

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-92**

PANEL: Mr. Mel Myers, Chairperson

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

HEARING DATE: March 30, 2011

ISSUE(S): Whether or not the Appellant has abandoned her appeal.

RELEVANT SECTIONS: Section 182(2), (3); Section 184(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

The appeal hearing commenced at 9:30 a.m. on March 30, 2011. Mr. Andrew Robertson, MPIC's legal counsel was present at that time but the Appellant did not appear. The Commission adjourned the hearing until 9:45 a.m in order to give the Appellant an opportunity to be present at the hearing. The Appellant did not attend the hearing at 9:45 a.m. and as a result, the Commission decided to proceed with the hearing.

The Commission noted that the Notice of Hearing, dated February 1, 2009 advised:

1. The Appellant and MPIC's legal counsel that the hearing would take place on March 30, 2011 to determine whether or not the appeal had been abandoned and whether the appeal should be dismissed on the merits.

2. That the Appellant would have the opportunity to make submissions as to whether or not she had abandoned her appeal and to make submissions in respect of the merits of her appeal.
3. If the Appellant did not attend the hearing, the Commission could consider that the Appellant had abandoned her appeal while alternatively, the Commission would proceed with the hearing of the appeal to issue its final decision.

The Notice of Hearing was sent by Xpresspost and regular mail to the Appellant at [text deleted] and in accordance with Section 174(2) of the MPIC Act as well as at [text deleted]. The Commission received notice from Canada Post that the Appellant received the Notice of Hearing at her address on [text deleted] on February 4, 2011 and confirmed receipt by her signature, a copy of which was provided to the Commission.

The Commission heard a written submission from MPIC's Legal Counsel that the Appellant had abandoned her appeal of the Internal Review Decision of April 22, 2009.

The Appellant was involved in a motor vehicle accident on December 14, 2006. In a decision of the case manager dated December 29, 2008, she was denied funding for chiropractic treatment on the basis that there was insufficient evidence to support a causal relationship between the accident and her symptoms. That decision was upheld in the Internal Review Decision of April 22, 2009 (Internal Review 09-96).

The Appellant filed a Notice of Appeal with the Commission on July 21, 2009, and indicated in this Notice of Appeal that she would be self-represented at the hearing of the Appeal. In a letter dated August 4, 2009, the Commission granted the Appellant's request for additional time to file her Notice of Appeal.

The Appellant completed a "Request to Set Hearing" form indicating she was prepared to proceed to a hearing on April 20, 2010. She was not intending to call any witnesses.

MPIC completed the "Request to Set Hearing" form on May 20, 2010.

As a result, the Commission set a hearing for August 24, 2010. The hearing of August 24, 2010 was adjourned at the request of the Appellant because she was required to be out of town at that time.

The Commission's secretary attempted to contact the Appellant many times and finally spoke to her on October 8, 2010. The Appellant indicated she was not sure if she wished to proceed with the Appeal since it was difficult for her to attend a hearing at the Commission's office as she was a [text deleted]. A Notice of Withdrawal form was mailed out to the Appellant.

The completed Notice of Withdrawal form was not sent to the Commission and the Commission's Appeals Officer spoke with the Appellant in the month of November 2010 to determine if the Appellant wished to proceed or withdraw. The Appellant advised the Appeals Officer it was very difficult to attend the Commission as she is a [text deleted]. The Appeals Officer advised the Appellant that her participation via teleconference may be an option for the hearing. The Appellant indicated she wanted a week or two to consider her options and would contact the Appeals Officer.

The Appeals Officer left a voice mail message for the Appellant in the months of December 2010 and January 2011 for the purpose of setting a date for the appeal but never received a response from the Appellant. As a result, on January 19, 2011 the Commission determined that this matter should be set down for hearing in order to determine whether or not the Appellant had abandoned her appeal and whether or not the Commission should hear the appeal on its merits and issue a final decision. After service of the Notice of the Hearing was confirmed on February 4, 2011, the Commission did not receive any communication from the Appellant.

At the appeal hearing on March 30, 2011, MPIC Legal Counsel filed the written submission with the Commission which stated:

“The Commission has considered the issue of abandonment of an Appeal in several decisions, notably [text deleted] (AC 06-71 and [text deleted] (AC 04-71). In those decisions, the Commission adopted the criteria set out by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115 in determining whether an Appeal before that Court had been abandoned.

The criteria to be considered 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.

1) Was there a continuous intention to prosecute the Appeal?

Since the original hearing was adjourned, MPI has not received any contact on this Appeal from the Commission or the Appellant. MPI is not aware of any inquiries or contact that the Appellant has had with the Commission since that time. There is no indication on the file that the Appellant has taken any steps to advance this Appeal since she requested that the original scheduled hearing be adjourned. It is therefore MPI's submission that the claimant's failure to take any steps to advance her Appeal since the adjournment shows a lack of a continuous intention to prosecute the Appeal.

2) Was there a reasonable explanation for the failure, in this case, to prosecute the Appeal?

To MPI's knowledge, the Appellant has not provided any explanation for failing to pursue her Appeal. Where no explanation has been provided, it is submitted there cannot be a determination of reasonableness and the Appellant cannot meet this requirement.

3) Were there arguable grounds for the Appeal?

The issue on this Appeal is whether or not there is a causal connection between the Appellant's accident of December 14, 2006 and her reported symptoms as of December 30, 2008. The Appellant claims that she began experiences (sic) pain in her neck and upper back immediately after the accident, and that she sought treatment with a massage therapist to address these pains, but that the pain continued to get worse up to the time she made her claim with MPI for chiropractic treatment.

However, the Appellant has provided no medical evidence of her condition between the time of the accident and the time she made a claim for benefits with MPI, a period of almost two years. If the Appellant had been receiving treatment from a massage therapist, it seems reasonable to assume that this massage therapist would be able to prepare a report discussing her symptoms. No such report has been presented.

The Appellant's doctor, [text deleted], prepared a report dated November 12, 2008 (Tab 13) indicating that he had never seen the Appellant regarding her accident. Again, it is reasonable to expect that if the Appellant had been suffering such symptoms for two years, she would have mentioned it to her doctor at some point in that time.

The only medical reports on file are an Initial Chiropractic Report from [Appellant's Chiropractor] dated October 6, 2008 (Tab 16) and a Primary Health Care Report by [Appellant's Doctor] dated February 22, 2009 (Tab 7). These reports were based on examinations of the Appellant 2-3 years after the accident, and while they do give evidence of her condition at the time that the examinations were performed, they do not provide any evidence linking that condition to the accident of two years before.

There is no evidence supporting a causal connection between the Appellant's 2006 accident and her pain symptoms two years later. It is therefore MPI's position that there is no arguable ground of appeal.

The Appeal should therefore be dismissed".

Decision

The Commission, after reviewing the documentary evidence and the written submission of MPIC's Legal Counsel, concludes:

1. That the Appellant was properly served with a Notice of Hearing to take place on March 30, 2011.
2. Pursuant to the criteria set out by the Manitoba Court of Appeal in *Fegol v. Asper* (supra), the Commission determines the Appellant has abandoned her appeal.
3. The Commission adopts the submission of MPIC's legal counsel that there was no causal connection between the Appellant's motor vehicle accident in 2006 and her complaints of pain and therefore finds that there was no arguable ground for this appeal.
4. For these reasons, the Appeal is dismissed and the decision of the Internal Review Officer dated April 22, 2009 is confirmed.

Dated at Winnipeg this 20th day of April, 2011.

MEL MYERS, Q.C.