

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-71**

PANEL: Mr. Mel Myers, Q.C., Chairperson

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: March 14, 2008

ISSUE(S):

1. Whether the Appellant received a Notice of Hearing pursuant to Sections 184.1(1) & (2) of the MPIC Act
2. Whether the Appellant's impairment benefits had been properly assessed in accordance with Table 13(1) and Division 2, Subdivision 1.1(b) of Manitoba Regulation 41/94
3. Whether the above-mentioned appeal should be dismissed on the grounds of abandonment

RELEVANT SECTIONS: Sections 184.1(1) and (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Table 13(1) and Division 2, Subdivision 1.1(b) of Manitoba Regulation 41/94

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

A Notice of Appeal was filed by [the Appellant] on May 18, 2006 in respect of an Internal Review decision relating to permanent impairment benefits granted to the Appellant by MPIC. The Notice of Appeal contained the Appellant's address as [text deleted], Manitoba. Subsequent to filing the appeal, the Appellant made arrangements for the Claimant Adviser Office to

represent the Appellant in this appeal. The Claimant Adviser Office advised the Commission, on November 21, 2007, that they were withdrawing as the Appellant's representative since they had been unable to contact the Appellant since their initial contact with him.

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

1. she had unsuccessfully attempted, on several occasions subsequent to December 20, 2007, to contact the Appellant for the purpose of providing him with the relevant material in order to permit him to conduct his appeal.
2. On December 21, 2007 she had written to the Appellant requesting contact information and had enclosed a form which would have permitted the Appellant, in writing, to withdraw his appeal if he so desired.
3. This letter was addressed to the same address that was listed on the Notice of Appeal and was returned by the Post Office marked "moved".
4. On January 4, 2008 the Commission determined that the [text deleted] telephone directory did not contain a listing for the Appellant.

The Commissioners' Secretary was instructed by the Commission to set this appeal down for a hearing and, as a result, a hearing was set for March 14, 2008 at 9:30 a.m. at the Commission's office in Winnipeg. The Commissioners' Secretary further advised the Commission that:

1. On February 5, 2008 the Commission sent out a Notice of Hearing to the Appellant by regular mail (a copy of which is attached hereto and marked as Exhibit A) in respect of this appeal, dated February 1, 2008, which was forwarded by Canada Post, by regular mail, to the Appellant's address at [text deleted], Manitoba, being the address that the Appellant set out in his Notice of Appeal.

2. A Notice of Hearing (a copy of which is attached hereto and marked as Exhibit B) in respect of this appeal, dated February 1, 2008, was forwarded by Canada Post Xpresspost to the Appellant's address at [text deleted], Manitoba, being the address that the Appellant set out in his Notice of Appeal.
3. On March 4, 2008 Canada Post returned to the Commission the above mentioned letters, which contained Exhibit A and Exhibit B, and both letters indicated that they had not been claimed by the Appellant.

Appeal Hearing

The appeal hearing commenced on March 14, 2008 at 9:30 a.m. The Appellant did not attend at that time but MPIC's legal counsel, Mr. Dean Scaletta, was present at the commencement of the hearing.

At the commencement of the hearing MPIC's legal counsel submitted that the Appellant had been properly served with a Notice of Hearing pursuant to Section 184.1(1)(b) and 184.1(2) of the MPIC Act, which provides as follows:

How notices and orders may be given to appellant

184.1(1) Under sections 182 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

...

(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.

Service of the Notice of Hearing

MPIC's legal counsel further submitted that since the Appellant had been properly served with a Notice of Hearing by mail, pursuant to these provisions of the MPIC Act, that the Commission had jurisdiction to hear the merits of the appeal in order to determine whether or not the Appellant, on the balance of probabilities, had established that MPIC had not properly assessed permanent impairment benefits that the Appellant received.

The Commission rejected MPIC's legal counsel's submission and found that the Appellant did not receive a Notice of Hearing by mail in accordance with Section 184.1(2) of the MPIC Act. The Commission noted that the regular letter containing Exhibit A was sent to the Appellant and had been returned to the Commission with the indication that there was no such address for the Appellant. The Commission further noted that the Xpresspost letter, which contained Exhibit B, was returned by Canada Post to the Commission with the indication that this letter was not claimed by the Appellant. The Commission finds that since the Appellant could not have received a mailed Notice of Hearing from the Commission that Section 184.1(2) of the MPIC Act could not be applied to establish that the Appellant had received notice that a hearing in respect of his appeal be heard by the Commission on March 14th, 2008. As a result, the Commission could not find, pursuant to Section 184.1(2) of the MPIC Act, that the Appellant was deemed to have received a notice of the hearing on the fifth day after the date of mailing of this Notice to him.

Abandonment of the Notice of Appeal

MPIC's legal counsel further submitted that the Commission was entitled to dismiss the Appellant's appeal on the grounds that the Appellant had abandoned his appeal and had not established, on a balance of probabilities, that the permanent impairment benefits awarded by MPIC have not been properly assessed.

The Commission noted that the Appellant was involved in a motor vehicle accident on July 24, 2002. MPIC's legal counsel provided a written submission to the Commission at the appeal hearing which stated in part:

The Ambulance Patient Care Report indicates that [the Appellant] sustained "minor" lacerations on the top of his head and on his left temple. He was described as "Confused" three minutes after the ambulance crew arrived, and "Oriented Alert" seven minutes later. His GCS was 13/15 on the initial assessment and 15/15 seven minutes later. The narrative notes read, in part: "PT's chest, arms, legs exposed. [No] injuries found other than contusions throughout body."

...

The first medical report, based on an examination which took place on July 30, 2002, questions whether [the Appellant] sustained a loss of consciousness. [The Appellant] apparently stated that he had a sore neck and sore knees, as well as the 2" laceration to the left temple. The report goes on to say that [the Appellant] "has never worked" and that he has "a major affective disorder and/or personality disorder". No particular treatment was recommended.

...

After consultation with a member of the MPI Health Care Services Team, the case manager assessed [the Appellant's] permanent impairments for facial scarring (at 7% - the maximum available under the Permanent Impairment Schedule in place at the time of the accident) and for "moderate" alteration of brain tissue (at 2% - based on the ambulance report).

Internal Review Officer's Decision

The Appellant filed two (2) Applications for Review dated February 18, 2004 and December 16, 2005. The Internal Review Officer issued a decision on March 1, 2006 confirming the case manager's decision dismissing the Appellant's Applications for Review. The Internal Review Officer determined that:

1. based on the medical information that was on file, which was supported by the medical opinion of [Appellant's Doctor] (November 23, 2003), the permanent impairment benefits paid were accurate and consistent with the schedule of permanent impairment benefits as set out in the legislation.

2. there was no basis for interfering with the case manager's decision dated December 1, 2003.
3. the Application for Review be dismissed.

Notice of Appeal

The Appellant filed a Notice of Appeal dated May 15, 2006 which stated "*I disagree with the permanent impairment award*". MPIC's legal counsel, in his submission to the Commission, stated that after the Appellant filed a Notice of Appeal, dated May 15, 2006, he took no further steps to proceed with the appeal. The Commission, however, noted that the Appellant did contact the Claimant Adviser Office who undertook to represent the Appellant. The Commission further noted that it was advised by the Claimant Adviser Office, on November 21, 2007, that it was withdrawing as the Appellant's representative in his appeal as they were unable to contact the Appellant since his initial contact with the Claimant Adviser Office.

Discussion

MPIC's legal counsel referred the Commission to a decision by the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004 CarswellMan 287 (Man. C.A.). In that case the Applicant was seeking an order restoring his appeal following its deemed abandonment as a result of the Appellant's failure to comply with The Court of Appeal Rules (Civil). In arriving at her decision in respect of this application, Madam Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99, 2004 CarswellMan 300 (Man. C.A.) and stated:

I also agree with Freedman J.A. in *Elias*, at para. 8, that the appropriate criteria to be considered are those set out in *Bohemier v. CIBC Mortgages Inc.* (2001), 160 Man. R. (2d) 39, 2001 MBCA 161 (Man. C.A.), and are:

1. There must have been a continuous intention to prosecute the appeal from the time

- when the documents in question should have been properly filed;
2. there must be a reasonable explanation for the failure to file the documents; and
 3. there must be arguable grounds of appeal.

Madam Justice Steel found that the Appellant had a continuous intention to prosecute the appeal but failed to satisfy the last two (2) criteria and, as a result, dismissed the Appellant's Application to the Court.

MPIC's legal counsel also referred to the Commission's decision in *[text deleted]* (*AICAC File No. AC-04-104* - July 14, 2006) wherein the Commission, in noting the distinction between a discontinuance of an appeal and an abandonment of an appeal, stated:

. . . In that case, the appellant submitted a letter, within the time period, indicating an intention to appeal. Two months later, she submitted another letter withdrawing her appeal. Nine months after that, the appellant submitted a Notice of Appeal.

The issue for determination by the Commission in the *[text deleted]* decision was whether the Appellant had discontinued her appeal and/or had abandoned her appeal. The Commission concluded that the Appellant had filed a timely appeal and determined that the Appellant had established, on a balance of probabilities, that there were grounds of a compelling nature which would be appropriate for the Commission to exercise its discretion and grant leave to set aside the Notice of Discontinuance. Pursuant to Section 174 of the MPIC Act the Commission extended the time to allow the Appellant to appeal the Internal Review decision. In arriving at its decision the Commission made a distinction between the discontinuance of an appeal (a deliberate, unilateral act of the Appellant) and an abandonment of appeal (where there is total inaction by the Appellant in processing the appeal).

The Commission finds that the legal principles set out by the Manitoba Court of Appeal in *Fegol v Asper (supra)* relating to the issue of abandonment are relevant in this appeal to the issue of whether or not an abandonment had occurred. The Commission finds, based on the evidence before the Commission, that the only action the Appellant took in pursuing the appeal was:

1. to file the Notice of Appeal dated May 15, 2006, which the Commission received on May 18, 2006.
2. to contact the Claimant Adviser Office and arrange for this office to represent the Appellant.

On November 21, 2007, the Claimant Adviser Office withdrew as the Appellant's representative on the grounds that they were not able to contact the Appellant after the initial contact. The Commission notes that the Appellant, subsequent to November 21, 2007, took no further steps to process his appeal.

The Commission further finds that the Appellant, having filed a Notice of Appeal on May 18, 2006, had an obligation, after the Claimant Adviser Office withdrew as the representative of the Appellant on November 21, 2007 (a period of six months), to have contacted the Commission to make appropriate arrangements to proceed with his appeal and he failed to do so. As a result, the Commission was unable to provide the Appellant with the relevant material he needed in order to proceed with the appeal, or to consult with him as to an appropriate date to hear his appeal.

The Commission determines that the Commission's officers took all reasonable steps, by telephone and letter, to contact the Appellant in order to set a date for the appeal hearing, but were unable to reach him.

Decision

The Commission therefore concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal after the Claimant Adviser Office withdrew as his representative.

The Commission also finds the Appellant has not provided any reasonable explanation to the Commission for delaying the processing of his appeal.

In respect of the merits of the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal for the following reasons:

1. In respect of the permanent impairment award relating to facial scarring, the Appellant received the maximum available under Class 3 – Minor Impairment, pursuant to Table 13.1 of Manitoba Regulation 41/2000. As a result, the Commission could not provide an increase in the permanent impairment award in respect of the Appellant's facial scarring even if such an increase in the award was merited.
2. In respect of the second permanent impairment award – alteration for brain tissue, the Appellant received a permanent impairment award in accordance with Division 2, Subdivision 1 (Item 1.1(b)) of Manitoba Regulation 41/94.

The Commission agrees with MPIC's legal counsel's submission who stated:

The criteria for a "moderate" cerebral concussion or contusion covers a loss of consciousness ("LOC") greater than 5 minutes but less than 1 hour. This is consistent with the information in the ambulance report which indicates that [the Appellant] was confused and less than fully alert for about seven minutes after the emergency personnel arrived.

The Commission therefore determines that the Appellant failed to establish, on a balance of probabilities, MPIC incorrectly assessed his entitlement to personal impairment awards in respect of facial scarring and the alteration of brain tissue. In summary the Commission concludes that the Appellant abandoned his appeal for the following reasons:

1. There was not a continuous intention by the Appellant to prosecute the appeal from the time he filed his Notice of Appeal.
2. The Appellant did not provide a reasonable explanation for delaying the processing of his appeal.
3. There were no arguable grounds of his appeal

The Commission, for these reasons, confirms the Internal Review Officer's decision dated March 1, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 2nd day of April, 2008.

MEL MYERS, Q.C.