

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-13**

PANEL: Mr. Mel Myers, Q.C., Chairperson

APPEARANCES: The Appellant, [text deleted], was represented by [Appellant's representative] who appeared via teleconference-;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Pardip Nunrha.

HEARING DATE: March 27, 2007

ISSUE(S): Extension of time to file Notice of Appeal

RELEVANT SECTIONS: Section 174 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

[The Appellant] was involved in a motor vehicle accident on February 24, 2005 and as a result sustained motor vehicle accident injuries and was in receipt of Income Replacement Indemnity ('IRI') benefits from MPIC.

On March 2, 2006 MPIC's case manager issued a decision letter terminating the Appellant's IRI benefits on the grounds that she was able to return to work as a cook. The Appellant made a timely application on June 20, 2006 to have the case manager's decision reviewed.

Internal Review Officer's Decision

On August 2, 2006 the Internal Review Officer issued a decision confirming the case manager's decision and dismissing the Appellant's Application for Review. The Internal Review decision stated in part:

APPEAL RIGHTS

You have ninety (90) days within which to appeal in writing to the Automobile Injury Compensation Appeal Commission. (underlining added)

The Appellant did not make application in writing to appeal the Internal Review Officer's decision within ninety (90) days from the date the decision of the Internal Review Officer was received by the Appellant.

Legal counsel for MPIC informed the Commission that the appeal period expired October 31, 2006 and the Commission notes that the Appellant's legal counsel did not challenge MPIC's calculations in this respect.

Application for an Extension of Time to Appeal

On December 8, 2006 the Appellant's legal counsel made application to the Commission for an extension of time pursuant to Section 174 of the MPIC Act.

The relevant provisions of the MPIC Act in respect of a Notice of Appeal to Review the decision of an Internal Review Officer is set out in Sections 174(1) & (2) of the MPIC Act 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.

Requirements for appeal

174(2) An appeal of a review decision must be made in writing and must include the claimant's mailing address.

On January 13, 2007 [Appellant's representative], on behalf of the Appellant, filed a Notice of Appeal of the Internal Review Officer's decision dated August 2, 2006 and a copy thereof was forwarded by the Commission to MPIC.

On February 9, 2007 [text deleted], Director of Legal Services for MPIC, wrote to the Commission and requested the Commission reject the Appellant's Application for an Extension of Time pursuant to Section 174 of the MPIC. In his letter [Director of legal services for MPIC] states:

The Internal Review Decision is dated August 2, 2006 and, accordingly, pursuant to Section 174 of the *MPIC Act*, the claimant should have filed the Notice of Appeal on or about October 31, 2006. In fact, it was not filed with the Commission until January 18, 2007, being 79 days beyond the 90 day time limit.

It is clear from the letter dated December 8, 2006 from [the Appellant's] lawyer, [text deleted], to the Commission that he had been retained to represent her in this matter during the appeal period. [Appellant's representative] states that he sent a letter to [the Appellant] on September 20, 2006 "but she did not have an opportunity to meet with me until after the appeal period expired on November 17, 2006 at which time she provided me with her instructions." As indicated, by our calculations, the appeal period expired on October 31, 2006.

In exercising its discretion as to whether or not additional time should be granted to the claimant to file a Notice of Appeal, MPI respectfully requests that the Commission seriously consider as a relevant factor that the claimant was represented by counsel who was not only under a duty to alert her to the 90 day time limit, which is clearly set forth on page 4 of the Internal Review Decision, but also to make sure it was complied with by filing a Notice of Appeal within the prescribed time.

In such circumstances, MPI further submits that whether there has been any prejudice to it resulting from the delay is not relevant.

Pre-Hearing – March 27, 2007

A hearing was convened on March 27, 2007 in order to hear submissions from the Appellant and from MPIC with respect to the Appellant's request for an extension of time to appeal the Internal Review decision to the Commission.

The Pre-Hearing was conducted by way of teleconference and the Appellant was present in the office of her legal counsel, [text deleted], which office is located in the [text deleted]. Ms Pardip Nunrha, legal counsel for MPIC, attended the hearing at the Commission office in Winnipeg.

During the course of the teleconference, the Appellant's legal counsel acknowledged that he had received the Internal Review decision dated August 2, 2006 from MPIC at his office in [text deleted], by registered mail several days after August 2, 2006. He further informed the Commission that he did not send a copy of this decision to the Appellant until he forwarded a letter to her on September 20, 2006, which was approximately forty-seven (47) days after he had received it. In his letter to the Appellant dated September 20, 2006 [Appellant's representative] requested the Appellant to contact him for the purpose of meeting so that he could obtain instructions to file the appeal.

He further advised the Commission that the Appellant attempted to contact him to meet with him at the office on several occasions. However, he informed the Commission that on one (1) occasion their meeting was cancelled by him, and on the other occasion he was in hospital for several days and was unable to meet with the Appellant. He further advised the Commission that he was able to meet with the Appellant on November 17, 2006, seventeen (17) days after the 90-day time limit had expired and received instructions from her to file an appeal.

The Commission further notes that on December 8, 2006, a period of twenty-one (21) days after the appeal period expired, the Appellant's legal counsel wrote to the Commission asking for an extension of time in order to file a Notice of Appeal. However, it was not until January 12, 2007 that, on behalf of the Appellant, he filed a Notice of Appeal in his own handwriting, which was

signed by him on behalf of the Appellant and dated January 12, 2007. The Commission received this Notice of Appeal on January 18, 2007, seventy-nine (79) days beyond the 90-day time limit for filing an appeal as set out in Section 174 of the MPIC Act.

Submissions

During the course of her submission, MPIC's legal counsel referred to the Commission's decision in [text deleted] (*AICAC #AC-02-103, April 22, 2004*) wherein the Commission had rejected an application for an extension of time to file a Notice of Appeal on the grounds that the Appellant, by her conduct, caused the delay in filing the appeal and that the Appellant had not provided a reasonable excuse for the delay.

MPIC's legal counsel further submitted in this appeal that:

1. the Appellant's counsel had been retained by the Appellant to represent her;
2. although there may not have been prejudice to MPIC resulting from any delay in filing the Application for Review that this was not a relevant factor in this appeal.
3. the Appellant's application for an extension time should be dismissed.

In response, the Appellant's legal counsel acknowledged that he was solely responsible for the failure to file a timely Notice of Appeal and no blame should be attributed to the Appellant. He also submitted that there was no prejudice to MPIC for the delay and in these circumstances an extension of time should be granted.

Discussion

The Commission notes that in addition to its decision in [text deleted] (*supra*) the Commission has rendered several decisions in respect of an extension of time as follows:

1. [text deleted] (*AICAC #AC-00-31, January 30, 2004*). In this appeal the Commission rejected an application for an extension of time in respect of the Appellant's application for failing to apply for a review of the Internal Review Officer's decision within the 60-day limit pursuant to Section 172 of the MPIC Act. The Commission found that the Appellant's conduct was the primary cause for the delay and that the Appellant had not provided a reasonable excuse in respect to said delay.
2. [text deleted] (*AICAC #AC-00-87, December 30, 2004*). In this appeal the Commission did grant an extension of time to permit the Appellant to file an application for review of an Internal Review Officer's decision pursuant to Section 172 of the MPIC Act. The Commission found that the delay in filing a timely application was the sole responsibility of the Appellant's representative and that the Appellant was not responsible for this delay. The Commission concluded that the oversight by the Appellant's representative did not prejudice the Appellant's claim.
3. [text deleted] (*supra*). In this appeal the Commission rejected the Appellant's application for an extension of time to file a Notice of Appeal pursuant to Section 174 of the MPIC Act on the grounds that the Appellant caused the delay and had not provided a reasonable excuse for this delay. The Commission stated:

Pursuant to Section 174 of the MPIC Act, the Commission has the discretionary power to extend the time for appealing a review decision. In exercising its discretion, the Commission may consider various relevant factors, such as:

1. the actual length of the delay compared to the 90 day time period set out in s. 174 of the MPIC Act;
2. the reasons for the delay;
3. whether there has been any prejudice resulting from the delay;
4. whether there was any waiver respecting the delay; and
5. any other factors which argue to the justice of the proceeding.

Upon a consideration of the totality of the evidence before it, both oral and documentary, and upon a consideration of the relevant factors surrounding the delay, the Commission finds that the Appellant has not provided a

reasonable excuse for her failure to appeal the internal review decision to the Commission, within the 90 day time limit set out in s. 174 of the MPIC Act, or for the significant delay in failing to proceed with this matter thereafter and in responding to the Commission in a timely fashion. As a result, the Commission will not extend the time limit within which the Appellant may appeal the Internal Review decision dated July 10, 2001 to the Commission.

4. [text deleted] (*AICAC #AC-01-75, July 23, 2004*). In this appeal the Commission granted an extension of time to the Appellant in respect of a late application for compensation pursuant to Section 141(a) of the MPIC Act. The Appellant was a Manitoba resident who was involved in a motor vehicle accident in 1995 and did not file a claim for compensation with the Commission until the month of December 2000. Section 141(a) of the MPIC Act required that a claim for compensation be made within two (2) years after the date of the accident. Section 141(4) of the MPIC Act permitted the Commission to extend the time for filing a claim for compensation if the Appellant had a reasonable excuse for failing to make the claim within that time.

The Appellant had retained counsel in Manitoba who had attempted to file a claim on behalf of the Appellant in the Province of Ontario but failed to make a claim for compensation on behalf of the Appellant to MPIC within a period of two (2) years following the motor vehicle accident. After unsuccessful legal proceedings in Ontario the Appellant changed legal counsel in the Province of Manitoba who immediately filed a claim for compensation approximately five (5) years after the occurrence of the motor vehicle accident and as well made application for an extension of time under Section 141(4) of the MPIC Act.

MPIC's legal counsel objected to the application for an extension of time and argued that MPIC had been prejudiced by the delay in respect of its case management of the claim and in its ability to provide a defense in respect of this claim.

In response, the Appellant's legal counsel rejected MPIC's submission on the issue of prejudice and submitted that the Appellant should not be prejudiced by the negligent actions of her previous counsel who had failed to protect her interests in this matter. In support of this position the Appellant's legal counsel cited the minority decision of Mr. Justice O'Sullivan in *Binkley v. Bajcura* [1980] M.J. No. 183 (Man. C.A.). The Appellant's legal counsel submitted that:

1. the Appellant had hired her legal counsel to represent her interests.
2. she had no knowledge of the time restrictions set out in the MPIC Act for filing a claim for compensation.
3. by her actions she did not cause any delay in the proceedings.

In its decision in [text deleted] (supra) the Commission reviewed the Manitoba Court of Appeal decision in *Binkley v. Bajcura* (supra) and noted that the majority of the Court of Appeal rejected the application for an extension of time on the grounds that the plaintiff had failed to provide an adequate explanation for the significant delay in having a Statement of Claim served upon the defendant in each case and for the plaintiff's delay in changing lawyers. The Commission further noted in the [text deleted] (supra) decision that the majority of the Court of Appeal, in arriving at its decision, reviewed three (3) cases in which there was a failure by the Plaintiff's solicitors to serve Statements of Claim upon the Defendants within the prescribed period of time provided by the statute and where the courts had provided an extension

of time and stated:

In each of the three cases relied on by the plaintiffs, the delay was minimal and should not be considered as comparable to the unusually long and unsatisfactorily explained delays in the cases before us. And, in addition to prejudice which follows from long delay (Minter, supra), the delay in these cases is aggravated by the plaintiffs denying the defendants any opportunity to obtain timely medical information about the female plaintiff's injuries. (underlining added)

and further stated:

. . . . As Culliton, C.J.S., put it in Simpson, ((1968) 65 D.L.R. (2d) 324), the conduct of the plaintiff is a relevant factor to be considered. This is not a case of merely visiting the errors of solicitors on innocent plaintiffs. Here, the plaintiffs have not given the court the necessary basis for granting an extension at this late date. To do justice between the parties in the cases before us, would not require an extension of time to serve the statements of claim, considering the background set out above and the absence of a satisfactory explanation from the plaintiffs for the long delays. (underlining added)

The majority of the court in *Binkley v. Bajcura* (supra) when rejecting the application for an extension of time determined that:

1. the plaintiff's conduct did contribute to the prejudice which follows from a long delay by denying the defendant an opportunity to obtain timely medical information about the female plaintiff's injuries.
2. the conduct of the plaintiff was a relevant factor in rejecting the application for an extension of time.
3. the plaintiff had failed to provide a satisfactory explanation for the long delays.

The Commission notes that the Manitoba Court of Appeal decision in *Binkley v Bajcura* (supra), and the Commission's decision in [text deleted] (supra) and [text deleted] (supra) the Appellant's conduct was the primary reason for the delay which resulted in rejection by the Commission of

the application for an extension of time. However, in the Commission's decisions [text deleted] (supra) and [text deleted] (supra) the primary reason for the delay was not caused by the Appellant but by the Appellant's representative.

In arriving at its decision the Commission, in [text deleted] (supra), noted the following comments made by Mr. Justice O'Sullivan in his dissent in *Binkley v Bajcura* (supra):

It is said in some of the cases that the plaintiff's conduct is a factor to be considered. In the Simpson case (supra), Culliton, C.J.S. said at p. 333:

“If the non-service of the writ was due to the personal actions of the plaintiff that, of course, would be a fact to be considered by the Court.”

I can understand there may be cases where a plaintiff's conduct amounts to a willful default or to contumacy, but I find it difficult to penalize a plaintiff for having confidence in solicitors licensed to practice by a public body. It is true that in this case we do not have an affidavit from the plaintiffs to account for their delay. Despite urging that counsel should ask for leave to file such an affidavit in this court, counsel declined to do so. But I think it is clear enough on the record before us that the plaintiffs were guilty of no dilatoriness other than a failure to press their lawyers more strongly for action.

The Commission, in [text deleted] (supra), granted the Appellant an extension of time to file an Application for Compensation on a number of grounds, including:

1. although there was a lengthy delay in requesting an extension of time, the Appellant did provide a satisfactory explanation for the long delay.
2. there was no evidence the Appellant personally caused any delay in the proceedings.
3. the Appellant did not know there was a requirement to make an Application for Compensation within two (2) years of the 1995 motor vehicle accident.
4. the Appellant relied on her legal counsel to protect her interests and the delay was the sole responsibility of the actions of her legal counsel.

Decision

Having regard to the decisions of the Manitoba Court of Appeal in *Binkley v Bajcura* (supra), and the Commission's decisions in [text deleted] (supra), [text deleted] (supra), [text deleted] (supra) and [text deleted] (supra), the Commission in exercising its discretionary power to extend the time for appealing the Internal Review decision, pursuant to Section 174 of the MPIC Act, considered the following factors:

1. the length of the delay;
2. the conduct of the Appellant and/or the Appellant's solicitor;
3. the reasons for the delay;
4. whether there has been any prejudice resulting from the delay;
5. whether there was any waiver by the Appellant in respect of the Appellant's right to have the Internal Review Officer's decision reviewed by the Commission;
6. any other factors which argue to the justice of the proceedings.

The Commission finds that:

1. the Appellant was not responsible for any delay in filing a Notice of Appeal in respect of the decision of the Internal Review Officer pursuant to Section 174 and that the sole responsibility for the delay was caused by the Appellant's legal counsel.
2. having regard to the issue of prejudice, the Commission notes that although there was a lengthy delay of seventy-nine (79) days, MPIC's legal counsel did not argue that the delay had prejudiced MPIC in its defense against the Appellant's claim.
3. In respect of the issue of waiver, MPIC's legal counsel did not, during the course of her submission, suggest that the Appellant had waived her right to file a Notice of Appeal of the Internal Review Officer's decision. The Commission finds that there was no evidence that was submitted to the Commission to establish that the Appellant

had knowledge of the time limits under Section 174 of the MPIC Act and, as a result, the Appellant did not waive her right to appeal.

In *Marischuk v. Dominion Industrial Supplies Lte. Et al*, (1991) 73 Man. R.(2d) 271 (S.C.C.), Mr. Justice Sopinka, at page 275, on behalf of the Supreme Court of Canada, in his judgment referred with approval to the comments of the trial judge, Mr. Justice Kennedy of the Manitoba Queen's Bench, who stated:

“The second issue of waiver comes into effect when a party knowingly acts in a manner where he waives or foregoes reliance upon some known right or defect. It is important that the right or defect, as the case may be, be known, since one should not be able to waive rights of which he was not fully aware or apprised.”

4. a refusal to extend the time limits will result in an obvious and substantial injustice to the Appellant, while to permit an extension of time would not result in any substantial injustice to MPIC or prejudice MPIC's defense.

Upon a consideration of the totality of the evidence, both oral and documentary, and upon a consideration of the relevant factors surrounding the delay, the Commission finds that the Appellant has provided a reasonable excuse for her failure to appeal the Internal Review Officer's decision to the Commission, with the 90-day time limit set out in Section 174 of the MPIC Act. As a result the Commission will extend the time limit within which the Appellant may appeal the Internal Review decision dated August 2, 2006 to the Commission.

Dated at Winnipeg this 12th day of April, 2007.

MEL MYERS, Q.C.

