

## **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-21-059**

**PANEL:** Pamela Reilly, Chairperson  
Linda Newton  
Sharon Macdonald

**APPEARANCES:** The Appellant, [text deleted] (“the Appellant”), was represented by Ken Kaltornyk; Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Anthony Lafontaine Guerra.

**HEARING DATE:** February 16, 2022.  
March 18, 2022, additional written sworn testimony and closing submissions received.

**ISSUE(S):** Whether the Commission should exercise its discretion to grant an extension of time and allow the Appellant to file his Notice of Appeal.

**RELEVANT SECTIONS:** Section 174(1) of The Manitoba Public Insurance Corporation Act (‘MPIC Act’).

**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**

#### **Background:**

The Appellant was a passenger in a motor vehicle that rolled into a ditch on July 1, 2006 (“the MVA”). As a result, the Appellant suffered injuries for which he sought Income

Replacement Indemnity (“IRI”) benefits. MPIC initially classified the Appellant as a “non-earner”. The Appellant filed an Application for Review (“AFR”) of that classification, which resulted in an Internal Review Decision (“IRD”) dated May 28, 2008. On August 23, 2008 the Appellant filed a Notice of Appeal (the “2008 NOA”) to this Commission.

The 2008 NOA proceeded through mediation and resulted in MPIC changing its classification of the Appellant from “non-earner” to a self-employed, “temporary earner”, [text deleted] worker. To that end, his Case Manager rendered a decision dated July 30, 2013 (“CMD”), stating that the Appellant would be paid IRI benefits for the period July 1, 2006 to November 7, 2006. The benefits ended based upon a medical opinion that the Appellant’s chronic low back pain was not caused by the MVA.

On September 23, 2013, the Appellant filed a second AFR in which he stated that due to his chronic back pain he was unable to return to work and further, MPIC’s classification of “temporary earner” was the wrong category for him. This AFR resulted in the IRD dated November 12, 2013, which upheld the July 30, 2013 decision of the Appellant’s classification and ability to return to work.

The Appellant appealed the November 12, 2013 IRD to the Commission by NOA dated March 30, 2021. The NOA states that the Appellant does not agree with MPIC’s decision to end his IRI on November 7, 2006.

The MPIC Act allows an Appellant 90 days in which to file a NOA from an Internal Review Decision. The Appellant's NOA was filed 2,615 days late. MPIC did not agree to an extension and the Appellant requests that the Commission extend the 90-day time limit.

**Issue:**

Whether the Commission should exercise its discretion to grant the Appellant an extension of time and allow the filing of his Notice of Appeal.

**Decision:**

The Commission declines to exercise its discretion to grant an extension of time which would allow the Appellant to file his Notice of Appeal.

**Hearing:**

As a result of the pandemic and safety considerations, the hearing of the appeal was conducted remotely, through videoconference technology.

**Appellant direct-examination**

The Appellant described the 2006 MVA in which the driver was speeding (impliedly on a rural road), hit a driveway and the truck, in which the Appellant was a passenger, rolled over. (The July 25, 2006 Application for Compensation records that the driver was killed.)

The Appellant described struggling to remove himself from the overturned truck, and "blacking out" on a number of occasions as he made his way through a field to a

farmhouse to seek help. The Appellant said that he injured his back and right knee, as well as other injuries, which have since healed.

The Appellant explained why he did not file his NOA sooner saying, "I didn't know I had the option." When referred to the November 12, 2013 IRD, which states that "a hearing was held on October 30, 2013", the Appellant testified that when he arrived at the MPIC office, he was told the hearing had been cancelled. He further testified that the Internal Review Officer ("IRO") told him that "there was nothing more they could do for me and I had no more appeals."

The Appellant said that after being advised he had no further appeals, he contacted a lawyer but he could not afford the ten thousand dollar retainer. Also, in or about 2013, the Appellant sent letters to MLAs, but received no responses. He testified that "recently, when I put out letters to MLAs and the Ombudsman" he was put in touch with MPIC's Fair Practice Office and the Claimant Adviser Office.

The Appellant said that he has a Grade 11 education. During the past seven to eight years he has seen his doctor regularly. He attended physiotherapy, but was told he has a "mechanical problem" and physiotherapy will not help his particular issues.

**Appellant cross-examination**

In response to questioning, the Appellant agreed that this appeal before the Commission is not his first. He confirmed that he disagreed with the short payment period of IRI benefits, as set out in the July 30, 2013 CMD.

He alone prepared and filed his September 23, 2013 Application for Review to which he attached a sworn statement from October 2009 (used in his prior appeal before the Commission). The Appellant readily admitted that he was aware of the Internal Review process because he had gone through it before, having “read the decision letter of 2013 which said [he] had the right to do so.”

The Appellant contradicted his direct testimony and denied that he said the IRO told him he had no further right of appeal. In cross-examination the Appellant said that the IRO cancelled the October 2013 hearing and told him he “wasn’t allowed any more reviews.” The Appellant was not dissuaded from his recollection that the October 30, 2013 hearing was cancelled and did not take place.

When asked when he recalled first receiving the November 12, 2013 IRD, the Appellant said, “I assume it would be around the time it was dated.” He agreed that he read the IRD when he received it and probably would not have agreed with the decision, which is why he is now appealing the decision.

MPIC Counsel referred the Appellant to page four of the IRD, (which sets out the Appellant's "APPEAL RIGHTS"). Unfortunately, this page was missing from the Appellant's Indexed File. [We agreed that the hearing would continue but that the Appellant would be given an opportunity to obtain and review page four, then provide sworn responses to written questions from MPIC. These would be provided to the Commission as soon as possible.]

The Indexed File contains the Appellant's May 12, 2021 reasons for late filing to the Commission, explaining the delay. It states that he did not know that he was able to have his "decision reviewed at that time" and that, "Recently I was in touch with Manitoba Ombudsman, they directed me to the Fair Practices Office." MPIC Counsel asked what he meant by "recently". The Appellant could not recall the "exact date" he contacted the Fair Practices Office and said it was "getting confusing for me".

He confirmed his purpose for contacting the Ombudsman was to "get something going with MPI", in order to resolve his dispute over IRI entitlement. MPIC Counsel then asked if he next contacted the Claimant Adviser Office, to which the Appellant responded, "It's confusing. I didn't know the difference between the two."

In response to Panel questions asking for clarification as to what he meant by "recently" in relation to his contact with the Ombudsman, the Appellant responded that it "was around the time of the May 12, 2021 handwritten letter". In response to Panel questions about whether his last contact with MPIC was when he received his IRI cheque referred

to in the July 30, 2013 decision, the Appellant said, “That could be...I honestly don’t remember.”

The hearing was adjourned pending receipt of the Appellant’s sworn answers to MPIC’s questions about page four of the IRD. MPIC forwarded two questions for response. The Appellant’s written responses, and the closing submissions were received on March 18, 2022.

The Questions and the Appellant’s sworn responses were as follows:

1. “Having previously testified that that he recalls that he previously read and did not agree with Document #2 [November 12, 2013 IRD], is it [the Appellant]’s evidence that he did not or does recall reading page 4 of that document?”

The Appellant responded, as follows: “I do not recall reading it, and I do not have it on file. I recently read it when Ken Kaltornyk sent me a copy”.

2. “In light of the information contained on page 4 of [the IRD], does [the Appellant] maintain that [text deleted] [IRO] specifically advised him on October 2 [sic], 2013 that he had no further right to review?”

The Appellant responded, as follows: “Yes, I was not allowed any more reviews and she also said there is nothing else they can do for me anymore. And I have to wonder if the hearing on Wednesday, October 30, 2013, 10:30 a.m. is the one they cancelled on me.”

**Appellant closing submissions:**

The Appellant's Representative reviewed the Appellant's testimony about being told by the IRO that he had no entitlement to further review. There is dispute as to whether the Appellant testified to saying the IRO informed him about a "review" as opposed to an "appeal". In either case, the evidence clearly established that the Appellant did not understand the difference between a "review" and an "appeal".

The Appellant's Representative submitted that the IRO inadvertently confused the Appellant with respect to his right to appeal. The Appellant understood that he had exhausted his right to appeal. Nonetheless, the Appellant, over the years, continued to seek help and clarification from various agencies and individuals, but no one provided him with clear instructions.

The Appellant's Representative submitted that it was not until the Appellant eventually contacted the MPIC Fair Practices Office that he received proper advice to file a Notice of Appeal. According to his testimony, the Appellant did not receive this clear advice until sometime in early 2021, shortly before contacting the Appeal Commission.

The Appellant's Representative referred to AC-01-57 in which the Commission stated that the MPIC Act is a complex and difficult document to understand without legal training. In this case, the Appellant made repeated attempts to pursue his appeal, including trying to retain a lawyer. He has shown his intention to pursue his appeal. He lacked an



understanding of how to proceed, until he obtained clear advice from the Fair Practices Office.

Appellant's Representative acknowledged the significant delay in filing the NOA, but given the Appellant's intention and repeated efforts to seek help and clarification, the Appellant requests that the Commission accept his explanation as reasonable, and extend the time to allow him to file his appeal.

**MPIC closing submissions:**

MPIC Counsel reviewed the relevant legislation and submitted that it is within the discretion of the Commission to grant an extension of time pursuant to section 174(1). He noted that it is the Appellant's responsibility to convince the Commission to exercise that discretion in favour of the Appellant.

Counsel submitted that prior Commission decisions have established a set of factors that the Commission should consider when applying section 174(1). These factors are as follows:

1. The actual length of the delay compared to the 90-day time period set out in section 174;
2. The reasons for the delay;
3. Whether there has been any prejudice resulting from the delay;
4. Whether there has been any waiver respecting the delay;
5. Any other factors which argue to the justice of the proceeding.

MPIC Counsel addressed the length of delay in this case. The Appellant testified that he could not recall the specific date on which he received the IRD. However, calculating 90-days from the November 12, 2013 IRD puts the earliest deadline for filing his NOA at February 10, 2014. The NOA was date stamped as being received at the Commission on April 9, 2021. This is 2,615 days past the deadline and while we cannot establish (based upon the evidence) the actual delay period, the Commission may infer that the delay is in the vicinity of the 2,615 days calculated.

Counsel submitted that the reasons for delay are often the most important factor because a reasonable explanation may excuse a long delay period. Conversely, the absence of a reasonable explanation may result in the refusal to grant an extension even with a short delay period.

In this case, the Appellant's May 12, 2021 written explanation for his delay is that he did not know that he was able to appeal and only learned of this when he contacted the Fair Practices Offices. Counsel noted that the Appellant likely filed his prior Application for Review ("AFR") of the July 13, 2013 CMD, within the 60 day time limit, because the IRD did not raise any issue of late filing.

Further, Counsel noted the Appellant's prior involvement in a Commission appeal, assisted by the Claimant Adviser Office ("CAO"). This is apparent based upon a review of the Appellant's AFR and the attached sworn statement, which references both a Commission file number (AC-08-85) and a CAO office file number. The implication,

therefore, is that the Appellant is familiar with the appeal process based upon his past experience.

Importantly, the last page of the IRD describes the Appellant's appeal rights, including the statement that the Appellant had 90 days from receipt of the IRD to appeal. MPIC Counsel questioned the reliability of the Appellant's written sworn statement in which he states that he does not recall reading page four, and does "not have it on file."

MPIC Counsel submitted that there is no evidence of a medical condition that would prevent the Appellant from submitting his NOA on time. The only medical conditions to which the Appellant testified were his low back and right knee pain. Further, the Appellant has a Grade 11 education, has sufficient reading and writing skills, and filed both his 2013 AFR (including his handwritten reasons and supporting documents) and his 2021 NOA without assistance.

In a further response to the Appellant's explanation that he did not know he had a right to appeal, MPIC Counsel restated the Appellant's past experience with the Commission appeal process. MPIC Counsel submitted that the Commission may infer that the Appellant received all pages of the November 2013 IRD, including page four, which sets out the appeal rights and the 90-day filing limit.

MPIC Counsel said that the Appellant admitted that he was dissatisfied with the result of the IRD. However, he failed to adequately explain why he did not file another NOA to the

Commission. Further, the Appellant did not explain the time gap between the 2013 IRD and his contact with the Ombudsman in 2021. And, without providing evidence of when he first learned of his right to appeal from the Fair Practices Office, the Commission is unable to determine whether the Appellant acted reasonably and without undue delay, from that date.

MPIC Counsel referred to the findings in AC-20-96, which state that the Commission's appeal process is straight forward and involves the use of a relatively simple form. In this case, the Appellant has not met his burden of explaining the considerable delay, or in establishing that he acted promptly and reasonably.

On the remaining factors of whether the delay has caused prejudice and whether MPIC has waived the delay, MPIC Counsel confirmed that MPIC has not waived the delay.

Counsel submitted that there is inherent prejudice in this case given the lengthy passage of time. There may be actual prejudice given the fact that the MVA occurred more than 15 years ago and the primary issue is calculation of IRI. It is not unreasonable to assume that tax and employment records are no longer available. However, Counsel has conceded that MPIC had not identified specific prejudice in this case.

MPIC Counsel concluded that there is insufficient evidence to justify the Commission's exercise of discretion and allow an extension of the 90-day filing period. As such, MPIC requests the NOA be rejected.

**Issue**

The issue is whether the Commission should exercise its discretion to extend the 90-day filing period and allow the Appellant's NOA to be filed.

**Legislation**

The applicable section of the MPIC Act is as follows:

**Appeal from review decision**

174(1) A claimant may, within 90 days after receiving notice of a review decision by the corporation or within such further time as the commission may allow, appeal the review decision to the commission.

**Credibility and reliability**

The Panel considers several factors when making an assessment about credibility and reliability. These factors involve the Appellant's demeanor, the Appellant's recollection of events, the consistency with which the Appellant can recount events over time, and the consistency of the testimony with documentary evidence.

The Appellant spoke clearly and in a straightforward manner. He appeared to listen carefully to questions and answer to the best of his ability. The Appellant stated when he could not recall certain events, some of which was explained given the passage of time. However, the Appellant's memory tended to improve when recalling specific facts that benefitted his case as compared to other recollections.

The Appellant's testimony that he could not recall any details of MPIC's initial July 30, 2013 reclassification decision was somewhat surprising. On the one hand the Appellant

provided specific detail about his review hearing meeting with the IRO in October 2013 and submitted that he always wanted to appeal the IRD decision. His evidence is that over the years he has repeatedly tried to get assistance through various agencies, including a lawyer. Therefore, his lack of recall about the details of his issue under appeal is puzzling.

The Appellant's recollection of the October 30, 2013 meeting with the IRO (i.e., that the meeting was cancelled) was inconsistent with the facts set out in IRD. His recollection of the October 30, 2013 meeting fundamentally underlies the reason for his delay (i.e., his confusion about 'review' vs 'appeal'). Yet, in his reasons for late filing provided to the Commission dated May 12, 2021, the Appellant does not refer to this meeting and the IRO's verbal statement that he was not allowed further reviews. This is an obvious inconsistency.

In response to questions about what the Appellant meant by "recently" in his May 12, 2021 statement, the Appellant said he could not recall the exact date and the issue was getting confusing for him. In a follow up question from the Panel to get his response as to what he meant by 'recent' contact with the Ombudsman, the Appellant testified that this meant, "Around the time of the May 12, 2021 handwritten letter."

However, this response is puzzling given the fact that his NOA is dated March 30, 2021, which he presumably submitted on the advice he received from either the Ombudsman or the Fair Practices Office, but is completed some 43 days prior to May 12, 2021. It is

therefore also unclear what the Appellant means by 'around the time', and raises the question of why the Appellant would not recall contact with the Ombudsman or Fair Practices Office 'around the time' he filed his March 30, 2021 NOA.

The Panel therefore finds that the Appellant's testimony on the important issue of timing was vague, and lacked clarity and cogency. The testimony was generally unreliable and we have relied primarily upon the documentary evidence.

### **Discussion**

The Panel agrees with MPIC Counsel that prior Commission decisions have set out a series of factors to be considered when deciding whether to exercise discretion and grant an extension of time.

#### Length of the Delay

The Panel agrees that the delay in this case is almost seven and a half years between the November 12, 2013 IRD and the March 30, 2021 NOA. As always, the onus is on the Appellant to show, on a balance of probabilities, that he has a reasonable explanation for the delay. The explanation, on balance, must be clear and cogent, particularly given the considerable delay.

#### Reason(s) for delay

After determining that the Appellant had filed his NOA some 2,615 days beyond the 90-day appeal period (as calculated from the November 12, 2013 IRD), the Commission

sent a letter to the Appellant dated April 27, 2021, which explained the calculation, as well as the power of the Commission to extend the time limit. The letter requested the Appellant to provide information, as follows:

Please provide your written explanation for the reasons for late-filing, including any reasons why the Commission should exercise its discretion to extend the time to allow you to file the Notice of Appeal.

The Appellant's written response explains the reasons for the delay, as follows:

I didn't no [sic] I was able to have that decision reviewed at that time. Recently I was in touch with Manitoba Ombudsman, they directed me to the Fair Practices Office. They told me I should be able to have that decision reviewed.

I am asking for the time limit to be extended because I was not treated fairly by MPI. That vehicle crash caused me to have permanent chronic lower back pain and a painfull [sic] right knee. It is almost 15 years of struggling day to day with no income, very stressful and depressing. If it wasn't for the caregiver [name redacted] suporting [sic] me and helping with day to day task's [sic] when my back is out, I wouldn't of [sic] made it this long.

The Appellant testified to a specific recollection of the October 2013 meeting with the IRO. He specifically recalled the IRO stating "there was nothing more" that MPIC could do for him, and he "was not allowed any more reviews." (Interestingly, this is technically a correct statement as the Appellant had exhausted the MPIC review process and his next step was an appeal to this Commission.)

The Appellant's representative argued that the Appellant did not understand the difference between a "review" and an "appeal" and these alleged comments by the IRO confused him. The Appellant's documentary evidence is that he did not know he had a right to appeal the IRD. He requests an extension because he was not treated fairly by



MPI. He does not say that he was treated unfairly because the IRO told him he had no right of review. This is a noteworthy inconsistency, which leaves the testimony sounding embellished.

Further, although the Appellant submits that he did not understand the difference between a “review” and an “appeal” (the implication being that he believed he had no right to appeal), he did not dispute that he had pursued a prior appeal before the Commission, which resulted in some success through the mediation process. The Appellant had experience with both the “review” and the “appeal” processes, and it is difficult to understand why he would be confused about pursuing another appeal to the Commission.

Finally, the November 12, 2013 IRD concludes with the standard notice, in bold capital letters about “APPEAL RIGHTS”, on page four. That page sets out the ninety (90) day appeal period to the “Automobile Injury Compensation Appeal Commission” and provides the Commission’s address as well as the “CLAIMANT ADVISER OFFICE” address and contact information.

The sworn statement from the Appellant states that he does not recall reading page four and further states, “I do not have it on file.” This statement is somewhat in contrast to the Appellant’s cross-examination testimony in which he testified that he assumed he received the IRD around the time it was dated (November 12, 2013), that he read it and he would have disagreed with the decision.

The Panel finds it unlikely that the Appellant did not receive all pages of the IRD including page four. Not only does page four contain the Appeal Rights information, but it also contains the complimentary closing. Page three simply ends with the statement that the IRO is confirming the case manager's decision and dismissing the Application for Review. Common sense dictates that a reasonable person would notice that the decision was incomplete and contact MPIC to request a complete copy.

Either way, the Panel finds that the Appellant likely received the complete IRD, including page four, which notified him of his Appeal Rights. This would be in accord with the Appellant then immediately seeking out a lawyer and pursuing other sources of advice.

#### Prejudice, Waiver, any other Factors

The Panel acknowledges MPIC's statement that there is no actual prejudice. However, given the passage of time, it would not be surprising that the ability to obtain income records has been compromised, particularly given the lack of detail the Appellant had about his rate of pay and annual income when he completed his PIPP Application for Compensation in July 2006.

It is clear that MPIC did not waive the delay and there are no additional factors that need to be considered.

**Findings**

The Panel finds that the Appellant probably received the complete IRD shortly after the date of November 12, 2013. The Panel finds that the Appellant likely read the IRD and was informed of his Appeal Rights to the Commission, including the 90-day time period for filing his notice of appeal.

The Panel finds that the Notice of Appeal was filed 2,615 days late which is a considerable delay and requires a clear and cogent explanation. The Panel finds that the Appellant's explanation that he did not know about his appeal rights, or that he was confused as to his appeal rights is based upon inconsistent statements. We find, on a balance of probabilities that the Appellant has failed to provide a clear, cogent or reliable reason for his delay.

**Disposition**

Accordingly, the panel will not exercise its discretion to extend the statutory time limit for filing an appeal of the November 12, 2013 Internal Review Decision.

Dated at Winnipeg this 13<sup>th</sup> day of May, 2022.

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**PAMELA REILLY**

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**LINDA NEWTON**

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**SHARON MACDONALD**