

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-13-020**

PANEL: Jacqueline Freedman, Chairperson

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: March 18, 2014

ISSUE(S):

- 1. Whether the Appellant is entitled to Income Replacement Indemnity benefits for the first 180 days following his motor vehicle accident on November 9, 2012;**
- 2. Whether the above mentioned appeal should be dismissed on the grounds of abandonment.**

RELEVANT SECTIONS: Sections 85(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 was filed by the Appellant with the Commission on February 20, 2013 in respect of an Internal Review Decision dated January 28, 2013, relating to Income Replacement Indemnity ("IRI") benefits. The Notice of Appeal contained the Appellant's 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 18, 2014 at 9:30 a.m., at the Commission's office in Winnipeg.

MPIC's legal counsel, Mr. Matthew Maslanka, was present at the time of the hearing, but the Appellant did not appear. The Commission noted that the Notice of Hearing dated January 13, 2014, stated that:

1. The hearing would take place on March 18, 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; and
2. The Xpresspost 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 that he did not want any further communication from the Commission and that he was not intending to pursue his appeal.

The panel delayed the commencement of the hearing for 15 minutes to allow the participation of the Appellant in the event that he chose to attend in person or by telephone but he did not do so. Accordingly, the hearing reconvened without the Appellant's participation at 9:45 a.m.

Service of the Notice of Hearing

The MPIC Act contains provisions dealing with how notices and orders may be given to the Appellant. Section 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 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 his written submission stated:

"The Appellant has shown no intention to advance his appeal since the Commission received notice on September 9, 2013 that mediation had been unsuccessful.

Since that time, the CAO has withdrawn its representation.

Aside from one voicemail message of November 4, 2013, the Appellant has not responded to two letters sent by the Appeals Officer. I am advised by the Appeals Officer that in his voicemail, the Appellant indicated that he did not want any further communication from the Commission and was not intending to pursue his appeal.

It is MPI's understanding that the Appellant has been properly informed that this abandonment hearing would be proceeding".

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, he has not filed any further evidence or documentation in support of his appeal. He failed to attend at the dated 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 his submission:

“To MPI's knowledge, the Appellant has not provided any explanation for failing to pursue his appeal and in fact, has indicated that he does not wish to pursue his appeal”.

The Commission agrees with MPIC's submission, and concludes that the Appellant's conduct clearly indicates that he had no continuous intention to prosecute his appeal and 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 December 19, 2012, classified the Appellant as a non-earner at the time of the accident and therefore he was not entitled to IRI benefits for the first 180 days following the accident, pursuant to section 85(1) of the MPIC Act, which provides as follows:

Entitlement to I.R.I. for first 180 days

85(1) A non-earner is entitled to an income replacement indemnity for any time during the 180 days after an accident that the following occurs as a result of the accident:

- (a) he or she is unable to hold an employment that he or she would have held during that period if the accident had not occurred;
- (b) he or she is deprived of a benefit under the *Employment Insurance Act* (Canada) to which he or she was entitled at the time of the accident.

The Internal Review Decision of January 28, 2013 upheld the case manager's decision and found that the Appellant could not establish that he would have held employment during the first 180 days after the accident; therefore, as a non-earner he was not entitled to IRI.

MPIC's legal counsel stated in his submission:

“As this is the Appellant's appeal, the onus is upon him to establish that the Internal Review Officer's decision was incorrect. He has provided nothing to further his appeal in this respect.

The Appellant's Notice of Appeal filed February 19, 2013 [with the Claimant Adviser Office] states the following: “Conflict of interest with MPI doing the application for compensation (PIPP). They don't have any medical experience.” The Notice of Appeal contains no articulable grounds for appeal and the Appellant has provided nothing to the Commission since the filing of the Notice of Appeal.

The decision made by the Internal Review Office was reasonable based upon the information at his disposal at the time, and we adopt those reasons. Furthermore, there is no new evidence to contradict the Internal Review Officer's findings and no argument articulated by the Appellant to indicate an error was made”.

The Commission agrees with MPIC's submission. The Appellant has failed to file any additional evidence to establish that he would have held employment at the relevant time; on the contrary, the evidence on the Appellant's indexed file indicates that he was in receipt of CPP disability benefits at the time of the accident, which the Internal Review Officer notes requires that “one must be incapable of regularly pursuing any substantially gainful employment of indefinite duration”.

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 January 28, 2013 is confirmed.

Dated at Winnipeg this 1st day of April, 2014.

JACQUELINE FREEDMAN