

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-11-157**

PANEL: Ms Laura Diamond, Chairperson
Dr. Sheldon Claman
Mr. Les Crisostomo

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: January 10, 2013

ISSUE(S): 1. Entitlement to further chiropractic treatments;
2. Entitlement to further Income Replacement Indemnity benefits.

RELEVANT SECTIONS: Sections 81(1)(a), 110(1), 136 and 184 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 8 of Manitoba Regulation 37/94 and Section 5 of Manitoba Regulation 40/94.

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 December 8, 2011 in respect of an Internal Review decision dated September 15, 2011 relating to chiropractic treatment and Income Replacement Indemnity ("IRI") benefits. The Notice of Appeal contained the Appellant's address in Manitoba, as well as the address of the counsel who was representing him at that time.

On June 22, 2012 the Commission was advised by counsel for the Appellant that he was no longer representing the Appellant. As a result, the Commission wrote to the Appellant on June 26, 2012 advising him of this fact. On July 31, 2012 the Commission staff telephoned the Appellant and was advised that he wished to proceed with his appeal but needed assistance, so the Appellant was provided a brochure regarding the Claimant Adviser Office. However, the Commission staff, in spite of leaving voicemail messages for the Appellant on September 5 and 20, 2012, did not receive any response from the Appellant.

The Commission's secretary was instructed by the Commission to set this appeal down for a hearing and, as a result, a hearing was set for January 10, 2013 at 9:30 a.m. at the Commission's office in Winnipeg. 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 of this appeal, dated October 3, 2012 was forwarded by Canada Post Xpresspost to the Appellant's address in [text deleted] Manitoba, being the address set out in his Notice of Appeal.
2. A scanned delivery date and signature, dated October 9, 2012 was provided by Canada Post to the Commission. A copy of this scanned delivery date and signature of the recipient from Canada Post is attached hereto and marked as Exhibit "B".

The appeal hearing commenced on January 10, 2013 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. Accordingly, the hearing convened without the Appellant's participation at 9:40 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)(b) and Section 184(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.

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 not properly assessed his entitlement to 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 his appeal and had not established, on a balance of probabilities, that the benefits awarded by MPIC had not been properly assessed.

Counsel reviewed the background factual information regarding the Appellant's motor vehicle accident and the reviews conducted by his case manager and the Internal Review Officer for MPIC. It appears, counsel noted, that the last document filed by the Appellant in regard to his appeal was the Notice of Appeal filed on December 12, 2011. No further information or documentation was ever provided by the Appellant.

Counsel referred the Commission to its previous decision in [text deleted] (AC-06-71) and [text deleted] (AC-04-71). In those decisions, the Commission adopted the criteria set out in 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;
3. there must be arguable grounds of appeal.

1. Was there a continuous intention to prosecute the appeal?

Counsel submitted that there had been no developments on the Appellant's appeal since the Appellant filed the Notice of Appeal in December 2011. At one point the Appellant was represented by counsel, but that was no longer the case. There had been no new documentary evidence filed. With no movement on these appeals in over a year, the Appellant had shown absolutely no continuous intention to prosecute his appeals. In addition, the Commission staff has had difficulty in contacting the Appellant in respect of the processing of his appeal, suggesting that he does not intend to proceed with the prosecution.

2. Was there a reasonable explanation or the failure, in this case, to prosecute the appeal?

Counsel submitted that no explanation had been provided and that the Appellant failed to appear at his appeal hearing.

3. Were there arguable grounds for the appeal?

Counsel submitted that as the Appellant had failed to raise a reasonable argument in his Notice of Appeal and had not provided any other evidence to support his position that the Internal Review decision was incorrect, there were therefore no arguable grounds for appeal and the appeal should be dismissed. The Appellant has the burden to establish, on a balance of probabilities that the Internal Review decision was incorrect and, by failing to provide any information or to appear, the Commission has no reason to reconsider MPIC's Internal Review decision. Further, counsel noted that there was no documentation relating to the lower back complaints alleged by the Appellant resulting from the motor vehicle accident. The injuries reported by the Appellant following the motor vehicle accident and for which he was provided treatment were to his neck, right shoulder, arm and wrist. The first mention of back complaints clearly documented is in progress reports from a rehabilitation program, one year after the accident.

In addition, the Appellant had lower back concerns prior to the motor vehicle accident and had sought treatment from his chiropractor and family doctor in this regard.

It was the uncontradicted opinion of his rehabilitation program provider that the Appellant was able to perform the essential duties of the employment he had held prior to the motor vehicle accident and, as such, IRI was properly terminated as of April 28, 2011, pursuant to Section 81(1)(a) and 110(1)(a) of the MPIC Act. The documents on the Appellant's indexed file contain

information stating that the Appellant returned to work as of May 1, 2011, which appears to have been reiterated by the Appellant at the Internal Review hearing. There is no evidence that the Appellant had not been working at his previous employment from May 1, 2011, nor is there any medical evidence that the Appellant was, at the end of his receipt of IRI benefits, incapable of doing his pre-accident employment or that he was not employed in the same position as he had been prior to the accident. As he appears to be currently working, there is no income to replace.

Counsel also submitted that the Appellant had received a lengthy course of appropriate and multi-disciplinary treatment and it was the undisputed finding of MPIC's chiropractic consultant that the Appellant had reached maximum therapeutic benefit and was unlikely to derive sustained or progressive benefit from further chiropractic treatment. As such, any further treatment would be elective and not medically required as contemplated by Section 5(a) of Manitoba Regulation 40/94.

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

Discussion:

The Commission finds that the Appellant received the Notice of Hearing, as evidenced by his signature on the Xpresspost delivery receipt. 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* (supra), relating to the issue of abandonment, are relevant in this appeal to the issue of whether or not abandonment has occurred.

Following the filing of his Notice of Appeal, the Appellant did not file any further evidence or documentation in support of the appeal. He failed to attend on the date scheduled for his appeal hearing. The Commission therefore concludes that the Appellant's conduct indicated that at the date of the appeal hearing, the Appellant 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, given his failure to establish an inability to work at the employment which he held prior to the motor vehicle accident, as a result of injuries sustained in the motor vehicle accident.

The Appellant also failed to establish, on a balance of probabilities, that further chiropractic treatment would not be elective and that it would be medically required pursuant to the MPIC Act. The evidence before the Commission was that the Appellant had reached maximum therapeutic benefit and was unlikely to derive sustained or progressive benefit from any further chiropractic treatment.

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 appeal from the time he filed his Notice of 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 15, 2011 and dismisses the Appellant's appeal.

Dated at Winnipeg this 7th day of February, 2013.

LAURA DIAMOND

DR. SHELDON CLAMAN

LES CRISOSTOMO