

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-078**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Neil Cohen
Mr. Robert Malazdrewich

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

HEARING DATE: June 28, 2012

ISSUE(S): Entitlement to chiropractic treatments.

RELEVANT SECTIONS: Sections 184.1(1) and (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

A Notice of Appeal was filed by [the Appellant] on June 10, 2011 in respect of an Internal Review Decision relating to MPIC's denial of reimbursement for chiropractic treatments. The Notice of Appeal contained the Appellant's address as [text deleted].

The Commission was advised by the Appeals Officer that:

1. On September 14, 2011 the Commission received notification from the Claimant Adviser Office that they will be representing the Appellant.

2. On September 14, 2011 the Commission received a Notice of Withdrawal from the Appellant, but the date signed is September 12, 2003.
3. Between September 15, 2011 and September 23, 2011 the Appeals Officer attempted to contact the Appellant, but is unable to reach him.
4. On September 23, 2011 the Appeals Officer received a voice mail message from the Appellant advising that he wished to proceed with his appeal for chiropractic, whiplash injuries and injury to his hand.
5. On October 11, 2011 the Appeals Officer contacted the Claimant Adviser and informed him that the Appellant intended to proceed with the appeal.
6. On November 10, 2011 the Appeals Officer sent a mediation package to the Appellant at the Claimant Adviser's request.
7. On November 15, 2011 the Claimant Adviser Office advised that a letter had been sent on September 22, 2011 to the Appellant requesting that he respond to certain questions.
8. On November 15, 2011 the Claimant Adviser Office advised that they would be sending a letter to the Appellant's chiropractor for information in respect of the Appellant's appeal.
9. On November 17, 2011 the Appellant advised the Claimant Adviser that he had received the letter and would be responding to the questions asked.
10. On February 17, 2012 the Appeals Officer received a letter from the Claimant Adviser Office indicating they will close their file as they had received a response from the chiropractor and it provided insufficient evidence for the Claimant Adviser to continue representing the Appellant.
11. On February 17, 2012 the Claimant Adviser advised the Appeals Officer that the Appellant had moved and that they had sent the index to the last known address and to the Public Interest Law Centre.

12. On March 20, 2012, the Claimant Adviser Officer advised that the index had been returned to them marked “unclaimed”.
13. On March 21, 2012 the Appeals Officer tried to contact the Appellant at his last known telephone number and the telephone continued to ring with no opportunity to leave a message.
14. On March 22, 2012 the Appeals Officer received a call from a representative of the Public Interest Law Centre advising that they had forwarded a letter to the Appellant to contact the Commission.
15. On April 27, 2012 the Appeals Officer contacted the representative of the Public Interest Law Centre who advised that they are not representing the Appellant and they sent him a letter in March asking that he contact the Commission. The Centre received no response to this letter and cannot confirm whether or not the Appellant received the letter.
16. On May 8, 2012 the Appeals Officer discussed the matter with a Deputy Chief Commissioner who advised to schedule an abandonment hearing.

A Notice of Hearing dated May 22, 2012 (Exhibit A) was forwarded to the Appellant by Canada Post Xpresspost and by regular mail to the Appellant’s address at [text deleted], being the Appellant’s address as shown on the Notice of Appeal. Attached as Exhibit B is a delivery confirmation received from Canada Post indicating that Exhibit A was not claimed. The Notice of Hearing sent by regular mail was assumed delivered.

Appeal Hearing:

The appeal hearing was convened on June 28, 2012 at 9:30 a.m. at the Commission’s office. The Appellant did not attend at that time and the hearing was adjourned until 10:00 a.m. When the

hearing was reconvened, the Appellant was not in attendance. MPIC's legal counsel was present.

The Commission found that the Appellant had been properly serviced with a Notice of Hearing pursuant to Sections 184.1(1)(b) and 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

(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.

Service of the Notice of Hearing – Commission's Jurisdiction:

MPIC's legal counsel submitted that since the Appellant had been properly served with a Notice of Hearing by mail, pursuant to the provisions of the MPIC Act, the Commission had jurisdiction to determine whether or not the Appellant had abandoned his appeal and whether or not, on a balance of probabilities, the Appellant had established that MPIC had not properly assessed the permanent impairment benefits that he received.

Abandonment of the Appeal:

MPIC's legal counsel further submitted that the Commission was entitled to dismiss the Appellant's appeal. MPIC's legal counsel submitted:

"The Appellant was involved in a motor vehicle accident on November 28, 2008. In a decision of the Case Manager dated March 25, 2011, he was denied funding for chiropractic treatment on the basis that there was insufficient evidence to support a causal relationship between the accident and his symptoms. That decision was upheld in the Internal Review Decision of April 26, 2011 (Internal Review 11-138).

The Appellant filed a Notice of Appeal with the Commission on May 3, 2011, and indicated on that Notice of Appeal that he would be self-represented at the hearing of the Appeal. However, the Appellant appears to have obtained representation from the Claimant Advisor (sic) Office at some point in the Appeal process.

Since the Appellant filed his Notice of Appeal, the only information that MPI has received is a report from [Appellant's chiropractor] to [text deleted] of the Claimant Advisor (sic) Office dated November 30, 2011. [Appellant's chiropractor's] report indicated that she did not believe that the Appellant's symptoms were related to the accident.

MPI did not receive any further contact on this Appeal until the Notice of Hearing form dated May 22, 2012 setting this Abandonment Hearing."

Discussion:

At the appeal hearing, MPIC's legal counsel referred the Commission to a decision by the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004. In that case the Applicant was seeking an order restoring his appeal following its deemed abandonment as a result of the Appellant's failure to comply with The Court of Appeal Rules (Civil). In arriving at her decision in respect of this application, Madam Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99 and 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.

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.

The issue for determination by the Commission is whether the Appellant abandoned his appeal.

The Commission 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 to the issue of whether or not an abandonment has occurred. The Commission finds, based on the evidence before the Commission that the only actions the Appellant took in pursuing the appeal were:

1. Filing the Notice of Appeal dated May 3, 2011 which the Commission received on June 10, 2011.
2. The Appellant contacted the Claimant Adviser Office to request that they represent him at the appeal hearing.
3. The Claimant Adviser Office advised the Commission that, after receipt of a chiropractic report in respect of the Appellant, there was insufficient evidence to proceed in representing the Appellant.
4. The Appellant indicated that he wished to proceed to mediation but never filed the appropriate documentation with the Automobile Mediation Office.
5. The Appellant apparently contacted the Public Interest Law Centre; a representative of the Centre informed the Commission that they were unable to contact the Appellant.
6. On April 27, 2012 the Public Interest Law Centre representative advised that they would not be representing the Appellant by letter, with a request that he contact the Commission. They advised that they had no further contact with the Appellant.

7. The Appellant did not contact the Commission to proceed with his appeal.

The Appellant failed to attend the hearing at 9:30 a.m. on June 28, 2012. As a result the Commission proceeded with the appeal hearing.

The Commission has determined that the Appeals Officer took all reasonable steps by telephone and letter to contact the Appellant to set a date for the appeal hearing but was unable to contact him.

Decision:

The Commission determines that the Appellant's conduct clearly indicated that he had no continuous intention of proceeding with his appeal on the following grounds:

1. After filing the Notice of Appeal on June 10, 2011, the Appellant requested the Claimant Adviser to represent him.
2. The Claimant Adviser obtained a chiropractic report from the Appellant's chiropractor. In this report dated November 30, 2011 the chiropractor advised that it is not probable that the Appellant's complaints were from the November 28, 2008 motor vehicle accident.
3. The Claimant Adviser Office advised the Commission on February 17, 2012 that they were no longer representing the Appellant as there was insufficient evidence to support his appeal. The Appellant contacted the Public Interest Law Centre to represent him. They were unable to contact him and as a result they advised the Commission on April 27, 2012 that they were not representing the Appellant.

The Appellant failed to advise the Commission of the reason why he did not attend the hearing on June 28, 2012.

The Appellant failed to demonstrate a continuous intention to prosecute the appeal. MPIC's legal counsel stated:

“Since the Notice of Appeal was filed, MPI's only contact with the Appellant on this Appeal has been the report of [Appellant's chiropractor]. 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 the report of [Appellant's chiropractor] was received in November 2011. It is therefore MPI's submission that the Claimant's failure to take any steps to advance his Appeal in the past seven months shows a lack of a continuous intention to prosecute the Appeal.”

The Commission agrees with MPIC's legal counsel that on a balance of probabilities the Appellant has failed to establish that he had demonstrated a continuous intention to prosecute the appeal.

In respect of the issue relating to a reasonable explanation for failing to proceed with his appeal, MPIC's legal counsel stated:

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

The Commission agrees with the submission of MPIC's legal counsel that the Appellant has not provided a reasonable explanation for failing to prosecute his appeal.

In respect of the issue of whether there were arguable grounds for the appeal, MPIC's legal counsel submitted:

“The issue on this Appeal is whether or not there is a causal connection between the Appellant's accident of November 28, 2008 and his reported symptoms as of February/March 2011. However, the Appellant has provided no medical evidence of his condition between the time of the accident and that time, a period of over two years.

The only medical reports on the file are from [Appellant's chiropractor]. In her report of November 30, 2011, she specifically indicates that she does not think that it is likely that the Appellant's current condition is causally related to the accident.

There is no evidence supporting a causal connection between the Appellant's 2008 accident and his pain symptoms two years later. It is therefore MPI's position that there is no arguable ground of appeal."

The Commission agrees with MPIC's legal counsel and finds there are no arguable grounds for the Appellant to proceed with this appeal.

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

1. There was no continuous intention by the Appellant to prosecute the appeal after he filed his Notice of Appeal.
2. The Appellant did not provide a reasonable explanation for delaying the processing of his appeal.
3. There were no arguable grounds of appeal.

For these reasons the Commission confirms the Internal Review Officer's decision dated April 26, 2011 and dismisses the Appellant's appeal.

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

MEL MYERS, Q.C.

NEIL COHEN

ROBERT MALAZDREWICH