

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-14-179**

PANEL: Laura Diamond, Chairperson

APPEARANCES: The Appellant, [text deleted], did not attend; Manitoba Public Insurance Corporation ('MPIC') was represented by Ashley Korsunsky.

HEARING DATE: December 17, 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 (the MPIC Act).

Reasons For Decision

Background:

The Appellant was involved in a motor vehicle accident (MVA) on January 17, 2011. She suffered injuries as a result of the MVA and sought benefits pursuant to the Personal Injury Protection Plan (“PIPP”).

On April 29, 2014, the Appellant’s case manager issued a decision which stated that, based upon medical evidence and a review of her medical file by its Health Care Services (HCS) department, the Appellant’s low back pain and need for revision breast surgery were not caused by the MVA and there was no entitlement to funding for chiropractic or physiotherapy treatment, or permanent impairment benefits.

The Appellant sought an internal review of the case manager's decision. On August 26, 2014, an Internal Review Officer ("IRO") for MPIC upheld the case manager's decision. The IRO found that the Appellant's need for breast surgery following the MVA addressed a well-documented chronic and recurrent problem with implants which predated the MVA. The Appellant would have required surgery regardless of the accident. Further, a causal and temporal relationship between her lumbar spine condition and the MVA was not established based on the evidence on the claim file.

On November 8, 2014, the Appellant filed an appeal with the Commission from the Internal Review Decision ("IRD") of August 26, 2014. The Notice of Appeal ("NOA") indicated that the Appellant would be represented by the Claimant Adviser Office ("CAO"). However, as the Appellant's appeal progressed at the Commission, the Commission was advised by the CAO, on September 14, 2015, that it was no longer representing the Appellant and was asked to direct any future inquiries or correspondence related to her appeal directly to the Appellant. The Appellant did not retain another representative and continued to represent herself in her appeal. She was provided with and confirmed receipt of the indexed file of documents prepared by the Commission for the appeal, which contained the relevant documents from MPIC's claim file.

At a case conference meeting held before the Commission on May 11, 2017, counsel for MPIC was in attendance and the Appellant participated by teleconference. The indexed file was reviewed as well as a summary of Income Replacement Indemnity ("IRI") benefits previously paid by MPIC to the Appellant. The Appellant confirmed that she was seeking Permanent Impairment benefits with respect to skin grafts and scarring. She confirmed that she was not seeking chiropractic or physiotherapy treatment benefits for low back pain.

Counsel for MPIC requested the opportunity to review the file further and possibly have discussions with the case manager and the HCS team.

On March 16, 2018, counsel for MPIC wrote to the Commission indicating that MPIC was rescinding the case manager's decision letter dated April 29, 2014 in relation to the Appellant's Permanent Impairment entitlement for scarring (breast implants and skin graft on lower back). The Benefit Administration Unit of MPIC had been instructed to determine the Appellant's Permanent Impairment award for the scarring. Accordingly, since the Appellant had indicated at the case conference meeting of May 11, 2017 that this was the only benefit she was seeking, counsel requested that the Appellant provide a Notice of Withdrawal ("NOW") to the Commission in relation to her appeal issues. Counsel requested that her correspondence be provided by the Commission to the Appellant. A copy of her letter was then sent to the Appellant, with a covering letter from the Commission's Appeals Officer, on March 21, 2018.

The case manager issued a decision on Permanent Impairment entitlement to the Appellant, awarding her a ratable impairment, by letter dated July 13, 2018.

On July 12, 2018, the Appellant called the Commission to advise that there was a new case manager's decision and advised, on July 13, 2018, that she wished to obtain legal advice in this regard. She was provided with the contact information for the CAO.

This was followed by another letter from counsel for MPIC to the Commission advising that the matter had been resolved and requesting that the Appellant provide a NOW to the Commission in relation to her appeal. Counsel requested that this correspondence be forwarded to the

Appellant. The Appeals Officer forwarded the letter, along with a blank NOW form for the Appellant to sign, by covering letter dated August 29, 2018.

Several further attempts were made by the Commission to contact the Appellant and request that she submit a completed NOW form. When the Appellant did not comply, counsel for MPIC wrote to the Commission on July 11, 2019. Given the Appellant's previous indication that she was not pursuing the remaining issue under appeal (low back pain) and the Appellant's lack of response to the Commission's correspondence, MPIC requested that the matter be set for a Failure to Pursue Hearing.

The Commission determined that it would schedule a hearing to determine whether the Appellant had failed to diligently pursue her appeal, within the meaning of subsection 182.1 (1) of the MPIC Act, and, if so, whether the Commission should dismiss her appeal.

Issue:

The issue which requires determination in this hearing is whether the Appellant has failed to diligently pursue her appeal and, if so, whether the Commission should dismiss her appeal.

Decision:

For the reasons set out below, the Commission finds that the Appellant has failed to diligently pursue her appeal, and her appeal should be dismissed.

Procedural matters:

Following receipt of a copy of the new case manager's decision dated July 13, 2018, the Commission provided a copy of the letter, along with a NOW form for signing, to the Appellant

on August 29, 2018. The Commission's Appeals Officer also attempted to contact the Appellant by telephone on August 22, 2018 and August 29, 2018, in order to further discuss the matter. However, there was no answer and her voicemail was full.

A further copy of the NOW form was provided to the Appellant by the Commission's letter of October 10, 2018. This was followed up by the Appeals Officer's email to the Appellant of November 15, 2018 requesting that the Appellant provide a signed NOW form in order to close her appeal file.

On November 15, 2018, the Appeals Officer also contacted the Appellant by telephone to remind her to complete and return the NOW form. The Commission wrote to the Appellant again on November 27, 2018, forwarding another copy of the NOW form and requesting its completion.

On March 13, 2019, the Appeals Officer spoke with the Appellant by telephone. When the Appellant advised that she had settled her matter with MPIC, the Appeals Officer sent her another copy of the NOW form with a self-addressed stamped envelope. When this was not returned to the Commission, the Appeals Officer sent her an email, attaching a NOW form and requesting that it be completed and returned to the Commission by May 22, 2019.

On May 8, 2019, the Appeals Officer sent another copy of the NOW form to the Appellant.

On July 10, 2019, counsel for MPIC wrote to the Commission requesting that the matter be set for a Failure to Pursue Hearing.

The Appeals Officer wrote to the Appellant on July 22, 2019, summarizing its attempts to obtain the signed NOW form and close the Commission's file. She indicated that the Commission had reviewed the matter and determined that a hearing date would be scheduled to determine whether she has failed to diligently pursue her appeal and, if so, whether the Commission should dismiss the appeal.

The original NOA completed by the Appellant listed an address on [address #1]. Following a change of address notice dated January 31, 2017, the Appellant again confirmed her address on [address #1] in writing for the Commission on March 21, 2018. Then, on July 11, 2018, she provided a Notice of Change of Address and phone number to the Commission, advising of a new address on [address #2]. On October 10, 2018, she verbally provided a new address for Ronald Street.

A Notice of Hearing was sent to the Appellant by Canada Post Xpresspost and regular mail.

As the Commission was unable to obtain a written confirmation of the Appellant's change of address to [address #1], the Commission sent a copy of the Notice of Hearing to the Appellant's last known address, verbally provided, on [address #1], as well as to the address on [address #2], for which written confirmation had been provided. Both Xpressposts were returned to the Commission unclaimed. The regular mail was not returned to the Commission.

The Notice of Hearing provided that the time and date of the hearing were firm and that postponements would only be granted under extraordinary circumstances. The Notice provided that at the hearing, the Commission would consider whether the Appellant had failed to diligently pursue her appeal, and that the parties would have the opportunity to make

submissions on the issue. It also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and dismiss the appeal, adjourn the hearing to a new time and date, or take such other steps as a deemed appropriate.

Counsel for MPIC attended at the Commission on the hearing date, but the Appellant did not attend. In accordance with the Commission's practice, after waiting 15 minutes, the hearing proceeded in her absence.

Relevant legislation:

Section 184.1 of the MPIC Act provides how notices may be given to the Appellant. It provides as follows:

How notices and orders may be given to appellant

184.1(1) Under sections 182, 182.1 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.

Section 182.1 of the MPIC Act provides that the Commission may dismiss an appeal in certain circumstances. It provides as follows:

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.

Opportunity to be heard

182.1(2) Before making a decision under subsection (1), the commission must give the appellant the opportunity to make written submissions or otherwise be heard in respect of the dismissal.

Informing parties of decision

182.1(3) The commission must give the appellant and the corporation a copy of the decision made under subsection (1), with written reasons.

Submission for MPIC:

Counsel submitted that the appeal should be dismissed on the grounds that the Appellant had failed to pursue the appeal, subject to section 182.1 (1) of the Act. She relied upon the Commission's decision in AC-14-115, where the Commission, after finding that the Appellant had failed to pursue her appeal, considered whether the Appellant had failed to diligently pursue her appeal under the MPIC Act or whether she provided adequate reasons for the absences and omissions set out.

Counsel submitted that there had clearly been a delay and that the Appellant had not provided adequate reasons for absences or omissions in pursuing the appeal. The MVA had occurred almost nine years ago, the IRD was issued more than five years ago and the NOA was filed in 2014.

The IRD addressed two issues:

- Whether the Appellant is entitled to therapy for her lower back condition; and

- Whether she was entitled to Permanent Impairment benefits for breast implants and skin graft surgeries.

At the case conference meeting of May 11, 2017, the Appellant confirmed that she was not seeking benefits for lower back pain due to the MVA and was only seeking benefits regarding breast implants and skin grafts.

A new case manager's decision was then issued and forwarded to the Commission which provided the Appellant with a decision which entitled the Appellant to the benefits for scarring which she was seeking. Both counsel for MPIC and the Commission had previously noted that the Appellant had indicated she was only pursuing the scarring issue. As this had now been resolved, she was requested to provide a NOW for the appeal. The Commission wrote to the Appellant several times, spoke with her by telephone and attempted several additional telephone calls, but the Appellant did not respond or provide a signed NOW. Counsel noted that documents contained in the indexed file showed that the Commission had sent the NOW forms to the Appellant on six occasions.

Counsel submitted that when MPIC rescinded the case manager's decision letter which is the subject of the appeal and issued a new case manager's decision, the Appellant's appeal became moot. The Appellant then advised that she would speak with legal counsel but never advised the Commission that she was not satisfied with the new case manager's decision. Nor did she file an Application for Review of that new decision. In conversations with the Appeals Officer in October 2018 and March 2019, she advised the Commission that she considered the matter settled.

She also indicated on May 11, 2017, that she was not pursuing her appeal in regard to the lower back pain issue.

In examining whether the Appellant has provided a reasonable excuse for her failure to diligently pursue the appeal, counsel for MPIC submitted that the Appellant has not provided any explanation. The only communication she seems to have provided is that she considers the appeal regarding scarring settled and resolved and is not interested in pursuing the appeal for therapy for lower back pain.

Accordingly, counsel submitted that the Appellant had failed to diligently pursue her appeal, which should be dismissed by the Commission pursuant to its authority under section 182.1(1) of the MPIC Act.

Discussion:

As indicated above, the issue which requires determination in this hearing is whether the Appellant has failed to diligently pursue her appeal, and, if so, whether the Commission should dismiss the appeal.

The Notice of Hearing for the December 17, 2019 hearing was sent to the Appellant by Canada Post Xpresspost and regular mail, to the last address provided by her in writing to the Commission, as well as to the last address she verbally provided.

Section 182.1 of the MPIC Act requires that the Commission give the Appellant the opportunity to be heard. The Notice of the Hearing was provided to the Appellant at the address she provided to the Commission, and all aspects of section 182.1 were complied with. The Notice of Hearing

provided that at the hearing, the parties would have the opportunity to make submissions, and their submissions could be made orally or in writing. Although the Appellant was not present at the hearing, she has been given proper notice and the opportunity to make submissions in respect of the dismissal of her appeal. Therefore, the Commission has jurisdiction to consider whether the Appellant failed to diligently pursue her appeal and, if so, whether it should be dismissed by the Commission.

Did the Appellant Fail to Diligently Pursue her Appeal?

It is MPIC's position that the Appellant has failed to diligently pursue her appeal, that she has not provided an excuse for this failure, and that the Commission should exercise its discretion to dismiss the appeal.

Although the Appellant accepted delivery of the indexed file and continued to communicate with the Commission by participating in the case conference meeting of May 11, 2017, to clarify the issues under appeal, she failed to act upon any of the Commission's further requests for follow-up after the new case management decision was issued on July 13, 2018. Although she had previously confirmed that she was not seeking therapy benefits for low back pain and that the only benefits she was seeking were for scarring, when the scarring benefits were awarded in the new case manager's decision, she failed to sign and return the NOW form, as requested by the Appeals Officer, or to respond to the Appeals Officer's attempts to communicate with her.

The Appellant failed to respond to written communication requests dated August 29, 2018, September 24, 2018, October 10, 2018, November 15, 2018, November 27, 2018, January 8, 2019, March 13, 2019, May 7, 2019, May 8, 2019, May 22, 2019 and July 22, 2019. She also failed to respond to numerous attempts at telephone communication by the Appeals Officer.

The Appellant's last active participation in her appeal occurred on October 10, 2018 and March 13, 2019 when she indicated to the Commission that she had settled the matter with MPIC. She then failed to respond to further communications and to sign and return the NOW forms provided to her.

The Commission finds that her conduct following October 10, 2018 did not amount to "careful and persistent application or effort" which would display "diligence" in pursuing her appeal. The Appellant did not attend the present hearing, nor did she provide any written submissions, although she was provided the opportunity to do so. She did not provide any explanation for her failure to appear or to respond to the Commission's attempts to contact her.

Conclusion:

Upon a consideration of the totality of the evidence and submissions, and upon consideration of the relevant legislation, the Commission finds that the Appellant has failed to diligently pursue her appeal.

Disposition:

Based on the foregoing, the Appellant's appeal is dismissed.

Dated at Winnipeg this 4th day of February, 2020.

LAURA DIAMOND