

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-17-056**

PANEL: Laura Diamond, Chairperson

APPEARANCES: [Appellant] was self-represented but did not attend the hearing.
Manitoba Public Insurance Corporation (“MPIC”) was represented by Mitch Mroavic.

HEARING DATE: April 4, 2023

ISSUE(S): Whether the Appellant has failed to diligently pursue his appeal, and if so, whether the Commission will dismiss the appeal.

RELEVANT SECTIONS: Section 182.1 and 184.1 of *The Manitoba Public Insurance Corporation Act* (the “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 injured in a motor vehicle accident (“MVA”) on September 27, 2015. He suffered fractures of the tibia and fibula, with left knee, leg, ankle and foot pain.

Following assessment by an Occupational Therapist, the Appellant was awarded a Permanent Impairment (“PI”) benefit from MPIC under the provisions of the Personal Injury Protection Plan (“PIPP”). He was not satisfied with the PI benefit outlined for him by MPIC’s benefit administration unit (“BAU”) and sought internal review of that decision.

On April 25, 2017, an internal review decision (“IRD”) was issued upholding the PI benefit awarded.

Appeal

The Appellant filed a Notice of Appeal (“NOA”), dated May 9, 2017, with this Commission on May 12, 2017. The matter was returned to the Commission from mediation in July 2019.

The Commission staff prepared an indexed file of documents collected from MPIC and the Appellant and relevant to the appeal (“Index”). It was sent to both parties with a letter, dated February 19, 2021, asking the parties to review the material and advise, by April 2, 2021, whether the issue to be dealt with was properly identified in the documents and whether either wished to add additional documents. No response was received.

The Commission attempted to phone the Appellant on July 2, 2021, however the call was not answered and no voicemail option was available.

The Commission wrote to the Appellant again on July 9, 2021 asking him to contact the Commission to discuss the appeal. This letter was returned to the Commission on August 9, 2021, marked as undelivered.

The Commission phoned the Appellant again on August 27, 2021, but was not successful in reaching him.

Failure to Pursue (FTP) Correspondence

On September 22, 2021, the Commission wrote to the Appellant and advised that if he did not contact the Commission, his appeal file would be held in abeyance for six (6) months to allow him time to take steps to pursue his appeal or to explain why he was unable to do so. This letter was sent by regular mail (which was not returned and assumed delivered) and by Xpresspost (which was returned unclaimed).

No response was received, and on October 14, 2021 the Appellant was advised by letter that his file would be held in abeyance for six (6) months.

Again receiving no response, the Commission wrote on April 25, 2022 (sent by regular mail and Xpresspost) to advise the parties that the Commission would now schedule a hearing date to determine whether the Appellant had failed to diligently pursue their appeal and, if so, whether the Commission should dismiss the appeal.

In preparation for the hearing, the Commission compiled another indexed file, which contains all documents relevant to the FTP hearing (“FTP Index”). These documents constitute evidence and either party may rely upon them at the hearing. The Commission numbers these documents for ease of reference by the parties and the Panel. Attached to these reasons and marked as Schedule “A” is a copy of the FTP Index Table of Contents.

Canada Post confirmed a delivery date of March 17, 2023 of the FTP Index to the Appellant.

Notice of Hearing (“NOH”)

A NOH, dated February 16, 2023, advised that the matter had been set down for hearing on April 4, 2023. Canada Post provided confirmation of Xpresspost delivery dated March 2, 2023. A copy of the NOH sent by regular mail was not returned and therefore assumed to be delivered.

Issue

The Commission must decide whether the Appellant failed to pursue their appeal diligently, and if so, whether the Commission will dismiss the appeal.

Decision

The Commission finds that the Appellant failed to pursue their appeal diligently and therefore dismisses the Appellant’s appeal.

The Hearing

Because of safety considerations arising from the pandemic, and with written notice to the parties, the Commission conducted a teleconference appeal hearing.

Appellant submissions

The Appellant did not appear at the scheduled time for the hearing. He did not file any written submission. In accordance with Commission policy, the Commission waited 15 minutes for the Appellant to attend the hearing. The Appellant did not appear and therefore the hearing proceeded without him.

MPIC submissions

MPIC Counsel submitted that, based upon prior decisions of the Commission (*AC-17-033* and *AC-14-088*), some factors that the Commission may consider on the failure to pursue issue are:

1. Did the Appellant receive proper notice of the hearing?
2. If so, did the Appellant fail to pursue and/or diligently pursue their appeal?
3. If so, did the Appellant supply an adequate explanation for their failure to pursue and/or diligently pursue the appeal?
4. Despite the above, is there some reason the appeal should or should not be struck, in whole or in part (i.e., other considerations)?

Counsel emphasized that the Commission has stated that a determination under the FTP section (s 182.1 of the *MPIC Act*) does not require a consideration of the merits of the appeal (*AC-04-175*).

1. **Notice of FTP Hearing**

Counsel submitted that although the Appellant did not attend the FTP hearing, he was provided with proper notice of the hearing.

Pursuant to s. 184.1 (1) (b) of the *Act*, he was provided with notice by regular letter mail to the address provided by the Appellant. This was a P.O. Box in [City], Manitoba and the address which was used on his application for benefits and the original MPIC decision on PI benefits.

Between February 21, 2021 and July 27, 2021, the Commission sent letters to the Appellant using the address of [text removed], [City], which had been provided in the NOA, but the Appellant did not respond to the letters sent. So on July 27, 2021, the Commission contacted MPIC to obtain any possible updates to the mailing address for the Appellant. In reply, MPIC advised that the MPIC system had recorded “[text removed], [City], MB, [Postal Code]” as the mailing address on its system.

Although the address provided by the Appellant on his NOA was the street address at [text removed], [City], counsel submitted that this P.O. Box appears to be the mailing address in relation to that physical address. There is no indication that the Appellant supplied any other address to MPIC or the Commission.

The FTP Index was sent to the P.O. Box and delivery was confirmed by Canada Post on March 17, 2023.

In *AC-04-175*, the Commission noted that s. 182.1(2) of the *Act* requires that an Appellant be given an opportunity to make written submissions or otherwise be heard in respect of any proposed dismissal of their appeal. The provision of notice of this FTP Hearing satisfied this requirement.

The Appellant did not attend, and did not supply written and/or oral submissions.

As a result, MPIC submitted that the available evidence proves that the Appellant received proper notice of the FTP hearing and there can be no doubt that the Appellant ought to have been aware of this appearance. The Commission may therefore continue to consider the remaining three issues despite the absence of the Appellant.

2. Failure to Diligently Pursue Appeal

Counsel submitted that simple pursuit of an appeal is not enough. Any pursuit must also be diligent. In *AC-17-033*, the Commission found that diligence in pursuit of an appeal requires the “careful and persistent application of effort”.

Counsel reviewed in detail the efforts the Commission had made to contact the Appellant after he filed his NOA. These included providing a copy of his Index for the appeal and numerous letters and phone calls, including correspondence asking the Appellant to make contact with the Commission to discuss his appeal. These efforts continued between the filing of the NOA in May 2017 and the Commission’s letter of October 14, 2021 advising him that, due to his lack of response, his file would be held in abeyance for six (6) months, before scheduling the matter to determine whether he had failed to diligently pursue his appeal.

There is no evidence that the Appellant contacted the Commission within this six (6) month period, or at all. On April 25, 2022, the Commission sent the Appellant a letter indicating that the Commission had not received a response from him and again highlighting the power of the Commission to dismiss an appeal under s. 182.1(1) of the Act “...where an Appellant does not take active steps to pursue their appeal...”.

The Appellant was specifically warned that his failure to contact the Commission within six (6) months of October 14, 2021 would result in the scheduling of an FTP Hearing. Notwithstanding this warning, the Appellant did not respond.

Counsel submitted that the Appellant did not carefully and persistently apply effort to advance his appeal following the filing of his NOA and further submitted that the Commission should find that the Appellant has failed to diligently pursue his appeal.

3. Adequate Reasons

In addressing whether the Appellant has provided adequate reasons for failing to diligently pursue his appeal, counsel submitted that there was no explanation before the

Commission. The Appellant did not attend the FTP hearing and did not put forward any written or oral submission. There is nothing in the evidence before the Commission to suggest the existence or hint of a reasonable explanation.

MPI submitted that the Commission must conclude that there is no excuse for the failure of the Appellant to pursue his appeal, let alone an adequate one.

4. Other Considerations

Counsel noted that MPI was unaware of any other considerations that would weigh in favour of allowing the Appeal to continue at this stage. There is little to no precedential value in the PI issues raised by the Appellant.

In conclusion, counsel submitted that the evidence shows that the Appellant did not diligently pursue his appeal and has no explanation for his failure to do so. Further, he was or ought to have been aware of this FTP hearing but he did not attend.

MPI submitted that the Commission can and should dismiss his appeal in its entirety.

Legislation

The applicable sections of the *MPIC Act* are 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.

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.

Discussion

Section 184.1 of the *MPIC Act* requires that notice of a hearing may be given to an appellant by sending the notice by regular mail to the address provided by him when filing the appeal, or other address provided by him. This is deemed to be received on the fifth day after mailing, unless it is otherwise established, in good faith.

Although the Appellant provided only his street address in [City] on his NOA, he provided a [City] P.O. Box to MPIC. Commission staff then confirmed with Canada Post that the P.O. Box provided by MPIC is that which corresponds to the mailing address for [text removed] in [City].

The NOH and Guidelines for Hearing were sent to the Appellant by regular mail and Xpresspost on February 16, 2023. The regular mail was not returned to the Commission and documents from Canada Post confirmed a delivery date of March 2, 2023. Canada Post also confirmed a delivery date of March 17, 2023 for the FTP Index.

I find that the Appellant was provided with the FTP Index, Guidelines for Hearing and the Notice of Hearing. This informed him of the FTP issue being considered and hearing date, and provided him with an opportunity to be heard in respect of the matter.

The Appellant did not attend the hearing. He did not provide any written correspondence, submissions or explanation to address the question of his failure to attend or to pursue his appeal.

Section 182.1(1) of the *MPIC Act* grants the Commission authority to dismiss an appeal at any time, if the Commission determines an appellant has failed to pursue the appeal diligently. This

section does not require the Commission to consider the merits of the appeal. The Commission agrees that the word “diligently” requires some evidence of careful, steady and persistent effort. The onus is on the Appellant to show he has not breached s.182.1 (1).

The Commission finds that the evidence is undisputed and un-contradicted. Since filing his NOA in May 2017 and completing mediation in July 2019, the Appellant has not contacted or responded to the Commission. In spite of numerous requests for information, he did not indicate that he wished to pursue his appeal or explain why he had failed to do so. Consequently, the appeal has not progressed for over four (4) years. He failed to attend this hearing or to make any submission to explain his actions or establish diligence.

Disposition

The Commission finds that the Appellant has provided no explanation for his failure to respond to Commission correspondence, to advance his appeal or to attend this hearing. The Commission finds, on a balance of probabilities that the Appellant has failed to pursue the appeal diligently. Consequently, the Commission dismisses the appeal.

Dated at Winnipeg, Manitoba this 17th day of April, 2023.

LAURA DIAMOND