

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-06-110**

PANEL: Ms Laura Diamond, Chairperson
Ms Jacqueline Freedman
Ms Jean Moor

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

HEARING DATE: October 18, 2012

ISSUE(S): 1. Whether the permanent impairment award was properly assessed and calculated.
2. Whether the Appellant was entitled to benefits following the first 180 days after the motor vehicle accident.

RELEVANT SECTIONS: 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

A Notice of Appeal was filed by the Appellant on July 7, 2006, from an Internal Review Decision dated April 18, 2006 relating to his Income Replacement Indemnity ("IRI") benefits.

A second Notice of Appeal was filed by the Appellant on December 27, 2006 in respect of the Internal Review decision dated November 30, 2006 relating to the assessment and calculation of a permanent impairment award.

The Notices of Appeal contained the Appellant's address in Manitoba. The Appellant also filed a Statement of Reasons for Appeal dated February 26, 2007 and identified a representative, setting out the representative's address in Manitoba.

The Commission's secretary was instructed by the Commission to set the appeal down for a hearing and, as a result, a hearing was set for October 18, 2012 at 9:30 a.m. at the Commission's office in Winnipeg. The Commission's secretary advised the Commission that:

- A Notice of Hearing (a copy of which is attached hereto and marked as Exhibit "A") in respect of this appeal, dated August 3, 2012, was forwarded by Canada Xpresspost and by regular mail to the Appellant's address set out in his Notice of Appeal and his representative's address set out in the Statement of Reasons for Appeal.

The Commission's secretary further advised that the Xpresspost mail sent to the Appellant and his representative were returned to the Commission noted "Moved – Address Unknown". The regular mail was not returned.

The appeal hearing commenced on October 18, 2012 at 9:30 a.m. MPIC's legal counsel, Mr. Matthew Maslanka, was present at the commencement of the hearing, but the Appellant did not attend at that time. As no word was received from the Appellant, the hearing convened without the Appellant's participation, at 9:45 a.m.

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 Section 184.1(2) of the MPIC Act which provide 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.

Counsel further submitted that since the Appellant had been properly served with a Notice of Hearing pursuant to the provisions of the MPIC Act, the Commission had jurisdiction to hear the merits of the appeal in order to determine whether or not the Appellant, on a balance of probabilities, had established that MPIC had erred in the Internal Review decisions issued. He 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 benefits awarded by MPIC had not been properly assessed.

Counsel also clarified that the issues under appeal should properly be characterized as:

(1) whether the permanent impairment award was properly assessed and calculated; and

(2) whether the Appellant was entitled to benefits following the first 180 days after the motor vehicle accident.

The Appellant was involved in a motor vehicle accident on March 13, 2005

A case manager's decision on November 24, 2005 found that after the 181st day following the motor vehicle accident, the Appellant was functioning at a level capable of employment and therefore not entitled to Income Replacement Indemnity ("IRI") benefits. The Appellant filed an Application for Review in respect of this decision and in a decision of April 18, 2006, the Internal Review Officer upheld the case manager's decision. The Appellant filed a Notice of Appeal with the Commission on July 7, 2006 stating that he was challenging this IRI determination. Nothing had been filed subsequently by the Appellant regarding this issue.

On September 1, 2006 the case manager set out the Appellant's entitlement to a permanent impairment award. The Appellant was deemed entitled to a permanent impairment award of 27%.

The Appellant filed an Application for Review in respect of this decision stating that it did not take into account the loss of mobility/range of motion to his right hip. However, counsel noted that the investigations undertaken by the physiotherapist indicated that the range of motion in the right hip were of normal limits, resulting in a 0% permanent impairment entitlement in that regard.

In her decision of November 30, 2006, the Internal Review Officer revised the case manager's decision, increasing the permanent impairment award by 1% to take into account abnormal

healing following the Appellant's ankle surgery. The Appellant then filed a Notice of Appeal with the Commission dated December 27, 2006 stating that he was challenging the permanent impairment award for range of motion.

Contact and attempts of contact between the Commission's Appeals Officer and the Appellant showed that the Appellant was at one point represented by the Claimant Adviser Office, who withdrew from representation on March 31, 2011.

Subsequently, a mediation package was mailed out to both the Appellant and the representative listed in the Statement of Reasons for Appeal, on October 24, 2011. There was no response from either the Appellant or his representative. There was no further contact with the Appellant or his representative in spite of the Commission sending out a Notice to Set Hearing and a Notice of Hearing. The Xpresspost hearing documents were not claimed and the regular mail documents were not returned to the Commission.

Counsel referred the Commission to its previous decisions in *[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.

Counsel submitted that there had been no developments on this appeal since the Appellant filed the Statement of Reasons for Appeal in February 2007. There has been no new documentary evidence provided by the Appellant, nor any information that the Appellant is or was at any time seeking new information. There has been no contact at all with the Appellant since at least March of 2011.

With no movement on these appeals in almost six years, the Appellant has shown absolutely no continuous intention to prosecute his appeals. Additionally, it appears that the Appellant has not kept the Commission informed of his whereabouts, which indicates that he has little interest in proceeding. He did not appear at the hearing and provided no explanation for his failure to appear.

Nor was there any reasonable explanation provided for the failure, in this case, to prosecute the appeal.

Counsel for MPIC submitted that as the Appellant had failed to raise a reasonable argument in his Notice of Appeals and has not provided any evidence to support his position that the Internal Review decisions were incorrect, there are therefore no arguable grounds for appeal and the appeal should be dismissed.

With respect to the Appellant's ability to work, counsel submitted that the case manager and Internal Review Officer correctly relied upon the information provided by the Appellant's orthopaedic surgeon, [text deleted] who stated that the Appellant had recovered from his injuries and was capable of full-weight bearing. He authorized a full-time return to schooling or employment and this view was supported by the Appellant's physiotherapist and by MPIC's

Health Care Services Team. A report provided by the Appellant's family doctor did not indicate that the Appellant was unfit for work, although there was mention made of some loss of function. Counsel submitted that the Appellant could not have succeeded on this issue.

With regard to the permanent impairment benefit, the Appellant did not present any evidence to contradict the assessment of the physiotherapist, [text deleted]. [The Appellant's Physiotherapist] performed the impairment assessment on the Appellant and determined that he had no compensable impairment for a loss of range of motion due to his right hip. There is nothing in the material to suggest that his assessment was performed incorrectly and as such, it was reasonable for the case manager and the Internal Review Officer to rely upon this assessment. The Appellant provided no evidence of his claim that the impairment affected daily life and the report of [the Appellant's Doctor] did not articulate an assessment of the range of motion loss in the right hip. This is contrasted with [the Appellant's Physiotherapist's] use of proper methodology to measure the range of motion in this case.

Accordingly, counsel submitted that the Appellant would not have succeeded in his appeal on this issue.

Accordingly, counsel submitted that the appeal should be dismissed as having been abandoned by the Appellant.

Discussion:

The Commission finds that the Appellant has been properly served with the Notice of Hearing pursuant to the requirements of Section 184.1 of the Act.

The Commission also 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.

Following the filing of the Notices of Appeal and the Statement of Reasons for Appeal, the Appellant did not file any further relevant evidence or documentation in support of his appeals. He failed to attend on the date scheduled for his appeal hearing, and no reasons or communication were provided. The Commission therefore concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal and has not provided any reasonable explanation to the Commission for this failure.

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, as submitted by counsel for MPIC.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly assessed his entitlement to permanent impairment benefits or IRI benefits.

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

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

The Commission, for these reasons, confirms the Internal Review Officer's decisions of April 18, 2006 and November 30, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 28th day of November, 2012.

LAURA DIAMOND

JACQUELINE FREEDMAN

JEAN MOOR