

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-021**

PANEL: Ms Laura Diamond, Chairperson

APPEARANCES: The Appellant, [text deleted], failed to appear by teleconference; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka.

HEARING DATE: November 29, 2011

ISSUE(S):

- 1. Whether the Appellant's appeal was abandoned;**
- 2. Whether the Appellant's Personal Injury Protection Plan benefits were correctly terminated under Section 160(a) of the MPIC Act.**

RELEVANT SECTIONS: Sections 160(a) and 184.1(1)(b) and 184.1(2) 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 Appellant was injured in a motor vehicle accident on December 29, 2000. She was in receipt of Personal Injury Protection Plan ("PIPP") benefits for treatment, expenses and Income Replacement Indemnity ("IRI") benefits.

The Appellant's case manager wrote to her on July 24, 2001 advising that a decision had been made by MPIC to terminate all her PIPP benefits. Information obtained by MPIC indicated that

the Appellant's level of functioning was much greater than she had led MPIC to believe through the information she provided. The Appellant's benefits were terminated in accordance with Section 160(a) of the MPIC Act which states:

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(a) knowingly provides false or inaccurate information to the corporation;

The Appellant sought an Internal Review of that decision. However, prior to an Internal Review hearing being held, the Appellant was convicted of fraud in the Manitoba Court of Queen's Bench. A judgment delivered on June 9, 2004 found many untruths on the part of the accused concerning her medical problems or condition and found that she unlawfully defrauded MPIC of monies between May 1, 2001 and July 7, 2001 in an amount exceeding five thousand dollars. She was sentenced to a fine of five hundred dollars and restitution.

However, a decision of the Manitoba Court of Appeal dated September 19, 2005, found that the trial judge had erred in his reliance on the crucial evidence of a witness who was permitted to refer to notes he had made of conversations with the accused, for the purpose of refreshing his memory. The Appellant's conviction was overturned by the Court of Appeal.

On February 27, 2009, an Internal Review Officer for MPIC reviewed the case manager's decision terminating benefits. He reviewed video surveillance on the Appellant's file which contradicted the information she provided to her case manager and concluded that the case manager was correct in making his decision to terminate her benefits under Section 160(a) of the MPIC Act.

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

The Appellant filed an appeal by letter on January 24, 2010. In her letter the Appellant provided her current address of [text deleted] and provided a telephone number. On April 28, 2010, the Appellant advised that she had moved to another suite in the same building and her new address was [text deleted] and that her telephone number remained the same.

On May 26, 2010, the Commission held a hearing regarding whether the Appellant had a reasonable excuse for failing to file her Notice of Appeal within the time limit set out by the Act. The Appellant participated by teleconference from the telephone number she had provided. The Commission agreed to allow an extension of time and the Appellant was requested to complete and return a Notice of Appeal form.

On August 4, 2010, the Appellant provided a completed Notice of Appeal form and confirmed her new address at [text deleted] and the same telephone number as previously provided.

On August 17, 2010, the Commission was advised that the Claimant Adviser Office had been retained by the Appellant to assist with her Appeal and the consent form provided indicated the Appellant's current address and telephone number as previously provided.

On July 22, 2011, the Commission was advised by the Claimant Adviser Office that they were no longer assisting the Appellant with her Appeal, but that her contact information remained the same.

On July 25, 2011, an appeals officer for the Commission sent a letter to the Appellant at [text deleted] requesting information regarding her appeal. The letter was not returned to the Commission and no response was received.

On August 25, 2011, the appeals officer telephoned the Appellant at the number she had provided, but the number was no longer in service. She also tried two other phone numbers provided by the Claimant Adviser Office but was advised that the Appellant was no longer working at the first number and the second number was no longer in service.

The appeals officer sent a further letter to the address the Appellant had provided. The letter was not returned to the Commission but no response was received.

On August 31, 2011, the Commission also sent a mediation package to the Appellant. The letter was not returned to the Commission and no response was received.

The appeals officer also attempted to contact the Appellant on September 29, 2011, and left a voice mail message at one of the telephone numbers provided by the Claimant Adviser Office, but no response was received.

The Commission's secretary was instructed by the Commission to set the appeal down for hearing and, as a result, a hearing was set for November 29, 2011 at 10:30 a.m. at the Commission's office in Winnipeg. As the last known address for the Appellant was in [text deleted], the hearing was scheduled to allow the Appellant to participate by teleconference.

The Commission's secretary further advised the Commission that:

1. A notice of hearing (a copy of which is attached hereto and marked as exhibit A) in respect to this appeal, dated October 11, 2011, was sent by regular mail to the Appellant at [text deleted] A copy was also sent by Canada Post Xpresspost, to the same address;
2. The hand delivered date and signature by “[text deleted]” dated October 18, 2011 was provided by Canada Post to the Commission regarding the xpresspost notice, but the Notice of Hearing sent by regular mail was not returned to the Commission.

The Appeal hearing commenced on November 29, 2011 at 10:30 a.m. MPIC’s legal counsel, Mr Terry Kumka was present at the commencement of the hearing, but the Appellant did not attend or telephone the Commission. At 10:40 a.m. on November 29, 2011, the Commission attempted to call the Appellant at the last known telephone number she had provided of [text deleted], but the telephone number was not in service.

The other number provided, [text deleted] was also called by the Commission, but the individual who answered advised that it was the wrong number and the Appellant was not there.

Accordingly, the hearing convened, without the Appellant’s participation, at 10:40 a.m. At the commencement of the hearing, MPIC’s legal counsel submitted that the Appellant had been properly served with the Notice of Hearing pursuant to Section 184.1(1)(b) and Section 184.1(2) of the MPIC Act which provides 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 letter mail 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 the Notice of Hearing by regular mail pursuant to the provisions of the MPIC Act, the Commission had jurisdiction to hear the merits of the Appeal to determine whether or not the Appellant, on a balance of probabilities had established that MPIC had erred in terminating her “PIPP” benefits.

MPIC’s legal counsel further 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 the termination of her benefits was in error.

Counsel addressed the three criteria to be considered regarding whether the Appellant had abandoned her appeal.

He noted that he was not aware of any communication between the Appellant and the Commission, beyond the filing of the Notice of Appeal, which would show an intention on behalf of the Appellant to prosecute her appeal.

Nor was he aware of any documents filed or an explanation made to provide a reasonable explanation for this failure to file further documentation or evidence, or to appear at the hearing of her appeal or participate by teleconference.

Counsel for MPIC also noted that the Appellant had not established arguable grounds for her appeal. He noted that the trial judge had convicted the Appellant of fraud because he was satisfied that there were substantial differences between what the Appellant had communicated to MPIC and what was portrayed in video surveillance evidence.

Although the Appellant had appealed this criminal conviction, the Reasons for Decision provided by the Court of Appeal in overturning her conviction centered on issues relating to whether or not the method of note taking considered by the trial judge could support a criminal conviction. The problem stemmed from a case manager taking notes and putting them into the “CARS” system without keeping original notes from the time period. The Court of Appeal concluded that while “the notes taken may have been quite satisfactory for case management purposes, they fell short of a standard suitable for criminal prosecution purposes.”

In the view of the Court of Appeal, the frailties of the case manager’s note taking process led to the conclusion that it could not be satisfied he recorded his discussions with the accused “sufficiently reliably so that his notes can be the basis of a criminal conviction for fraud.”

However, it was submitted, the Commission does not apply the same standard as the criminal court must apply. When one reviews the surveillance evidence provided, it is clear that both the case manager and Internal Review Officer directly concluded that a suspension could be amply supported.

The Appellant has failed to file any new evidence or submissions to rebut the video surveillance evidence.

Counsel for MPIC also noted that the original case management decision of July 24, 2001, had indicated that MPIC would be seeking to recover all payments it had made to the Appellant to date. However, with the Appellant's ultimate acquittal by the Court of Appeal, no further decision letters have been issued and, he noted, the Commission need not be concerned with the issue of MPIC seeking collection, following the registered acquittal through the criminal process.

Although counsel acknowledged that the Appellant may have shown an intention to proceed with her appeal in May 2010, she had not filed any evidence since then and had not contacted the Commission since July of 2011. Accordingly, MPIC submitted that the Appellant had abandoned her appeal and that the appeal should be dismissed for failing to establish that the Internal Review Officer was in error. The decision of the Internal Review Officer should therefore be upheld.

Discussion:

The Commission finds that the Appellant was deemed to have received a Notice of Hearing by regular letter mail, pursuant to Section 184.1 (2) of the MPIC Act. As a result, the Commission finds that the Appellant has been properly served with a Notice of Hearing pursuant to 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*, 2004, MBCA 115, relating to the issue of abandonment, are relevant in this appeal to the issue of whether abandonment has occurred. The appropriate criteria for the Commission to consider 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 failure to file documents or process the appeal;
3. There must be arguable grounds of appeal.

Following the filing of the letter of appeal, the Commission indicated that it would allow an extension of time for filing the appeal, and the Appellant filed a formal Notice of Appeal. However, following the filing of that Notice of Appeal, the Appellant did not file any further evidence or documentation in support of her appeal. She failed to attend at the date scheduled for her appeal hearing and did not participate by teleconference.

The Commission therefore concludes that the Appellant's conduct clearly indicates that she had no continuous intention of processing her appeal and she has not provided any reasonable explanation for this failure.

In respect to the grounds for the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal, given her failure to provide any evidence which would contradict the findings of the video surveillance evidence, the case manager's decision and the findings of the Internal Review Officer.

The Commission therefore, determines that the Appellant has failed to establish, on a balance of probabilities, that MPIC incorrectly terminated her PIPP 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 her appeal from the time she filed her Notice of Appeal;
2. The Appellant did not provide a reasonable explanation for failing to process her appeal;
3. There were no arguable grounds for her appeal.

The Commission, for these reasons, confirms the Internal Review Officer's decision dated February 27, 2009 and dismisses the Appellant's appeal.

Dated at Winnipeg this 12th day of January, 2012.

LAURA DIAMOND