

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-105**

PANEL: Ms Laura Diamond, Chairperson
Mr. Neil Cohen
Mr. Wilf De Graves

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Ken Kaltornyk of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Matthew Maslanka.

HEARING DATE: May 8, 2012

ISSUE(S): 1. Entitlement to further Permanent Impairment benefits.
2. Whether the appeal should be dismissed on the grounds of abandonment.

RELEVANT SECTIONS: Section 184.1(1) and (2) 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 October 20, 2008 in respect of an Internal Review Decision dated September 2, 2008 relating to permanent impairment benefits. The Notice of Appeal contained the Appellant's address at [text deleted], in [text deleted].

The Appellant then obtained representation from the Claimant Adviser Office. On October 20, 2008, the Appellant filed an "Amendment to the AICAC Notice of Appeal" form authorizing the

Claimant Adviser Office to represent him with his appeal. A copy of the Amendment is attached hereto and marked as Exhibit "A".

On December 8, 2010, the representative for the Claimant Adviser Office contacted the Commission to request updated contact information for the Appellant. The Commission contacted MPIC and obtained a new address for the appellant in [text deleted], Manitoba. This was provided to the Claimant Adviser Office.

On January 11, 2011, the Claimant Adviser advised the Commission that a letter he sent to the Appellant for an update on the status of the appeal came back indicating that the Appellant had moved with no forwarding address.

On February 7, 2011, the Claimant Adviser Office advised that they had been unable to contact the Appellant.

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

1. She undertook a "411" search, looked in the telephone book and requested updated information from MPIC.
2. When she was still unable to locate an address for the Appellant, she then contacted the Appellant's doctors' offices, including [Appellant's doctor #1] in [text deleted] and [Appellant's doctor #2] in [text deleted].
3. On February 22, 2011, the Appeals Officer was advised that the Appellant was at the same address in [text deleted], Manitoba with a new phone number which she attempted to call. However, when she called the customer was unavailable and there was no option to leave a voicemail message.

The matter was then set down by the Commission for a hearing set for May 2, 2011. However, on April 12, 2011, the Appellant contacted the Commission to advise that he had been incarcerated and would not be released until June 29, 2011. As a result, and at the request of the Claimant Adviser Office, the hearing scheduled for May 2, 2011 was adjourned.

On August 12, 2011, the Commission sent a mediation package to the Appellant. The Claimant Adviser Officer advised that the Appellant contacted him with messages in August and September of 2011. As a result, the Claimant Adviser advised that he sent a Registered Letter to the Appellant which was returned on September 29, 2011. On October 31, 2011, the Claimant Adviser advised the Commission that all attempts that he had made to reach the Appellant had been unsuccessful.

The Claimant Adviser advised that continuing efforts to locate the Appellant in January and February of 2012 were also unsuccessful.

The Commission's secretary was instructed by the Commission to set this appeal down for hearing, and as a result, a hearing was set for May 8, 2012 at 9:30 a.m. at the Commission's office in Winnipeg. The Commission's secretary further advised the Commission that as the Appellant had completed an Amendment to the Notice of Appeal authorizing the Claimant Adviser Office to represent him, the Notice of Hearing dated March 8, 2012 (a copy of which is attached hereto and marked as Exhibit "B") was sent to the Claimant Adviser Office by courier, on March 13, 2012.

The appeal hearing commenced on May 8, 2012 at 9:30 a.m. The Appellant did not attend and at 9:40 a.m. the hearing commenced.

Submission of the Claimant Adviser:

The representative for the Claimant Adviser Office advised that he had spoken to the Appellant while he was incarcerated and that the Appellant had promised to contact him when he was released. The Claimant Adviser Office had left messages for the Appellant but had not heard back from him. The CAO also sent a Registered Letter to the address set out on the Appellant's Notice of Appeal, but that letter had been returned.

The Claimant Adviser Office provided the Commission with a copy of a letter dated April 3, 2012 addressed to the Appellant and advising him of the appeal or abandonment hearing scheduled for May 8, 2012. This letter was sent by Canada Post Registered Mail to the Appellant's address at [text deleted].

The Registered Letter was signed for by a family member of the Appellant on April 10, 2012. A copy of this letter and the Canada Post report was filed at the hearing by the Claimant Adviser Office as Exhibit 1 and is attached hereto as Exhibit "C", but the Claimant Adviser indicated that he had no knowledge as to whether the Appellant had ever seen or received the letter.

Submission for MPIC:

Counsel for MPIC noted that the Appellant was involved in a motor vehicle accident on October 2, 2006. On April 15, 2008, the case manager determined that the Appellant was entitled to a permanent impairment benefit for loss of range of motion to his right 5th finger and for scarring to his right hand. No benefit was assessed for his right or left shoulder, as it was determined that these were not causally related to the motor vehicle accident.

The Appellant filed an Application for Review and on September 2, 2008 the Internal Review Officer upheld the case manager's decision.

The Appellant filed a Notice of Appeal with the Commission on October 20, 2008, indicating that his right shoulder was injured in the accident and required surgery. This interfered with his ability to work and he also had scars on his shoulders and the back of his shoulder.

The Appellant was represented by the Claimant Adviser Office. It was the understanding of counsel for MPIC that the Claimant Adviser Office had not had direct contact with the Appellant since April 12, 2011, when, while incarcerated, the Appellant stated he wanted to proceed with his appeal. However, as both the Claimant Adviser Office and the Commission then lost contact with the Appellant, on March 8, 2012, the Commission sent a Notice of Hearing to the Claimant Adviser Office and MPIC to determine if the Appellant's appeal had been abandoned.

Counsel for MPIC noted that 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.

In regard to the question of a continuous intention to prosecute the appeal, counsel for MPIC noted that it had now been almost four years since the Notice of Appeal was filed on October 20, 2008. The Claimant Adviser Office, due to its inability to maintain contact with the Appellant, has been unable to take any steps to further his appeal on his behalf. There was no indication, other than the Appellant stating in April 2011 that he was interested in pursuing his appeal, that he has taken any steps to do so.

Counsel submitted that the fact of the Appellant's incarceration should not have prevented him from maintaining contact with his representative, or from providing the Claimant Adviser Office or the Commission with at least an update of his whereabouts. The fact that he has not even felt it important to do this is evidence enough that he does not intend to pursue the appeal. It was therefore MPIC's submission that the Appellant's failure to maintain contact with his representative or provide updates as to his whereabouts strongly suggest that he has displayed no continuous intention nor has any intention to prosecute his appeal. It is the Appellant's responsibility to pursue his appeal in a reasonably diligent manner and it is obvious that he has not done so. MPIC was aware of no evidence to suggest a reason for the Appellant's delay or evidence pointing towards a continuous intention to prosecute his appeal. As such, counsel submitted that he has failed to meet this burden and his appeal should be dismissed as abandoned.

In regard to whether the Appellant had a reasonable explanation for the failure, in this case to prosecute his appeal, counsel indicated that to MPIC's knowledge, the Appellant had not provided any explanation for failing to proceed with his appeal. He did not appear at the hearing, has not been in touch with his representative or the Commission, and has not met the

requirement to explain his failure to prosecute. As such his appeal should be dismissed as abandoned.

In regard to whether there were arguable grounds for the appeal, MPIC submitted that as the Appellant had failed to raise a reasonable argument in his Notice of Appeal and has not provided any other evidence to support his position that the Internal Review Decision was incorrect, there were no arguable grounds for appeal and the appeal should be dismissed.

Counsel noted that the onus is not upon MPIC or the Commission to divine the possible arguments the Appellant *could* have made on his appeal. That onus rests upon the Appellant who has not fulfilled the onus placed upon him. No new evidence before the Commission was submitted to indicate that the case manager's decision, upheld by the Internal Review Officer, was incorrect. In the view of MPIC's Health Care Services Consultant, the medical reports on the Appellant's file did not support the finding of a shoulder injury following the motor vehicle accident. Accordingly, counsel submitted that the appeal should be dismissed as having been abandoned by the Appellant.

Discussion:

The MPIC Act provides:

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

(a) personally; or

(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.

The Commission notes that Notice of the Hearing was provided to the Appellant when the Notice was sent to the address of his authorized representative, the Claimant Adviser, who then made various attempts to call and contact the Appellant and to send a copy of the Notice of Hearing by Canada Post Registered Mail.

The Commission concludes that the Appellant's overall conduct clearly indicated that he had no continuous intention of processing his appeal after his indication to the Claimant Adviser Office on April 12, 2011 that he wanted to proceed. He did not effectively respond to any attempts to contact him made by the Claimant Adviser Officer or by the Appeals Officer of the Commission, in order to provide any further evidence or information regarding his whereabouts or his 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 provided no evidence or arguments to his counsel or to the Commission in support of the merits of his appeal.

The Commission finds that the Appellant has not provided any reasonable excuse, or any explanation for his failure to process his appeal.

The Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities, that his permanent impairment benefits were incorrectly calculated by MPIC. 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 his appeal.
2. The Appellant did not provide a reasonable explanation for failing to process his appeal.
3. There were no arguable grounds for his appeal.

The Commission, for these reasons, confirms the Internal Review Officer's Decision dated September 2, 2008 and dismisses the Appellant's appeal.

Dated at Winnipeg this 19th day of June, 2012.

LAURA DIAMOND

NEIL COHEN

WILF DE GRAVES