

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-114**

PANEL: Mr. Mel Myers, Q.C.

APPEARANCES: The Appellant, [text deleted], did not attend the hearing; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: October 17, 2011

ISSUE(S):

- 1. Entitlement to further Income Replacement Indemnity benefits beyond June 26, 2005.**
- 2. Whether the appeal should be dismissed on the grounds of abandonment.**

RELEVANT SECTIONS: Section 70(1) 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

A Notice of Appeal was filed by [the Appellant] on July 25, 2006. The Appellant was represented by the Claimant Adviser Office and an index of the material was sent to them on April 12, 2007. On November 2, 2010 MPIC requested a copy of the index and material. On March 4, 2011 the Claimant Adviser Office withdrew as the Appellant's representative.

On March 7, 2011 the Commission's Appeals Officer sent a letter to the Appellant at [text deleted] being the Appellant's address as listed on the Notice of Appeal. In this letter, the

Appeals Officer requested that the Appellant advise whether or not she wished to proceed with the appeal.

On April 27, 2011 and May 13, 2011 the Appeals Officer left a telephone message for the Appellant to contact the Commission, but the Appellant failed to do so.

As the Appellant failed to contact the Appeals Officer, the Commission decided to set the matter down for an Abandonment Hearing.

On June 7, 2011, a Notice of Hearing was sent to the Appellant at [text deleted] indicating that an Abandonment Hearing would be held on August 16, 2011 at 9:30 a.m. at the Commission's office. The Notice of Hearing stated:

“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.”

On August 15, 2011 the Appellant contacted the Commission's Appeals Officer to indicate she wished to proceed with her appeal and requested an adjournment of the August 16, 2011 hearing. The Commission determined that a Case Conference would continue on August 16, 2011 and the Appellant could communicate with the Commission by telephone at her request.

At the August 16, 2011 Case Conference the Appellant participated by teleconference and Ms Danielle Robinson appeared on behalf of MPIC. The Appellant advised the Commission that she wished to pursue her appeal and requested a hearing date in October. The Commission granted her request and set the date for Monday, October 17, 2011 at 10:00 a.m. The Appellant was advised that the hearing would proceed whether she attended or not and she was provided with directions to the Commission. A Notice of Hearing was sent to the Appellant by Xpresspost mail.

Appeal Hearing:

The relevant provision of the MPIC Act is:

Definitions

[70\(1\)](#) In this Part,

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile...

On October 17, 2011 the hearing in this matter commenced at 10:00 a.m. MPIC's legal counsel was present at the hearing but the Appellant was not. As a result, the Commission delayed the hearing until 10:20 a.m. At that time the Appellant had not attended and the Commission proceeded to deal with the hearing.

The Commission noted that the Appellant had been advised by telephone at the August 16, 2011 Case Conference that as a result of her request a hearing was set for October 17, 2011 at 10:00 a.m. The Appellant was advised that the hearing would proceed whether she attended or not. The Commission therefore found that the Appellant had received notice that the hearing would

be held on October 17, 2011. The Commission waited until 10:20 a.m. before starting the hearing.

Abandonment of the Notice of 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 her appeal and had not established, on a balance of probabilities that she was entitled to further Income Replacement Indemnity ("IRI") benefits beyond June 26, 2005.

Internal Review Officer's Decision:

The Appellant appealed the Internal Review Officer's Decision of April 28, 2006 wherein it was determined that the June 10, 2005 case manager's decision terminating the Appellant's IRI entitlement as of June 26, 2005 was correct and dismissed the appeal. The Internal Review Officer reviewed all of the relevant medical reports and in relying on [MPIC's Doctor's] narrative report determined that the Appellant's development of shingles, radicular leg pain and severe pelvic pain were not related to the motor vehicle accident.

The Appellant filed a Notice of Appeal on July 25, 2006 wherein she indicated that she disagreed with the Internal Review Officer's Decision cancelling her IRI benefits.

Submission:

MPIC's legal counsel referred to a decision of the Manitoba Court of Appeal in *Fegol vs Asper*, 2004 MBCA 115, 2004 CarswellMan 287 (Man. C.A.) which 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.”

In her decision, 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.

In view of the above, MPIC’s legal counsel therefore submitted that the Appellant had abandoned her appeal and the Commission should dismiss this appeal.

Discussion:

The Commission finds that in filing a Notice of Appeal the Appellant had an obligation to demonstrate that she continuously intended to prosecute the appeal and failed to do so.

Upon filing the Notice of Appeal the Appellant had an obligation to keep in touch with the Appeals Officer. When the Appeals Officer contacted her for the purpose of discussing the status of the appeal the Appellant ignored the telephone messages left for her on two occasions. As a result of the Appellant’s failure to contact the Appeals Officer the Commission was obligated to schedule a hearing on August 16, 2011 to determine whether or not the appeal had been abandoned. The Appellant contacted the Commission’s Appeals Officer on August 15, 2011 and indicated that she wished to proceed with the Appeal. She was advised that a Case Conference would be held on August 16, 2011 to deal with this matter. On August 16, 2011 the Commission contacted the Appellant by telephone and she agreed to attend a hearing of the

appeal on Monday October 17, 2011 at 10:00 a.m. The Appellant did not attend the appeal hearing on October 17, 2011

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

The Commission finds the Appellant has not provided any reasonable explanation to the Commission for the delay in processing her appeal and for failing to attend the hearing on October 17, 2011.

In respect of the merits of the appeal, the Commission finds that the Appellant did not have arguable grounds to proceed with the appeal. The Commission agrees with the Internal Review Officer's Decision of April 28, 2006 which concluded that the Appellant had failed to establish on a balance of probabilities there was a causal connection between the injuries she sustained in the motor vehicle accident and her complaints of shingles, radicular leg pain and pelvic pain. [MPIC's Doctor] [text deleted], reviewed all the relevant medical reports and concluded there was no causal connection between the motor vehicle accident and the Appellant's complaints.

The Commission received a report from [Appellant's Doctor] dated September 13, 2010. The Commission notes that [Appellant's Doctor] stated that "possibly the physical trauma of the motor vehicle accident may have initiated the pelvic pain". In order to find a causal connection between a motor vehicle accident and the pelvic pain, the onus is upon the Appellant to establish that on a balance of probabilities there was a causal connection. At best, according to [Appellant's Doctor] there was a possible connection which in the Commission's view is not

sufficient to establish in law a causal connection between the Appellant's pelvic pain and the motor vehicle accident. Accordingly, the Commission does not find that there were arguable grounds for her appeal.

The Commission therefore determines the Appellant has failed to establish on a balance of probabilities that MPIC incorrectly assessed her entitlement to IRI benefits in respect of pelvic pain.

In summary, the Commission concludes the Appellant 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 had not provided a reasonable explanation for delaying the processing of the appeal and for failing to attend the hearing on October 17, 2011; and
3. there were no arguable grounds for her appeal.

For these reasons, the Commission confirms the Internal Review Officer's Decision dated April 28, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 21st day of October, 2011.

MEL MYERS, Q.C.