review during the three years which passed between the case manager's decision and the filing of the application for review, the Appellant has failed to establish that the stresses in his life were so severe that they completely impinged upon his ability to file an Application for Review at any time during the entire three years following the case manager's decision.

The panel is of the view that the Appellant has failed to meet the onus upon him of establishing, on a balance of probabilities, that he had a reasonable excuse for failing to file an application for review at any time during this three year period, and particularly, within the approximately fourteen month period following [Appellant's neuropsychologist's] report of June 2005, when [Appellant's neuropsychologist] found that the Appellant had made a full recovery in all the neuropsychological functions that were assessed.

Accordingly, the decision of the Internal Review officer dated October 12, 2006 is upheld by the Commission, and the Appellant's appeal hereby dismissed.

Dated at Winnipeg this 25th day of February, 2008.

LAURA DIAMOND

PATRICK DOYLE

MARY LYNN BROOKS