

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-12-157**

PANEL: Jacqueline Freedman, Chairperson

APPEARANCES: The Appellant, [text deleted], was not present at the Appeal Hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: March 26, 2014

ISSUE(S):

1. Whether the Appellant is entitled to Income Replacement Indemnity ("IRI") benefits beyond August 10, 2012;
2. Whether the above mentioned appeal should be dismissed on the ground of abandonment.

RELEVANT SECTIONS: Subsections 110(1), 184.1(1) 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

A Notice of Appeal, dated September 25, 2012, was filed by the Appellant in respect of an Internal Review Decision dated September 14, 2012, relating to Income Replacement Indemnity ("IRI") benefits. The Notice of Appeal contained the Appellant's address in Manitoba. The Appellant subsequently notified MPIC, which notified the Commission, of his new address in Manitoba. 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 March 26, 2014 at 9:30 a.m., at the Commission's office in Winnipeg.

MPIC's legal counsel, Ms Danielle Robinson, was present at the time of the hearing, but the Appellant did not appear. The Commission noted that the Notice of Hearing dated January 23, 2014, stated that:

1. The hearing would take place on March 26, 2014 to determine whether or not the appeal had been abandoned;
2. The Appellant would have the opportunity to make submissions as to whether or not he had abandoned his appeal; and
3. If the Appellant did not attend the hearing, the Commission could consider that the Appellant had abandoned his appeal and alternatively, the Commission could proceed with the hearing of the appeal and may issue its final decision.

The Commission's secretary advised the Commission that:

1. The Notice of Hearing in respect of the appeal was forwarded by Canada Post regular mail and by Canada Post Xpresspost to the Appellant's address at [text deleted], being the address the Appellant set out in his Notice of Appeal;
2. The Xpresspost sent to [text deleted]. was returned "unclaimed" on January 23, 2014;
3. The Notice of Hearing in respect of the appeal was subsequently forwarded by Canada Post regular mail and by Canada Post Xpresspost to the Appellant's new address at [text deleted]; and
4. The Xpresspost sent to [text deleted] was returned "unclaimed" on February 12, 2014.

The Appeals Officer advised the Commission and counsel for MPIC that she had previously received voice mail communication from the Appellant in which he suggested that the hearing be cancelled. He indicated that he did not intend to pursue his appeal, nor did he plan to attend the hearing. Based on that information, the hearing convened without the Appellant's participation.

Service of the Notice of Hearing

The MPIC Act contains provisions dealing with how notices and orders may be given to the Appellant. Subsection 184.1(1) 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.

The Commission finds that the Appellant was properly served with the Notice of Hearing by regular mail pursuant to the above provisions of the MPIC Act. Therefore, the Commission had jurisdiction to hear whether the Appellant had abandoned his appeal and, if there was no abandonment, to determine the merits of the appeal.

Abandonment of the Appeal

The Commission received a written submission from MPIC legal's counsel, who asserted that the Appellant had abandoned his appeal.

Counsel referred the Commission to its previous decision in [text deleted] (AC-06-71) and [text deleted] (AC-04-71), which adopted criteria set out by the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, in regard to the question of deemed abandonment. In *Fegol v Asper*, the applicant was seeking an order restoring his appeal following its deemed abandonment as a result of his failure to comply with the Court of Appeal Rules (Civil). Madame Justice Steel, referring to the decision of Freedman, J.A. in *Elias v Wolf*, (2004) MBCA 99, set out the appropriate criteria to be considered:

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.

The Commission agrees that these are the appropriate criteria to be considered. Counsel for MPIC addressed these three criteria.

Was there a continuous intention to prosecute the appeal?

MPIC's legal counsel, in her submission at the hearing, noted that in his recent voice mail communication, the Appellant indicated that he did not intend to pursue his appeal. He stated that he did not plan to attend the hearing and suggested that it be cancelled. MPIC's counsel submitted that this shows a lack of intent to prosecute the appeal.

The Commission agrees that the conduct of the Appellant does not demonstrate an intention to prosecute his appeal. Following the filing of his Notice of Appeal, the Appellant has not filed any further evidence or documentation in support of his appeal. He failed to attend on the date scheduled for his appeal hearing and in fact advised the Appeals Officer that he was not intending to pursue his appeal.

Was there a reasonable explanation for the failure, in this case, to prosecute the appeal?

MPIC's legal counsel stated in her written submission:

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 Appellant did not attend the hearing, and accordingly did not provide any evidence to the Commission regarding the reasons for his failure to prosecute his Appeal. The Commission therefore concludes that the Appellant's conduct clearly indicates that he had no continuous intention to prosecute his appeal and he has not provided any reasonable explanation to the Commission for his failure to do so.

Are there arguable grounds for the appeal?

Counsel for MPIC argued that the Appellant had not established arguable grounds for his appeal.

The decision of the Case Manager dated August 13, 2012, determined that the Appellant was able to return full-time to his pre-accident employment and therefore he was no longer entitled to IRI benefits, pursuant to subsection 110(1) of the MPIC Act which provides in part as follows:

END OF ENTITLEMENT TO INCOME REPLACEMENT INDEMNITY

Events that end entitlement to I.R.I.

110(1) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident; ...

The Internal Review Decision of September 14, 2012, upheld the case manager's decision and found that the Appellant was able to return to his pre-accident employment; therefore, he was not entitled to IRI benefits after August 10, 2012.

MPIC's legal counsel stated in her written submission:

The termination of IRI resulted from objective medical evidence which included [Rehabilitation Clinic's] discharge report from an 8 week Work Hardening program and a Functional Capacity Evaluation. This evidence indicated that the Appellant was ready to return to his pre-accident employment at full hours. The Appeal should therefore be dismissed.

The Commission agrees with MPIC's submission. The Appellant has failed to file any additional evidence to establish that he was not able to return to his pre-accident employment; on the contrary, in his Notice of Appeal, which is dated September 25, 2012, the Appellant notes that he is back at work full-time as of the date of filing the appeal.

The Commission therefore finds that the Appellant has failed to establish that he had any arguable grounds for his appeal.

Disposition

Having regard to the documentary evidence on file, the submission of MPIC's legal counsel and the criteria for establishing abandonment as set out in the decisions of *[text deleted]* (supra) and *Fegol v. Asper* (supra), the Commission determines that the Appellant has abandoned his appeal.

Based on the foregoing, the Commission dismisses the Appellant's appeal and therefore the decision of the Internal Review Officer dated September 14, 2012 is confirmed.

Dated at Winnipeg this 2nd day of April, 2014.

JACQUELINE FREEDMAN