

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-14-115**

**PANEL:** Ms Laura Diamond, Chairperson  
Ms Jacqueline Freedman  
Ms Linda Newton

**APPEARANCES:** The Appellant, [text deleted], was self-represented;  
Manitoba Public Insurance Corporation ('MPIC') was  
represented by Mr. Steve Scarfone.

**HEARING DATE:** May 30, 2019.

**ISSUE(S):** Whether the Appellant has failed to diligently pursue her  
appeal.

**RELEVANT SECTIONS:** Section 182.1(1) of The Manitoba Public Insurance  
Corporation Act ('MPIC Act').

**Reasons For Decision**

The Appellant was injured in a motor vehicle accident on December 17, 2013. As a result of the accident she suffered soft tissue injuries, which included headaches as well as neck, upper back and shoulder pain. She received chiropractic treatment as a result.

MPIC advised the Appellant that she was entitled to receive up to 52 chiropractor treatments pursuant to Track II, Phase 2 care, and she received 46 treatments from [Appellant's chiropractor].

[Appellant's chiropractor] provided MPIC with further reports requesting entitlement to Track II, Phase 3 care funded by MPIC.

After consulting with MPIC's Health Care Services chiropractic consultant, the Benefit Administration Unit provided the Appellant with a decision dated June 13, 2014 indicating that she was not entitled to further funding of chiropractor treatment beyond Track II, Phase 2, which provided for a maximum of 52 treatments.

The Appellant filed an Application for Review and on August 5, 2014 an Internal Review Officer (IRO) for MPIC upheld the case manager's decision.

On August 13, 2014, the Appellant filed a Notice of Appeal from the Internal Review Decision (IRD) of August 5, 2014. A lengthy case management process ensued. Several case conferences were held. Some were attended by the Appellant, but there were others which she did not attend. On May 9, 2017 she advised the Commission she intended to obtain more medical reports. On July 25, 2017 the Commission wrote to the parties and set a deadline of November 1, 2017 for the parties to provide further medical reports to the Commission. This letter also outlined the Appellant's obligations, and advised that if she could not meet this deadline due to a medical condition she was required to provide the Commission with a medical note.

The Commission's records show that an Appeals Officer for the Commission contacted the Appellant on November 2, 2017 requesting an update. When the Appellant indicated that she was too incapacitated, the Appeals Officer asked her to provide a letter from her doctor in this regard. The Appellant indicated she would not be providing any medical documentation from her doctor and that she had no medical reports to provide to the Commission at that time. She then

ended the call. The Appeals Officer contacted the Appellant again on December 18, 2018. The Appellant indicated she did not wish to discuss her appeal and again ended the call.

The Commission then wrote to the parties on January 11, 2019 advising that the Appellant had not provided any further information or been willing to discuss her appeal. Therefore the Commission had determined it would schedule a hearing to determine whether the Appellant had failed to diligently pursue her appeal pursuant to Section 182.1(1) of The MPIC Act.

**Issue and Determination:**

The issue before the panel was whether the Commission should dismiss all or part of the Appellant's appeal on the grounds that the Appellant had failed to diligently pursue her appeal.

Following a review of the documentary evidence, the testimony of the Appellant and the submissions of the parties, the Commission has concluded that the Appellant has failed to diligently pursue her appeal.

**Background Information:**

Upon filing her Notice of Appeal with the Commission, the Appellant indicated that she would like to participate in mediation. The matter was then referred to the Automobile Injury Mediation office. On March 9, 2015, the Commission received correspondence from the mediation office advising that the mediation process had been completed and the issue was not resolved.

An indexed file was prepared in regard to the Appellant's appeal. A copy was sent to MPIC and the Appellant's counsel at the Claimant Adviser Office.

The Commission continued to request updates from the parties and was advised, on April 22, 2016, that the Claimant Adviser was no longer representing the Appellant. An Appeals Officer wrote to the Appellant on April 26, 2016 asking the Appellant to advise, by May 20, 2016 whether she would like to proceed with her appeal and, if so, whether she would be representing herself or making other arrangements.

The Appellant did not reply and a case conference was scheduled for July 14, 2016 to discuss these questions. A Notice of Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail. An acknowledgment receipt of the Canada Post Xpresspost was signed by the Appellant on June 14, 2016. On July 11, 2016, the Appellant called the Commission to request an adjournment of the case conference, advising that she had an eye appointment the day before and so could not attend. She was advised that the Commission's practices require adjournment requests to be in writing. No written request was received and the case conference proceeded on July 14, 2016. Counsel for MPIC attended but the Appellant did not attend. Attempts to reach her by telephone were unsuccessful. Accordingly, in accordance with the Commission's practice, after waiting 15 minutes, the case conference proceeded in her absence. Counsel for MPIC indicated that MPIC was now in receipt of a report dated January 16, 2015 from the Appellant's chiropractor and was seeking to have it reviewed by its chiropractic consultant. Therefore, it was agreed that another case conference should be set. A letter from the Commission to the parties dated July 20, 2016 confirmed this information.

The next case conference was scheduled for November 28, 2016. A copy of the Notice of Hearing was sent to the Appellant via Canada Post Xpresspost and regular mail. The notice sent by regular mail was not returned to the Commission.

On November 25, 2016, MPIC provided the Commission with a report from its chiropractic consultant dated August 23, 2016. An additional copy was prepared for the Appellant so that it could be provided to her at the case conference on November 28, 2016.

On November 28, 2016, counsel for MPIC attended the case conference. The Appellant did not attend. Attempts were made to reach her by telephone and then after waiting 15 minutes, the case conference proceeded in her absence. It was determined that in the Appellant's absence, the copy of the Health Care Services chiropractic report which had been prepared for her would be provided to the Appellant by mail. Possible options for hearing dates were reviewed, to be confirmed with the parties.

A hearing date was then scheduled for January 12, 2017. A Notice of Hearing and a copy of a supplemental index for the Appellant's appeal were sent to the Appellant by Canada Post Xpresspost and a signed receipt for this Xpresspost was dated December 9, 2016, although the signature was not clear.

A hearing was convened on January 12, 2017. Counsel for MPIC attended the hearing. The Appellant did not attend. The Appellant was contacted by telephone and she indicated that she was too ill to participate in the hearing. As a result, the hearing was adjourned and rescheduled for February 23, 2017. A Notice of Hearing for that date, together with a supplemental index, was sent to the Appellant by regular mail and Canada Post Xpresspost. However, due to difficulties in reaching the Appellant by telephone, the Commission also retained World Investigation to serve the Appellant with the Notice of Hearing and supplemental index. World Investigation provided the Commission with affidavits of attempted service dated January 23 and February 22, 2017 describing their attempts to serve the Appellant with these documents. Copies of these affidavits of attempted service are attached, and marked as Appendix A, B and C.

On January 24, 2017, the Appellant attended the Commission and provided a sick note from her doctor, [Appellant's physician], advising that: "The above named patient lost her appointment with Autopack(sic) due to a health condition". The Commission wrote to [Appellant's physician] seeking further clarification. [Appellant's physician] provided a letter dated January 26, 2017 indicating that he has been treating the Appellant for several months for arterial hypertension, paranoid state and situational stress. He indicated that he also treated her on January 18, 2017 for trauma to her right toe and ribs and on January 23, 2017 for diarrhea and stomach discomfort, which had prevented her from attending her "appointment with Autopac". He indicated that she was currently stable regarding her arterial hypertension and feeling better such that he did not see "any specific situation that could prevent her from attending her appointment scheduled for February 23, 2017."

The appeal hearing was convened on February 23, 2017. Counsel for MPIC and the Appellant both attended. However, the Appellant indicated that she was missing documents and did not have a copy of her indexed file or supplemental index. She indicated she would need a full day to argue her case but that she had a doctor's appointment scheduled for that afternoon and would have to leave. Accordingly, the Commission decided to hold a case conference that day instead of the hearing, to ensure that the Appellant had complete copies of her indexed files and to schedule a date for the hearing. The indexes were reviewed tab by tab with the Appellant and an appeal hearing was scheduled for March 21, 2017.

The Appellant then indicated that she could not participate in a hearing because of difficulties with her eyesight. She was requested to provide a medical note to substantiate this inability. The Commission received a medical note from her eye doctor, [text deleted], confirming that she had difficulty seeing, especially for reading, and she was being referred for a cataract surgery

assessment. As a result, the appeal hearing scheduled for March 21, 2017 was adjourned and a case conference was set for that date instead. The case conference was convened on March 21, 2017. Counsel for MPIC and the Appellant attended. The Appellant confirmed that she wanted to proceed with her appeal. She also confirmed that she was able to read enlarged documents. It was decided that the Appellant would meet with her Appeals Officer to review the documents in the indexed files and identify which documents should be enlarged for her. She was also encouraged to seek other assistance and support, such as obtaining a magnifying glass and contacting the [text deleted] to see what resources were available to assist her.

The Appeals Officer met with the Appellant on April 3, 2017 to review the indexes and provide enlarged documents for her. The documents were reviewed and she advised the Commission that she was able to read them. She advised that she had attended the [text deleted] and produced a magnifying glass which could be used for her assistance. An enlarged copy of the Commission's Guidelines for Hearing were also provided to the Appellant for review.

A case conference was held on May 9, 2017. Counsel for MPIC and the Appellant attended. The issues under appeal were reviewed. The Appellant advised the Commission that she intended to obtain more medical reports for inclusion in the indexed file. She was advised that she had already obtained two medical reports paid for by the Commission and would normally have only been entitled to one more medical report with a maximum cost of \$373.00. After discussion, MPIC consented to the remaining \$373.00 to be used for up to two reports. The Appellant confirmed that she would like payment for those reports to be made directly from the Commission and so was advised to communicate with her Appeals Officer to ensure that the Commission was properly invoiced. A follow up case conference was scheduled for July 25, 2017.

The case conference was convened on July 25, 2017. Counsel for MPIC and the Appellant were in attendance. It was noted that no further medical reports had been provided. Accordingly, as the Notice of Appeal in the matter was filed in August 2014 and there had been very little progress on the file over the last year, the Commission set a deadline of November 1, 2017 for the Appellant to have all medical reports filed with the Commission. She was also advised that she was required to provide a reasonable excuse should she not be able to meet this deadline, and if this was due to a medical condition she was required to provide the Commission with a medical note substantiating her inability to meet the November 1, 2017 deadline. These points were confirmed in a letter from the Commission to the parties dated July 25, 2017.

When no medical reports or contact from the Appellant were received by November 1, 2017, the Appeals Officer contacted the Appellant on November 2, 2017. A letter to the parties summarizing the recent history as well as this contact was sent to the parties on January 11, 2019. A copy of that letter from the Commission is attached and marked as Appendix D. The letter advised that as the Appellant had not provided any further information and had not been willing to discuss her appeal the Commission would be scheduling a hearing date to determine whether she had failed to diligently pursue her appeal, and if so, whether the Commission should dismiss the appeal.

On January 18, 2019, the Appellant attended at the Commission. The Appellant did not indicate whether she intended to pursue her appeal or whether she would attend a hearing. However, she submitted a note from her doctor dated January 17, 2019. This note indicated that the doctor was treating her for hypertension and understood “that she has not been able to deal with some of her usual duties due to this situation.”



On April 1, 2019 the Commission set the matter down for a hearing date of May 30, 2019. A Notice of Hearing was sent to the Appellant by regular mail and Canada Post Xpresspost. She accepted delivery of the Notice of Hearing by Canada Post on April 3, 2019. The Commission then wrote to the parties on April 10, 2019, setting out the issues to be dealt with at the appeal. The sole issue identified was whether the Appellant had failed to diligently pursue her appeal and therefore whether the appeal should be dismissed pursuant to Section 182.1(1) of the MPIC Act. A copy of the letter dated April 10, 2019 is attached as Appendix E.

The hearing into whether the Appellant had failed to pursue her appeal was convened on May 30, 2019. Both counsel for MPIC and the Appellant attended and provided submissions before a panel of the Commission. The Appellant confirmed that she still wanted to pursue her appeal. The background leading up to the hearing, summarized in the letters at Appendix D and E was then reviewed for the parties.

**Evidence and Submission of the Appellant:**

The Appellant testified at the hearing and provided submissions. She indicated that she had three reasons for her failure to pursue her appeal. Two of the Appellant's three stated reasons for failing to pursue her appeal related to her evidence of perceived difficulty in communicating with the Appeals Officer assigned to her file. She testified that the Appeals Officer was inappropriate, which stopped her from using her brain and stopped her from thinking. Every time she spoke to the Appeals Officer she would have to go to her cardiologist because she would have a mini stroke.

This led to the Appellant's description of her medical condition, which involved having a series of mini strokes on a daily basis. She indicated that as a result of this, she cannot pronounce words correctly and this interferes with her communication. Written communication is also affected. The Appellant indicated that she is still going through procedures to find out what is definitely wrong with her, which takes a very long time in our medical system. As a result, although she has been seeing doctors and has medical appointments booked, she could not provide any medical evidence to support her assertion.

On cross-examination the Appellant was asked if she recalled case conferences which had been scheduled regarding her appeal and for which she did not appear, including case conferences held in July and November 2016. The Appellant indicated that dates and times meant nothing to her and so she could not recall. Nor could she recall what illness prevented her from attending the scheduled hearing of her appeal in January 2017, when she had indicated it was because she was too ill. In response to several questions from counsel for MPIC, she indicated that her medical condition and strokes affect all of her memory. When asked what [Appellant's physician] meant when he opined that she could not deal with all of her usual duties, the Appellant indicated that her brain is not able to respond and she may drool. She is unable to perform any of her usual duties which may include getting up, taking care of herself, running around and paying bills, eating, dressing and trying to proceed with her appeal. She testified that her sister helps her out and has seen her strokes.

The Appellant submitted that her strokes are different each and every time and that they are getting stronger in nature. She is pursuing ongoing medical tests and procedures but everything is not known. She has had poor experience with the medical profession and she has found it difficult to comply with MPIC's rules and regulations. She needs her sister to help her and she

lives from second to second. Nothing is permanent and dates and times mean nothing to her. She testified that she was capable of making herself understood even if she had some trouble expressing herself, and she felt that her meaning was very clear.

**Submission for MPIC:**

Counsel for MPIC first addressed the history of Section 182.1(1) and the reasons that MPIC believed that it could and should be applied retroactively in the Appellant's case. He noted that the section was added to the MPIC Act through recent enactments pursuant to the Red Tape Reduction and Government Efficiency Act in 2018. He recognized that the Appellant's appeal has been ongoing for much longer than that. However, he submitted that this particular provision is one of the provisions which fall under the exception, which allow enacted provisions to have retroactive effect. Provisions like this allow the panel to consider any delay or failure to pursue appeals prior to the enactment in 2018. It only makes sense, it was submitted, to look at past delay when applying the legislation. After three years of inactivity, for example, it would not make sense to give a litigant another three years. Courts have interpreted similar provisions in this manner. Therefore, he submitted, this particular provision in the MPIC Act does allow the panel to look at past conduct in examining whether the Appellant has failed to diligently pursue her appeal.

Counsel went on to note that notwithstanding that the Appellant should be given some credit for appearing at the current hearing, the Commission cannot ignore what has happened since her appeal was filed almost five years ago. Much of this was canvassed in the Appellant's cross-examination. She was asked about her failure to attend the case conference in July 2016 but could not recall the events. She also failed to appear at the case conference in November 2016. At that time, MPIC agreed that since all the documents on the file were ready, a hearing

should be scheduled. A hearing was scheduled for January 2017 but it did not proceed, as the Appellant advised she was too ill to attend. When she was questioned about that illness on cross-examination, she wasn't able to recall.

Counsel relied upon a decision of the Worker's Compensation Appeal Tribunal in British Columbia in WCAT-2007-02651. In the case the appellant failed to attend his appeal hearing. Counsel submitted this decision is instructive because it asks the question of whether the appellant had provided adequate reasons for a failure to attend an oral hearing. Counsel urged the Commission to adopt a similar test for whether there were adequate reasons here for not prosecuting the appeal. At page 8 of that decision there is a list of what might be adequate reasons for such a failure. For example, a motor vehicle accident on the way to the hearing or admission to the hospital for emergency health care could be examples of adequate reasons. Conversely, concern about jeopardizing current employment by taking time off for the hearing or a non-emergency medical condition such as a cold or flu would not be considered adequate reasons for failing to attend a hearing without notice.

Counsel noted that in this appeal the Appellant was even given another opportunity after her failure to appear in January 2017 when the matter was adjourned to a second hearing date in February 2017. At that time she did appear, but without her materials, indicating she could not stay for the whole hearing as she had a doctor's appointment. No explanation was provided as to why she booked a doctor's appointment when she was aware she had to attend a full day AICAC hearing on that day.

The hearing was then set for March 2017, but when the Appellant raised concerns about her medical condition and glaucoma preventing her from reading, another case conference was held, so that the Commission could address these concerns. Her concerns were addressed and she was accommodated by the Commission, with a larger font indexed file and a magnifying glass from [text deleted].

The matter was then set down for a case conference in July 2017. However, since that date, the Appellant still has not diligently pursued her appeal. She indicated to the Commission that she needed one more report from a chiropractor and was given until November 2017 to obtain it. She did not comply and did not provide that report. No explanation was offered.

The Appellant then advised the Commission that she no longer wished to pursue her appeal, but contrary to that statement, appeared at the hearing and indicated that she did want to prosecute her appeal. Notwithstanding those comments, it was submitted that the documents on the indexed file indicated that the Appellant does not have a clear intention to proceed.

The three reasons provided at the hearing, based on her relationship with her Appeals Officer and an unsubstantiated claim of having mini strokes, are far from adequate.

A letter from her doctor indicates that she cannot deal with all of her usual duties, but there is no evidence to indicate why she would not be able to deal with the Commission's appeal process, as no real particulars were provided in this regard.

Therefore, MPIC submitted that the Appellant had failed to provide adequate reasons for failing to pursue her appeal and the appeal should be dismissed.

**Reply of Appellant:**

In reply, the Appellant indicated that her medical condition is a real reason for not complying with time limits. She indicated that her abilities fluctuate from minute to minute. Sometimes she is capable of defending herself and sometimes she cannot do it successfully. This is because a stroke takes away different abilities, periodically.

She submitted that she should not be considered unwilling or neglectful, but due to long waiting lists in the medical profession, delays have been created. Her medical condition is a very legitimate excuse for missing certain appointments.

**Discussion:**

The MPIC Act Section 182.1(1) states:

**Dismissal for failure to pursue appeal**

182.1(1) Despite subsection 182(1), the commission may dismiss all or part of an appeal at any time if the commission is of the opinion that the appellant has failed to diligently pursue the appeal

Following a review of the documentary evidence, the testimony of the Appellant and the submissions of the parties, the Commission has concluded that it does not seem to be in dispute between the parties that the Appellant has failed to pursue her appeal. Counsel for MPIC noted a list of the Appellant's failures, including failing to provide evidence in support of her appeal, to attend at a number of scheduled hearings and case conferences for which the Appellant had notice, and failure to provide chiropractic reports that she had indicated she would be forwarding

to the Commission. Further, she had advised her Appeals Officer, on more than one occasion, that she did not want to discuss her appeal. The Appellant acknowledged these absences and omissions but maintained that she had good reasons.

Therefore, the Commission finds that the Appellant did fail to pursue her appeal.

Given that we find the Appellant failed to pursue her appeal, the question which arises is whether she failed to diligently pursue her appeal under the MPIC Act or whether she provided adequate reasons for the absences and omissions set out above.

Although the Appellant cited her perception of difficulty in communicating with her Appeals Officer as a reason for her failure to pursue her appeal, the Commission notes that this was raised by her for the first time at the appeal hearing. A review of the documents and letters on the Appellant's file do not support this allegation. The panel has thoroughly reviewed the file, including letters to the parties summarizing case conferences held and did not find any record of her previously mentioning any such concerns. There is no other evidence which corroborates the Appellant's evidence on this point and the panel therefore has given little weight to the Appellant's assertion that her relationship with the Appeals Officer prevented her from pursuing her appeal.

Accordingly, we must consider that the primary reason the Appellant is advancing for her failure to pursue her appeal is her health condition.

The Appellant took the position that her health condition, in particular a series of mini strokes, prevented her from being able to manage her appeal and her usual duties. She testified that she had difficulty eating, dressing, taking care of herself, paying bills and pursuing her appeal. She submitted that this was all caused by mini strokes which her doctors had diagnosed or were in the process of investigating. However, she did not provide any medical evidence to support her testimony. There were three medical reports on the Appellant's file. None of these diagnosed or even mentioned a stroke.

The Appellant's testimony was that to this day she continues to suffer from this condition which continues to affect her ability to perform her usual duties.

Nevertheless, we note that she was able to attend the hearing, testify, respond appropriately on cross-examination, make submissions, listen patiently and comprehend MPIC's submission and then respond on reply, without the benefit of notes.

From this we infer that whatever condition she may have, whether we have medical evidence of it or not, it does not overall impair her ability to pursue her appeal. While we appreciate that the Appellant may have good times and bad times and that her condition may fluctuate, given the length of time that has elapsed over a number of years, we find that she has had sufficient opportunity to utilize periods where she was capable of diligently pursuing the appeal. From the history and records on the file and the evidence heard at the appeal, the panel concludes that she has not done so. We find that the Appellant has not established that her health has prevented her from pursuing her appeal over the course of time.



Accordingly, the Commission finds that the Appellant has failed to diligently pursue her appeal.  
Her appeal shall be dismissed.

Dated at Winnipeg this 12<sup>th</sup> day of July, 2019.

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**LAURA DIAMOND**

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**JACQUELINE FREEDMAN**

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**LINDA NEWTON**