

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-149**

PANEL: Ms Laura Diamond

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Ken Kaltornyk of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATE: April 28, 2011

ISSUE(S): Whether the Commission should extend the time within which the Appellant may file [her] Notice of Appeal.

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

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

The Appellant was injured in a motor vehicle accident on November 29, 2007. Her Application for Compensation with MPIC indicated that at the time of the accident she was receiving CPP disability benefits. The Appellant advised that she was incapable of employment due to a pre-existing disability of multiple sclerosis which had been diagnosed 19 years previous.

The Appellant's case manager wrote to her on March 7, 2008 indicating that she was not entitled to Income Replacement Indemnity ("IRI") benefits as she was not working or capable of working at the time of the accident.

The appellant sought an Internal Review of this decision. On June 13, 2008, an Internal Review Officer for MPIC provided a decision which indicated that the case manager's decision should be upheld and that the Appellant was not regularly capable of holding employment at the time of the accident as a result of a medical condition unrelated to the collision, and was not entitled to IRI benefits.

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

The Appellant filed a Notice of Appeal from the Internal Review Decision of June 13, 2008, on October 29, 2010. As the Notice of Appeal was filed outside of the 90 day time limit set out in the MPIC Act for filing appeals from decisions of Internal Review Officers, a hearing was held to determine whether the Appellant had a reasonable excuse for the late filing of her appeal and whether the Commission should exercise its discretion to extend the time limits for the filing of the appeal.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into her appeal. She confirmed that she was aware of the 90 day time limit for the filing of an appeal. She had received the Internal Review Decision dated June 13, 2008, but had not filed the Notice of Appeal within the 90 day limit because MPIC had made it clear to her that she had no entitlement to IRI benefits, as she had been on CPP at the time of the accident and had earned to income for the previous five years.

The Appellant testified that such communication from MPIC began in the hospital when she brought up the issue of IRI and her case manager asked if she had filed income tax returns showing her income. The Appellant indicated that she had not been working, but that she had

planned to start a new job. That is when the case manager told her she was not entitled to anything because she hadn't worked before.

Then, when the Appellant pursued her Internal Review Application, the Internal Review Officer kept repeating the same thing, telling her that because she had been on CPP she had no case.

The Appellant testified that she finally decided to file a Notice of Appeal, on October 29, 2010, after speaking with the Claimant Adviser Office, who made her aware that there was a case she could actually appeal.

On cross-examination, the Appellant confirmed that she had not worked in the previous 19 years because she had been on CPP Disability Benefits. She also confirmed that although she read the notice contained in the Internal Review Decision setting out the time limits to appeal, because her case manager kept telling her she had no case, she did not want to waste time and money in appealing, when people were telling her she was not entitled.

She also indicated that she had contacted the Claimant Adviser Office ("CAO") regarding other issues which arose with MPIC.

When asked for details regarding what earlier contact she had with the CAO (in 2009), the Appellant indicated that because of the pain she had to endure it was hard to remember details like that.

The Appellant also filed a letter from the Director of Research Training and Communication of [text deleted], where she began training to work as a facilitator, but was not able to complete her

practicum as a result of her injury. She also submitted a letter from a potential employer indicating that he had a verbal agreement with the Appellant to work for him as a scholar and educator in the delivery of several two day [text deleted] training sessions delivered by his company to the [text deleted]. Due to her injuries, the Appellant was not able to perform these duties.

Counsel for the Appellant submitted that a consideration of past decisions of the Commission provided guidelines for when the Commission would be willing to extend the 90 day time limit for the filing appeals.

Counsel for the Appellant reviewed the factors which the Commission will consider in extending the deadline to file a Notice of Appeal. He admitted that in this case the delay of 25 months was a relatively lengthy period of time, but that other factors should outweigh the length of the delay.

Counsel submitted that the most important factor to consider was the reason for the delay. He cited the information in the Notice of Appeal and the Appellant's testimony that she had been convinced by both the case manager and Internal Review Officer, in written and verbal explanations, that an appeal was hopeless in her case. She had been advised repeatedly by the case manager and the Internal Review Officer that because she had been on CPP benefits for such a lengthy period of time and had not worked in over 5 years, she could not qualify for IRI benefits, even though she had advised them of two actual offers of employment which she had. The Appellant accepted the Internal Review Officer's interpretation that she was incapable of holding employment within the meaning of Section 105 of the MPIC Act.

However, counsel submitted that this was not the correct interpretation of the Act. Someone in the Appellant's situation, with no legal training, would not have appreciated that the idea of being regularly incapable of work is not an intuitive concept, but rather a technical and legal one that hinges upon the particular circumstances of the case. As such, the Appellant should be given the opportunity to put forward her case before the Appeal Commission.

Counsel also submitted that MPIC had not suffered any prejudice resulting from the Appellant's delay and that had she filed her Notice of Appeal in 2008, nothing would have changed regarding the effects upon MPIC.

Counsel submitted that there had not been any waiver of time limits and that the Appellant's case manager had not fulfilled the responsibilities of MPIC under Section 150 of the Act to advise and assist claimants. MPIC never investigated the job offers which had been made to the Appellant or made any attempt to determine if she was capable of working at a sedentary job. All their efforts were made to convince the Appellant that her case was hopeless and the Commission should correct this injustice and hear her case. The Appellant should not be penalized because she reasonably trusted the logic of the Internal Review Officer.

EVIDENCE AND SUBMISSION FOR MPIC:

Counsel for MPIC explained that the Internal Review Decision of June 13, 2008 applied Section 105 of the MPIC Act to conclude that the Appellant was not regularly capable of holding employment and not entitled to IRI benefits.

Section 105 of the MPIC Act reads:

No entitlement to I.R.I. or retirement income

105 Notwithstanding sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

The Internal Review Officer concluded there was sufficient evidence on the Appellant's file to support that she was regularly incapable of holding employment before her motor vehicle accident of November 29, 2007.

Now, two years later, the Appellant has filed a Notice of Appeal indicating that she had delayed because she thought she had no hope of appealing. The Appellant contended that she would have worked in 2008, 2009 and possibly 2010 for a few two-day sessions, which might have earned her approximately \$4,000.

Counsel reviewed the factors which the Commission looks at in determining whether to extend the deadline for appeal.

In this case, the length of the delay of two years was a very long time. Counsel noted that very few cases before the Commission have extended the time frame by this long a period. The Appellant had filed five other appeals on a timely basis, and counsel submitted that it was not clear why this one could not have been filed on time as well.

Counsel also submitted that the Appellant had failed to give an excuse for the delay. The idea that the Appellant thought that there was no hope of winning is not an excuse, and certainly not a reasonable one. The argument that a decision is so convincing that a claimant thinks they cannot win when challenging it, is not reasonable. The fact that somebody else is persuasive is not really an excuse for failing to file an appeal on time.

Counsel also submitted that as this is a case of IRI benefits, MPIC would be prejudiced by the difficulty in trying to case manage a file such as this several years down the road. It would be difficult to gather information and make the determinations.

Counsel also submitted that the Appellant's appeal had no reasonable prospect of success. Just because she might have worked for a few training sessions does not change her situation – she was still not regularly capable of holding employment at the time of the motor vehicle accident. Counsel provided an excerpt from a decision of the Commission in *[text deleted]* (AC-08-42) to show how the Commission views the question of regular employment, submitting that it would be very difficult for the Appellant to meet this test. She had not worked in 19 years before the motor vehicle accident and would have a very high hurdle to clear in showing that she would have been capable of regular employment to qualify for IRI benefits. Section 105 of the Act would certainly apply, he submitted, and the documents which the Appellant had put forward did not even come close to showing that it did not.

Counsel submitted that the Appellant's appeal was very late and that no reasonable excuse had been offered for failing to meet the time limits. As such, the Commission should not exercise its discretion to extend the time limits for this appeal.

Discussion:

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.

Section 174 of the MPIC Act gives the commission discretion to extend the time limits for filing a Notice of Appeal. The Appellant must satisfy the Commission that there is a reasonable excuse for failing to appeal within the time limits set out in the MPIC Act and a good reason for extending that time period. The Commission will consider such factors as the length of the delay, the reason for the delay, whether a prejudice results to MPIC as a result, whether there has been a waiver of time limits, and any other factors arguing towards the justice of the proceedings.

The Commission has reviewed the documentary evidence on file and the evidence of the Appellant, as well as the parties' submissions. The Commission notes that the actual length of delay beyond the 90 day limit approaches two years. The Commission further notes that the primary reason for the delay provided by the Appellant was MPIC's consistent position, expressed by both the case manager and the Internal Review Officer that she was not entitled to benefits in question. In my view this is not a reasonable explanation for the failure to file a timely Notice of Appeal, or for the lengthy delay in this case.

The Commission finds that the Appellant has not provided a reasonable excuse for the lengthy delay and for her failure to appeal the Internal Review Decision within the 90 day limits set out in Section 174 of the MPIC Act. As a result, the Commission will not extend the time within which the Appellant may appeal the Internal Review Decision dated June 13, 2008 to the Commission. The Appellant's appeal is dismissed.

Dated at Winnipeg this 18th day of May, 2011.

LAURA DIAMOND