

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-05-197**

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

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

**HEARING DATE:** August 4, 2009

**ISSUE(S):** Termination of Income Replacement Indemnity Benefits effective March 6, 2005.

**RELEVANT SECTIONS:** Section 110(1)(a) 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**

A Notice of Appeal was filed by [the Appellant] on November 15, 2005 in respect of an Internal Review Decision relating to the termination of the Appellant's Income Replacement Indemnity ("IRI") benefits. The Notice of Appeal contained the Appellant's address as [text deleted].

The records of the Commission indicate:

1. Between October 6, 2006 and January 2007, [text deleted] contacted the Commission regarding the Appellant's appeal and he was advised on numerous occasions that he

needed authorization to act on the Appellant's behalf. No authorization was received by the Commission.

2. In October 2008, the Appeals Officer sent a letter to the Appellant at [text deleted] inquiring as to the status of his appeal.
3. In November 2008 the Appellant telephoned the Appeals Officer and advised that [text deleted] was acting as his representative and he would be forwarding further medical reports. The Commission did not receive further medical reports or authorization for [text deleted] to act on behalf of the Appellant.
4. In January 2009, the Appeals Officer contacted the Appellant at the telephone number, [text deleted], which was provided by the Appellant to the Appeals Officer. The Appellant's landlord advised the Appeals Officer that the Appellant does not have a telephone but the Appeals Officer could leave a message for the Appellant at that number. The Appellant phoned the Appeals Officer back and again advised that he had medical reports and authorization for [text deleted] to act on his behalf at the Commission. The Commission never received any documents from the Appellant.
5. In the months of March and April 2009 the Appeals Officer contacted the Appellant's landlady and left a message that the Appellant should contact the Appeals Officer
6. During the month of April 2009 the Appeals Officer sent a letter to the Appellant at his address at [text deleted] in [text deleted] inquiring as to the status of the appeal. The Appeals Officer received no response from the Appellant.
7. On May 25, 2009 a Notice of Hearing was sent to the Appellant at [text deleted], which was the address noted on the Appellant's Notice of Appeal. The Notice of Hearing stated:

The Commission has fixed the following date for a case conference:

**Date:** Tuesday, the 4<sup>th</sup> day of August, 2009  
**Time:** 10:30 a.m.  
**Place:** 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

The purpose of the meeting is to discuss the status of the appeal.

If there are any procedural or preliminary issues the parties would like raised, please advise in writing and at least one week prior to the meeting. Issues for which the Commission has not received such reasonable advance notice may not be considered at the meeting.

8. On May 26, 2009, the Appeal Officer sent a letter to the Appellant at [text deleted] in [text deleted] requesting that he contact the Commission by Friday, July 3, 2009 to confirm his case conference hearing on August 4, 2009 at 10:30 a.m.
9. The Appeals Officer did not receive a response to this letter from the Appellant.
10. On June 11, 2009, the Commission issued two identical Notices of Hearing to the Appellant at the following two addresses:
  1. [text deleted]
  2. [text deleted]

These Notices of Hearing stated:

The Commission has fixed:

**Date:** Tuesday, the 4<sup>th</sup> day of August, 2009  
**Time:** 10:30 a.m.  
**Place:** 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

for the hearing of the appeal.

The subject of the hearing is to determine whether the appeal has been abandoned.

At this hearing, you will have the opportunity to make submissions that you have not abandoned your appeal.

If you do not attend the hearing, the Commission may consider whether you have abandoned your appeal. Alternatively, the Commission may proceed with the hearing of your appeal and may issue its final decision.

The time and date are firm; postponements will only be granted under extraordinary circumstances.

Canada Post reported that the letter sent to [text deleted] was returned indicating that the Appellant was not at this address. However, Canada Post did report that the Appellant did receive the Notice of Hearing sent to [text deleted] on June 24, 2009.

11. On July 9, 2009, Ms Leanne Zabudsky, MPIC's legal counsel, contacted the Appeals Officer and indicated that the Appellant had contacted her indicating that he wished to pursue his appeal.
12. In response the Appeals Officer telephoned the Appellant at the landlady's telephone number at [text deleted] and left a message for the Appellant that she wished to discuss his appeal.
13. In response, on July 14, 2009, the Appellant left a voicemail message for the Appeals Officer that he wished to pursue his appeal.
14. The Appeals Officer again left a message at [text deleted] for the Appellant to contact her to discuss his appeal.
15. On July 16, 2009, the Appeals Officer again telephoned [text deleted]. The Appellant's landlady indicated that she passed the previous voicemail message to the Appellant. The Appellant's landlady also informed the Appeals Officer that the Appellant may be living at his sister's residence at [text deleted] and provided her with the telephone number ([text deleted]). The Appeals Officer left a voicemail message at [text deleted] but received no response to this message.
16. On July 21, 2009 the Appeals Officer sent two identical letters to the Appellant at [text deleted] and [text deleted]. These letters both stated:

The Commission has had difficulty in communicating with you to discuss the status of your appeal. Your matter has been scheduled for an Abandonment Hearing for

August 4, 2009, but MPIC has informed us you have contacted them and indicated you wish to pursue your appeal.

Kindly advise:

- if you will be representing yourself or if you will be retaining counsel;
- if you are in a position to set a date for the hearing of your appeal and if not, when you anticipate being in a position to do so;
- your contact information as the above address and indicate a phone number we can contact you

17. The Appellant did not respond to these letters.

18. On July 23, 2009, the Commission issued two identical Notices of Hearing to the Appellant at [text deleted] and [text deleted]. These letters both stated:

The Commission has fixed the following date for a case conference:

**Date:** Tuesday, the 4<sup>th</sup> day of August, 2009  
**Time:** 10:30 a.m.  
**Place:** 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

The purpose of the meeting is to discuss the status of the appeal.

If there are any procedural or preliminary issues the parties would like raised, please advise in writing and at least one week prior to the meeting. Issues for which the Commission has not received such reasonable advance notice may not be considered at the meeting.

19. On July 23, 2009, the Appeals Officer sent two identical letters to the Appellant at [text deleted] and [text deleted]. These letters both stated:

Your matter had been scheduled for an Abandonment Hearing on August 4, 2009, at 10:30 a.m.; however you later informed us of your intent to pursue your appeal. The Commission has had difficulty in communicating with you to discuss the status of your appeal.

Please be advised your Abandonment Hearing scheduled for August 4, 2009 at 10:30 a.m. will now be changed to a Case Conference Hearing to determine:

- if you will be representing yourself or if you will be retaining counsel;
- if you are in a position to set a date for the hearing of your appeal and if not, when you anticipate being in a position to do so;

- your contact information as the above address and indicate a phone number we can contact you

**You will still be required to attend the Commission on August 4, 2009 at 10:30 a.m. to discuss your appeal.**

20. The Commission's records indicate that the Post Office reported that an unsuccessful attempt was made to deliver the two letters dated July 23, 2009 to [text deleted] and [text deleted] and as a result a notice card was left at each of these addresses indicating that these letters could be picked up at the Post Office.
21. The Appellant did not respond to the Commission with respect to the two letters dated July 23, 2009.

**Hearing:**

The hearing commenced on Tuesday, August 4, 2009 at 10:55 a.m. Ms Leanne Zabudsky, MPIC's legal counsel, attended the hearing; however the Appellant did not attend the hearing. The Commission determined that the Commission's Notice of Hearing (dated June 11, 2009) advising the Appellant that a hearing in respect of his appeal would be held on August 4, 2009 was received by the Appellant at [text deleted] on June 24, 2009. The Commission decided to proceed with the hearing and requested Ms Zabudsky to make submissions in respect of the issue of abandonment of his appeal by the Appellant and in respect of the merits of the appeal.

**Abandonment of the Appeal:**

MPIC's legal counsel 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 he was entitled to a reinstatement of the IRI benefits.

The Appellant had been involved in a motor vehicle accident on January 16, 2005 and had sustained a sore neck along with headaches, stomach pain, back pain and some dizziness. The Appellant was in receipt of IRI benefits while he was off work.

The Commission received a report from [Appellant's neurologist], a neurologist, who saw the Appellant on March 7, 2005 and provided a report on April 4, 2005. [Appellant's neurologist] found no neurological deficit and felt the Appellant had recovered from his accident and he could find no objective basis for any physical findings. [Appellant's neurologist] was of the view that the Appellant could work full duties as a [text deleted].

[MPIC's doctor], medical consultant for MPIC's Health Care Services, reviewed the Appellant's file on April 15, 2005 and concluded there was no physical impairment from the accident precluding the Appellant from performing his occupational duties.

As a result, the case manager issued a decision letter on April 19, 2005 to the Appellant terminating his IRI benefits effective March 6, 2005.

[Independent chiropractor] provided an independent chiropractic examination report to the case manager and concluded the Appellant recovered from any injuries sustained in the motor vehicle accident and that the Appellant had not demonstrated any physical impairment restricting him from performing his full-time duties.

The Appellant made application to an Internal Review Officer to review the case manager's decision.

The Internal Review Officer Decision, dated August 17, 2005, determined that the evidence supported the decision by the case manager to end the IRI benefits under Section 110(1)(a) of the MPIC Act and that the decision of the case manager of April 19, 2005 was confirmed. As a result, the Appellant filed an appeal with the Commission dated November 8, 2005, indicating that the decision of the Internal Review Officer was inaccurate.

**Discussion:**

The Commission reviewed the decision of the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004 CarswellMan 287 (Man. C.A.) in its decision on JN (File No. AC 06-71), where the Commission stated:

“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.”



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 abandonment had occurred.

An examination of the Appellant's conduct clearly indicates that there was no continuous intention to prosecute the appeal from the time when the Appellant received a copy of his indexed material on September 28, 2006.

In the month of October 2008 the Appeals Officer wrote the Appellant at [text deleted] address inquiring as to the status of the appeal. In November 2008 the Appellant telephoned the Appeals Officer and advised that [text deleted] would be his representative and he would be forwarding further medical reports. The Commission at no time received any authorization for [text deleted] to act for the Appellant or any further medical reports. In the months of January, March and April 2009 the Appeals Officer attempted to contact the Appellant by telephone inquiring as to the status of the appeal but received no response from the Appellant.

On May 26, 2009 the Appeals Officer sent a Notice of Hearing to the Appellant advising him of a case conference to be held on August 4, 2009 at the Commission office commencing at 10:30 a.m. As well, the Appeals Officer wrote to the Appellant on May 26, 2009 requesting that the Appellant contact the Commission by Friday, July 3, 2009 to confirm his case conference hearing of August 4, 2009 at 10:30 a.m. The Appellant failed to respond to this letter. As a result, the Commission forwarded a Notice of Hearing to the Appellant dated June 11, 2009 advising him that the hearing on August 4, 2009 would deal with the issue as to whether or not he had abandoned his appeal. The Post Office confirmed that the Appellant had received this Notice of Hearing on June 24, 2009. The Appellant did not contact the Appeals Officer, but

instead contacted MPIC's legal counsel on July 9, 2009 indicating he wished to pursue his appeal.

On July 14, 2009 the Appellant left a voicemail for the Appeals Officer indicating he wished to pursue his appeal. The Appeals Officer again left a message at [text deleted] for the Appellant to contact her to discuss his appeal. The Appellant did not respond to this request.

On July 16, 2009 the Appeals Officer again telephoned [text deleted] and was advised by the Appellant's landlady that she had passed the message to the Appellant and further indicated that the Appellant may now be living at [text deleted] rather than [text deleted]. On July 21, 2009, the Appeals Officer sent letters to the Appellant at [text deleted] and [text deleted] requesting him to contact the Commission to discuss his appeal. Canada Post reports that the Appellant had not attended the Post Office to pick-up these letters.

The appeal hearing was scheduled for August 4, 2009 at 10:30 a.m. The appeal hearing did not start until 10:55 a.m. The Appellant did not attend this hearing.

The Commission finds that:

1. The Appellant had an obligation on a number of occasions to contact the Commission to make appropriate arrangements to proceed with his appeal and he failed to do so.
2. The Commission took several steps by telephone and by letter to contact the Appellant in order to schedule the appeal hearing.
3. The Appellant had notice that the appeal hearing would take place on August 4, 2009 at 10:30 a.m., but he failed to attend the hearing and as a result the Commission commenced the hearing at 10:55 a.m.

The Commission therefore concludes that the Appellant's conduct clearly indicated he had no continuous intention of processing his appeal.

The Commission also finds that the Appellant had 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 does not have any arguable grounds to proceed with the appeal for the following reasons:

1. In respect of the termination of the Appellant's IRI benefits the Appellant has failed to establish, on a balance of probabilities, that the injuries he sustained in the motor vehicle accident prevented him from returning to work.
2. The medical evidence does not identify any condition related to the motor vehicle accident which would justify the Appellant not being able to return to work.

In these circumstances the Internal Review Officer was correct in confirming the decision to invoke Section 110(1)(a) of the Act in support of the decision made by the case manager to terminate the Appellant's IRI benefits. The Commission therefore determines the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly terminated his IRI benefits.

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 for his appeal.

The Commission, for these reasons, confirms the Internal Review Officer's Decision dated August 17, 2005 and dismisses the Appellant's appeal.

Dated at Winnipeg this 7<sup>th</sup> day of August, 2009.

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**MEL MYERS, Q.C.**