

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-55**

PANEL: Ms Laura Diamond

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

HEARING DATE: July 13, 2010

ISSUE(S): 1. Entitlement to Income Replacement Indemnity Benefits beyond December 31, 2005.
2. Entitlement to Income Replacement Indemnity Benefits taking into account self-employed business.

RELEVANT SECTIONS: Section 110(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Manitoba Regulation 39/94.

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 June 6, 2007 in respect of an Internal Review Decision dated March 19, 2007, relating to the Appellant's entitlement to IRI benefits. The Notice of Appeal contained the Appellant's address as [text deleted], Manitoba.

The Appellant was represented by the Claimant Adviser Office. However, the Claimant Adviser Office wrote to the Commission on March 17, 2010 to advise that they would no longer be

representing the Appellant. The Claimant Adviser informed the Commission that the Indexed file and all relevant correspondence was being returned to the Appellant and that a Notice of Withdrawal Form had been sent to the Appellant at her request.

The Claimant Adviser provided the Commission with a new address for the Appellant at [text deleted].

An Appeals Officer for the Commission then wrote to the Appellant on March 22, 2010 informing her that the Commission had been advised that the Claimant Adviser Office was no longer representing her with respect to her appeal. The Appeals Officer advised that the Commission was unsure if she would like to proceed with her appeal and enclosed a Notice of Withdrawal Form, should she no longer wish to proceed with the appeal.

The Commission was advised by the Appeals Officer that the Commission's letter of March 22, 2010 to the Appellant requested her to contact the Commission by May 3, 2010. This letter was not returned to the Commission. No response was received.

The Appeals Officer advised that she left a voicemail message on April 13, 2010 at the Appellant's phone number of [text deleted], requesting the Appellant to contact the Commission. No response was received.

The Appeals Officer advised that she left a subsequent voicemail message for the Appellant, inquiring if she still wished to proceed with her appeal. No response was received.

On May 31, 2010, the Commission issued a Notice of Hearing which stated:

You have filed a Notice of Appeal from an Internal Review decision dated March 19, 2007.

The Commission has fixed:

Date: Tuesday, the 13th day of July, 2010
Time: 10:30 a.m.
Place: 301-428 Portage Avenue, Winnipeg, MB, R3C 0E2

for a hearing into your 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.

This Notice was sent by regular mail to the Appellant at [text deleted]. The Commission notes that the address at [text deleted] was the address which was indicated in the Appellant's Notice of Appeal dated June 6, 2007. A copy of the Notice of Hearing was sent by both Xpresspost and regular mail to [text deleted]. This address in [text deleted] was provided by the Claimant Adviser Office.

A report from a member of the Commission staff indicates that the Notices of Hearing that were sent by regular mail were not returned to the Commission and that the Notice of Hearing sent by Xpresspost mail was claimed with a signature by "[text deleted]".

The Commission finds that pursuant to Section 184.1(1) and (2) of the MPIC Act, the Appellant is deemed to have received notice of the Commission's hearing scheduled for July 13, 2010 on June 7, 2010.

The hearing commenced on Tuesday, July 13, 2010 at 9:30 a.m. Mr. Andrew Robertson, MPIC's legal counsel attended the hearing; the Appellant did not. The Commission requested Mr. Robertson to make a submission in respect of the issue of abandonment of the appeal and as well to make a submission 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 she had abandoned her appeal and had not established on a balance of probabilities that she was entitled to further IRI benefits. The Appellant had been involved in a motor vehicle accident on August 21, 2002. As a result of her injuries sustained in the motor vehicle accident she was receipt of IRI benefits. On March 23, 2004 the Appellant's case manager wrote to the Appellant to indicate that the medical evidence received by MPIC indicated that she was no longer entitled to IRI benefits as of April 4, 2004, as there was no objective medical evidence or physical impairment of function that would have prevented her from performing her work. An Internal Review Officer reviewed the medical evidence and allowed the Appellant's appeal. The file was returned to the case manager for a calculation of further IRI benefits up to the end of December 2005.

MPIC also calculated IRI benefits for the Appellant from self-employed business. The Appellant sought an Internal Review of this decision, claiming that the IRI calculation for self-employed business was not properly completed. On September 10, 2007, an Internal Review Officer for

MPIC reviewed the Appellant's file, the IRI calculations and the Act and Regulations. The Internal Review Officer found that the IRI entitlement from the Appellant's self-employment had been correctly calculated based upon the legislation and the financial information provided.

The Appellant filed a Notice of Appeal on June 6, 2007 stating that the Internal Review Decisions had not addressed the issue of self-employed income calculation and did not cover compensation to the date of medical approval for return to work.

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 in *JN* (File No. AC-06-71), 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.”

Counsel for MPIC submitted that after the Claimant Adviser Office withdrew from representing the Appellant in March of 2010, the Appellant had not responded to the inquiries of the

Commission and had failed to advise whether or not she intended to pursue the Appeal. Additionally, the letter from the Claimant Adviser Office of March 17, 2010 indicated that the Appellant had requested a Notice of Withdrawal form. It was MPIC's submission that the Appellant's failure to confirm that she intends to pursue her appeal and her request for a Notice of Withdrawal form suggest that the Appellant has no intention of prosecuting her appeal.

Counsel for MPIC also submitted that the Appellant had not provided any explanation for failing to pursue her appeal and that there could not be any determination of reasonableness in that regard.

Counsel for MPIC reviewed two issues set out in the Notice of Appeal. The first issue, regarding the Appellant's self-employed income concerned the Appellant's assertion that she had not been provided with a decision on that point. However, the appellant was provided with such a decision on September 10, 2007 and has not chosen to appeal that decision. Furthermore, the Appellant's entitlement to IRI benefits was as set out in Regulation 39/94 and was properly calculated. Accordingly, it was submitted that this was not an arguable ground for appeal.

The second issue set out in the Notice of Appeal concerned whether the Appellant is entitled to IRI benefits for any period after her IRI benefits were discontinued on December 31, 2005. Counsel submitted that [Appellant's Doctor], who treated the Appellant, provided a narrative report dated September 16, 2009 in which he wrote that following the Appellant's neurotomy procedure, her pain diminished substantially, and that her neck and headache pain would not have posed a barrier for her to return to any occupation for which she was suitably trained, as of the December 31, 2005 deadline. As the most recent information from the Appellant's doctor supported that position, counsel submitted that this was not an arguable ground for this appeal.

Accordingly, counsel for MPIC submitted that the Appellant's appeal should be dismissed.

The Commission finds that the legal principle set out by the Manitoba Court of Appeal in *Fegal v Asper* (supra) relating to the issue of abandonment are relevant in this appeal to the issue of whether or not abandonment had occurred. The Commission finds, based on the evidence before the Commission that, following the filing of her Notice of Appeal and early contact with the Claimant Adviser Office, the Appellant had no further contact with the Commission and took no further steps to contact the Commission or to respond to its inquiries in making appropriate arrangements to proceed with her appeal.

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

The Commission also finds that the Appellant has not provided any reasonable explanation to the Commission for delaying the processing of her 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 and has failed to establish, on a balance of probabilities, that she was not able to work and that she should be entitled to IRI benefits after December 31, 2005.

In respect to her entitlement to a recalculation of self-employed IRI benefits, a calculation provided and upheld by an Internal Review Officer on September 10, 2007. This decision was not appealed by the Appellant.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities that she is entitled to further IRI benefits.

In summary, the Commission concludes that the Appellant has abandoned her appeal for the following reasons:

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

The Commission, for these reasons, confirms the Internal Review Officer's Decision dated March 19, 2007 and dismisses the Appellant's appeal.

Dated at Winnipeg this 28th day of July, 2010.

LAURA DIAMOND