

## **Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [APPELLANT]  
AICAC File No.: AC-17-072**

**PANEL:** Pamela Reilly, Chairperson

**APPEARANCES:** The Appellant, [Text Deleted] did not appear.  
Manitoba Public Insurance Corporation (“MPIC”) was represented by Andrew Johnson (“Counsel”).

**HEARING DATE:** April 12, 2023.

**ISSUE:** Whether the Appellant failed to pursue his appeal diligently.

**RELEVANT SECTIONS:** Sections 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:**

On February 24, 2012, the Appellant’s vehicle struck another vehicle that did not stop at a stop sign (“the MVA”). The Appellant applied for Personal Injury Protection Plan (“PIPP”) benefits for injuries he reported as “sore neck and upper back, aches in shoulders and arms (whiplash).”

On February 7, 2017, the Appellant's case manager issued a decision ("the CMD") that declined to extend the Appellant's Income Replacement Indemnity ("IRI") benefits. The CMD relied upon a medical opinion that concluded the Appellant's MVA-related whiplash had resolved, and therefore his August 2016 symptoms were not MVA-related.

On March 20, 2017, the Appellant requested that MPIC's Internal Review Office conduct a review of the CMD. On June 7, 2017, MPIC's Internal Review Office issued a decision ("the IRD"), which concluded the Appellant had not suffered a relapse of his MVA-related injuries and confirmed the CMD.

The Appellant retained the Claimant Advisor Office ("the CAO"), and the Commission received the Appellant's Notice of Appeal ("the NOA") on June 14, 2017. In the NOA, the Appellant requested mediation with the Automobile Injury Mediation office ("AIM"). On November 23, 2017, AIM advised that the parties had completed mediation and returned the file to the Commission for processing the appeal.

The Commission compiles an Indexed File of documents (the "Indexed File") relevant to the appeal, and sends this to the parties. On August 29, 2018, the Commission received a letter from the CAO advising it no longer represented the Appellant and confirmed it had returned the Indexed File and all relevant correspondence to the Appellant. The CAO advised the Appellant to contact the Commission regarding his appeal.

On September 11, 2018, the Commission mailed a letter to the Appellant and requested that he contact the Commission within two weeks to advise whether he would pursue the appeal on his own, retain a lawyer, or withdraw his appeal. For convenience, the letter

enclosed a blank Notice of Withdrawal (“NOW”) for the Appellant to sign and return, if he chose.

The Appellant responded on September 21, 2018 to advise that he would proceed with his appeal and requested time to retain a lawyer. On September 27, 2018, the Commission acknowledged the Appellant’s request for time, and requested the Appellant confirm receipt of the Indexed File. Having received no response, the Commission sent another email on October 17, 2018, to which the Appellant responded, confirming receipt of the Indexed File. On November 27, 2018 and January 8, 2019, the Commission emailed the Appellant requesting an update, to which the Appellant did not respond.

On June 12, 2020, the Commission sent a letter to the Appellant requesting an update on whether he still intended to retain counsel, or alternately, no longer wished to pursue his appeal. Additionally on June 12, 2020, the Commission emailed the Appellant. Both the letter and email requested that the Appellant respond by June 26, 2020. The Appellant did not respond to either request.

On July 15, 2020, the Commission mailed a letter to the Appellant that outlined the above history of the Commission’s unsuccessful attempts to obtain information from the Appellant. The Commission quoted MPIC Act s.182.1(1), and advised that the Commission could dismiss his appeal at any time for failing to pursue his appeal diligently. The Commission warned the Appellant that if he did not contact the Commission within six months, the Commission would schedule his appeal for a failure to pursue hearing (“FTP Hearing”).

The Commission received information from MPIC of a potential new address, and on February 4, 2021, the Commission sent a letter to that address advising the Appellant of the Commission's efforts to contact him. The letter requested that he respond by February 19, 2021 to discuss his appeal or advise whether he wished to pursue his appeal. The Appellant did not respond.

On March 11, 2021, the Commission sent a letter to the Appellant's new address again quoting the "Dismissal for failure to pursue appeal" section 182.1(1) and advised the Appellant that the Commission would contact him with a choice of dates for scheduling his FTP Hearing. On June 4, 2021, the Appellant advised the Commission that he was awaiting a medical report, which he then provided on June 11, 2021. On June 17, 2021, the Appellant advised by email that he had no further documents to submit. The Commission requested that the Appellant advise whether he would call witnesses, to which he did not respond.

On September 15, 2021, the Commission mailed a letter to the Appellant advising of the Commission's attempts to contact him by email on August 24 and 31, 2021. The Commission requested a response by October 1, 2021 to discuss his appeal.

Having received no response, the Commission telephoned the Appellant on October 4, 2021. An individual answered the call, but immediately hung up. The Commission called again and left a voice message requesting that the Appellant contact the Commission. The Appellant did not respond.

On October 7, 2021, the Commission placed the file in the queue to schedule a Case Conference Hearing ("CCH"). On March 31, 2022, the Commission sent a Notice of Case

Conference Hearing (“NOCCH”) to the parties, advising them of the scheduled May 25, 2022 CCH date.

On May 24, 2022, the Commission Secretary spoke with the Appellant and reminded him of the CCH teleconference the following day. The Appellant confirmed he would attend. The Commission Chairperson and MPIC counsel attended the CCH. The Commission waited 15 minutes; however, the Appellant did not appear.

On May 25, 2022, the Commission mailed a letter to the parties that set out the history of the Appellant’s failure to pursue his appeal. The letter again explicitly quoted section 182.1(1) of the MPIC Act, “Dismissal for failure to pursue”. The letter warned the Appellant that if he did not contact the Commission or take steps to pursue his appeal within the next three months, the Commission would schedule a FTP Hearing, at which time the Commission could dismiss his appeal.

On February 17, 2023, the Commission utilized Canada Post Xpresspost to deliver the FTP Notice of Hearing (“FTP NOH”) and Guidelines for Hearing to both addresses the Commission had on file for the Appellant. The FTP NOH advised that the Commission had scheduled a FTP Hearing for April 12, 2023 at 1:30 p.m. Canada Post confirmed delivery of the FTP NOH to one of the Appellant’s addresses.

On April 11, 2023, the Commission Secretary telephoned and spoke to the Appellant to remind him of his upcoming hearing. The Appellant confirmed receipt of the FTP NOH, with the teleconference number, and stated that he would attend the FTP Hearing.

**Issue:**

The Commission must decide whether the Appellant has failed to pursue his appeal diligently, and if so, whether the Commission should dismiss the appeal.

**Decision:**

The Commission finds that the Appellant has failed to pursue his 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 the FTP Hearing via teleconference.

In preparation for the FTP Hearing, the Commission compiled an FTP Indexed File, which contains all documents relevant to the FTP Hearing. These documents constitute evidence that either party may rely upon 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 Indexed File Table of Contents.

**Appellant testimony and submissions:**

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

**MPIC submissions:**

Counsel adopted MPIC's written submission, which listed some factors that the Commission has considered in prior decisions on the failure to pursue issue, as follows:

- 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 provide an adequate explanation for their failure?
- 4) Are there any other reasons the Commission should consider?

Counsel submitted that the Commission provided proper notice of the hearing, in compliance with MPIC Act s. 184.1 that governs how the Commission may give notices. In particular, the FTP Indexed File contains documentary evidence of the Appellant's signature accepting the FTP NOH. Additionally, the Commission Secretary spoke with the Appellant on April 11, 2023, at which time he confirmed receipt of the FTP NOH, was aware of the FTP Hearing date, time and teleconference instructions. Therefore, Counsel submitted, the Commission has met the notice requirements.

Counsel submitted that prior Commission reasons have stated that "diligence" means a careful, steady and persistent application of effort to a person's matter. An Appellant bears the burden of showing diligence, which is more than simple pursuit.

Counsel noted the FTP Indexed File documents that outline the Commission's history of contacts with the Appellant and his failure to respond. Notably, Counsel submitted that the Appellant failed to attend the May 2022 CCH for which he received notice and agreed

to attend. Counsel submitted that the evidence clearly shows the Appellant has not made a persistent and careful pursuit of his appeal.

Finally, Counsel submitted that despite the Commission granting him the opportunity to be heard at the FTP Hearing, the Appellant did not appear or file submissions. Further, he has never provided any explanation for failing to attend the CCH, or to pursue his appeal.

Counsel submitted that section 182.1(1) both encourages an Appellant to advance their appeal promptly, and allows the Commission to remove from its docket those appeals that have languished. Counsel reiterated that the onus is on the Appellant to show that he diligently pursued his appeal.

Counsel submitted that in this case, the appeal is approaching six years old. The Appellant's failure to attend his CCH and FTP Hearing shows his lack of careful, persistent effort. He has not been diligent in responding to Commission warning letters. Counsel submitted that in consideration of the factors set out, the Commission should dismiss this appeal for failure to pursue diligently.

**Legislation:**

The applicable sections of the MPIC Act and Regulations 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.

**Issue:**

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

**Discussion:**

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 that he has not breached s.182.1(1). The evidence here is unchallenged.

The Commission finds that the Appellant received proper notice of the FTP Hearing by virtue of the Canada Post documentation, and the Commission Secretary's telephone conversation with the Appellant on April 11, 2023.

The Commission acknowledges that the Appellant initially appeared diligent in pursuing his appeal and responded to Commission enquires until approximately October 2018. Notwithstanding some brief contact in June 2021 regarding documentation, the Appellant failed to respond to subsequent Commission enquiries. The Commission agrees that simple pursuit of the appeal is not enough, and an Appellant must remain diligent.

The Commission finds that the Appellant received two warning letters quoting s. 182.1(1), which notified him that his appeal was in jeopardy of dismissal due to his failure to respond to Commission enquiries. The Commission finds that the Appellant received his first warning in the March 11, 2021 letter. This was prior to his March 25, 2022 CCH, which he then failed to attend.

The Commission finds that the Appellant received the second warning letter, dated May 25, 2022, to which he did not respond. The Commission finds that the Appellant's lack of response to Commission enquiries and warnings, and his failure to attend hearings despite receiving proper notice, demonstrates that he has not pursued his appeal carefully or persistently and therefore, not diligently.

The Commission finds that the Appellant provided no explanation for failing to respond to Commission enquiries, or for failing to attend his prior CCH.

**Disposition:**

The Commission finds, on a balance of probabilities that the Appellant has failed to pursue his appeal diligently. Consequently, in accordance with s. 182.1(1), the Commission dismisses the appeal.

Dated at the City of Winnipeg, in the Province of Manitoba, this 13<sup>th</sup> day of April 2023.

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**PAMELA REILLY**