

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-16-066**

PANEL: Ms Karin Linnebach, Chairperson
Ms Leona Barrett
Dr. Arnold Kapitz

APPEARANCES: The Appellant, [text deleted], did not appear;
Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Andrew Robertson.

HEARING DATE: June 1, 2017

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

RELEVANT SECTIONS: Section 174 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, [text deleted], was injured in a motor vehicle accident (“MVA”) on December 24, 2011. On June 30, 2015, the Appellant’s case manager issued a decision regarding entitlement to a permanent impairment award and further Income Replacement Indemnity (IRI) benefits. The case manager determined that the Appellant was entitled to a permanent impairment amount as a result of the injuries the Appellant sustained in the MVA. However, the case manager also determined the Appellant was not entitled to a permanent impairment award

in relation to his disc lesion and upheld a previous case manager's decision that the Appellant's entitlement to IRI benefits ended as of May 9, 2012.

The Appellant sought a review of this decision within the 60 day time limit under the MPIC Act. On November 17, 2015, an Internal Review Officer from MPIC dismissed his application for review and upheld the case manager's decision (Internal Review Decision 15-596). Internal Review Decision 15-596 stated in part:

“The consultant's statement is that disc changes are common in the general population including those that work labour type activities which you had done. Further there is an inability to determine when the onset of these changes occurred. Therefore, I do not find that the disc changes are causally related to the accident based on the balance of medical probabilities.”

The Internal Review Decision further stated:

RIGHT OF APPEAL

If you are unsatisfied with this decision, you have ninety (90) days within which to appeal in writing to the Automobile Injury Compensation Appeal Commission, which Commission can be reached at:

301 – 428 Portage Avenue
Winnipeg, MB
R3C 0E2

Telephone Number: 204-945-4155
Fax Number: 204-948-2402
Toll Free: 1-855-548-7443

Please note that the Commission operates independently from the Manitoba Public Insurance and its decisions are binding on MPI subject to the appeal provisions of Section 187 of *The Manitoba Public Insurance Corporation Act*.

If you need assistance in appealing this decision to the Commission, you can contact:

Claimant Adviser Office
200 – 330 Portage Avenue
Winnipeg MB
R3C 0C4

Telephone Number: 204-945-7413 or 204-945-7442
Fax Number: 204-948-3157

Toll Free: 1-800-282-8069, Ext. 7413

The Claimant Adviser Office operates independently of both MPI and the Commission and is available to you at no charge.”

Internal Review Decision 15-596 did not address the Appellant’s appeal of entitlement to further IRI benefits.

The Appellant did not make application in writing to appeal the Internal Review Officer’s decision within 90 days from the date the decision was received by the Appellant. On May 24, 2016, the Commission received a Notice of Appeal from the Appellant stating that “my lower back is not the same my spine is messed up this is not from work I would know the difference I know my own body”. As the Appellant’s Notice of Appeal did not indicate the date of the Internal Review Decision that he was appealing, the Commission contacted the Appellant to confirm that he was appealing Internal Review Decision 15-596, which addressed assessment and calculation of his permanent impairment, including entitlement to a permanent impairment award for disc changes. A copy of Internal Review Decision No. 15-596 was provided to the Appellant and he confirmed with the Commission that this was the Internal Review Decision he had appealed.

As the Notice of Appeal was filed outside the 90 day time period within which to file his appeal with the Commission, the Appellant was required to provide reasons for his late filing. The Appellant’s reasons were provided to counsel for MPIC, who then indicated that it was MPIC’s position that the reasons provided were not a reasonable explanation for the filing of the Notice of Appeal three months after the expiry of the 90 day time period within which to file. The Appellant was advised that, given the late filing of his appeal and MPIC’s position on the late filing, a hearing would be held to determine whether the Commission will grant the Appellant an

extension of time to file his Notice of Appeal. The hearing was scheduled for November 24, 2016 and the Appellant acknowledged receipt of the Notice of Hearing.

Subsequent to the scheduling of the hearing date, counsel for MPIC advised that a second Internal Review Decision dated November 17, 2015 (Internal Review Decision 15-595) had been found, which addressed the Appellant's back pain symptoms and entitlement to further IRI benefits. Counsel also advised that the Appellant had provided MPIC with a two-page Notice of Appeal form dated February 8, 2016, but received by MPIC on February 22, 2016. Given the uncertainty around what the Appellant's intentions were when providing this document to MPIC, counsel for MPIC requested that a Case Conference Hearing (CCH) be scheduled to seek clarification from the Appellant as to what decision he intended to appeal and the circumstances around the filing of the Notices of Appeal. Counsel for MPIC indicated that depending on the information provided at the CCH, MPIC may agree that an extension of time to file the Notice of Appeal should be granted. It was decided to use the November 24, 2016 hearing date as a CCH to seek clarification from the Appellant.

The Appellant did not attend the November 24, 2016 CCH. Correspondence dated November 28, 2016 was sent from the Commission to the Appellant seeking clarification on which Internal Review Decisions he was appealing and the circumstances of his filing of Notices of Appeal to MPIC and the Commission. The Commission's letter to the Appellant noted that MPIC may be prepared to consent to the Appellant's request to extend the time to file his appeal depending on his response to questions clarifying which decision he intended to appeal and what steps he took to further his appeal. The Appellant was also asked to complete a Notice of Change of Address form as the Appellant had changed his address with the Commission over the telephone when scheduling the November 24, 2016 hearing date, but had not provided anything in writing to the

Commission formalizing this address change. The Appellant did not respond to the Commission. As such, the issue of the late filing of the Notice of Appeal received by the Commission on May 24, 2016 was sent to hearing for determination on whether the Commission would grant such an extension of time for the filing of the Notice of Appeal of Internal Review Decision 15-596.

Decision:

For the reasons set out below, the Commission will not exercise its discretion to grant an extension of time for the Appellant to file a Notice of Appeal of Internal Review Decision 15-596.

Preliminary and Procedural Matters:

The Appellant's appeal was scheduled for hearing on June 1, 2017 at 9:30 a.m. The Appellant was served with a Notice of Hearing dated April 19, 2017 sent to him by regular mail and Xpresspost at the address on the Notice of Appeal filed with the Commission and at the address the Appellant verbally provided to the Commission (the Appellant's second address). Neither Notices of Hearing sent by Xpresspost were claimed. The Notice of Hearing sent to the address on the Notice of Appeal was returned to the Commission with the notation "moved". The Notice of Appeal sent to the Appellant's second address by regular mail was not returned.

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 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.

Despite the Commission's request, the Appellant did not provide an address change in writing to the Commission. As such, pursuant to subsection 184.1(1)(b) of the MPIC Act, the Commission sent the Notice of Hearing to the Appellant to the address provided by him on his Notice of Appeal.

Pursuant to subsection 184.1(2) of the MPIC Act, the Appellant is deemed to have received the Notice of Hearing that was sent to him by regular mail to the address provided by him in his Notice of Appeal. Subsection 184.1(2) requires the Appellant to establish that, acting in good faith, the Appellant did not receive the Notice of Hearing, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

The Notice of Hearing was also sent by regular mail to the Appellant's second address, the address he verbally provided to the Commission. The Notice of Hearing sent to the Appellant's second address was never returned to the Commission.

On June 1, 2017, the hearing of the Appellant's appeal was convened at 9:30 a.m. with counsel for MPIC present. The Appellant did not attend. The Commission's Notice of Hearing provided that the time and date of the hearing are firm and that postponements will only be granted under

extraordinary circumstances. The Notice also provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and may issue its final decision either granting or dismissing the appeal in whole or in part.

Accordingly, the appeal hearing proceeded at 9:45 a.m. and the panel heard the submissions from counsel for MPIC. After submissions were completed, the panel advised counsel for MPIC that the panel would, as is the normal course, adjourn to deliberate and advise the parties of its decision in due course by providing a written decision. The hearing then adjourned.

Submission for the Appellant:

The Appellant was required to provide written reasons as to why he was unable to file his Notice of Appeal within the 90-day time limit. On June 21, 2016, the Appellant provided the following reasons to the Commission:

This is my reason why I missed the 90 day mark my son [text deleted] was recently told he has Autism Spectrum 3 so everything I was doing was put on hold sorry the inconvenience but my son is important I have all my time with doctor appoints, speech therapy, to understand how to raise my son this is why I have been late sorry for this but if you need proof I can send you copies of what you need

No further information or clarification was provided by the Appellant.

Evidence for MPIC:

Counsel for MPIC submitted the factors that the Commission considers on motions to extend the time to file an appeal are well-known and have been considered extensively by the Commission. While there are a number of factors to consider on these motions, counsel submitted that the most relevant factor in this case is the reason given for the delay.

The Internal Review Decision was issued on November 17, 2015 yet the Notice of Appeal was not filed until May 2016, approximately 3 months after the expiry of the time limit within which to file. Counsel stated that while this is not a long delay, the delay is not insignificant. Nonetheless, the main factor to consider in this case is the reason provided for the delay, which MPIC submits is not a reasonable excuse.

The Notice of Appeal itself provides no reason or explanation for the late filing. It simply states that the Appellant is seeking compensation for a back condition and it describes the effect the back condition has had on him.

Counsel submitted that both Internal Review Decisions issued on November 17, 2015 (15-595 and 15-596) state, in clear language, the Appellant's right of appeal and the time line of 90 days within which he is required to file an appeal. The Internal Review Decisions include the Commission's contact information and the ability of the Appellant to contact the Claimant Adviser Office for assistance. Counsel submitted that there is no evidence that the Appellant had any intention to follow-up with the Commission or the Claimant Adviser Office within the 90 day time period.

With respect to the Appellant's reasons for late filing that were provided to the Commission on June 21, 2016, counsel submitted that his son's diagnosis of autism is not, on its own, a reasonable explanation. This is because the Appellant indicates he received a recent diagnosis, but doesn't say when. Counsel submitted that no information was provided as to whether the diagnosis was made during the 90 day period, after the 90 day period or after the Commission contacted him to request reasons for the late filing. Further, the Appellant didn't provide any contextual information as to how the diagnosis impacted his ability to file his appeal. While the

Appellant indicates that he had to put everything on hold and that he was busy attending appointments, no information was provided by the Appellant as to when the appointments began, how frequent they were and whether he had family or friends who could assist him.

Counsel submitted that the Appellant also failed to provide any explanation as to why he did not seek assistance if he wished to pursue his appeal. He failed to explain why he didn't reach out to the Commission or the Claimant Adviser Office. Counsel noted that the Notice of Appeal form is simply a single page form and completion of this form is all that the Appellant needed to do to make sure the time lines were met. If the Appellant contacted the Claimant Adviser Office, they could have assisted him, but there is no indication he ever contacted their office.

On November 17, 2016, MPIC provided the Commission with a second Internal Review Decision dated November 17, 2015 (15-595) and a two-page Notice of Appeal dated February 8, 2016. However, the two-page Notice of Appeal does not indicate which Internal Review Decision he was appealing and there is no information as to why the Appellant provided the February 8, 2016 Notice of Appeal to MPIC, yet waited to file with the Commission until May 24, 2016. Counsel for MPIC requested that a CCH be scheduled so that the Appellant can clarify what his intentions were. The Appellant failed to attend the CCH. Subsequent to the CCH, the Commission wrote to the Appellant seeking clarification. Despite being contacted by the Commission, the Appellant failed to provide any clarifying information.

Without the additional requested and necessary contextual information, counsel submitted that no weight should be given to the Appellant's reasons provided on June 21, 2016. The reasons don't include any specifics and, despite being provided with multiple opportunities to provide this contextual information, the Appellant has failed to do so.

Counsel also noted that when the Appellant provided reasons to the Commission on June 21, 2016, he made no mention of having provided the February 8, 2016 Notice of Appeal to MPIC. If the Appellant thought he filed his Notice of Appeal within the time limit, he had the opportunity to say so and didn't.

Counsel submitted that, overall, the Appellant has not provided a reasonable excuse for his failure to file the Notice of Appeal within the time limit and the Commission should decline to extend the time within which to file the Notice of Appeal in these circumstances.

Reasons for Decision:

Subsection 174(1) of the MPIC Act provides 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.

In this case, the Appellant's Notice of Appeal was not received by the Commission within 90 days after he received Internal Review Decision 15-596, dated November 17, 2015. Accordingly, he has asked the Commission to exercise its discretion to allow an extension of time to file the Notice of Appeal, which was received by the Commission on May 24, 2016.

In considering whether to exercise its discretion under Subsection 174(1) of the MPIC Act, 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 Section 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 has been any waiver respecting the delay; and,
5. any other factors which argue to the justice of the proceeding.

The panel has reviewed the documentary evidence on file and the submissions of counsel. Upon a consideration of the totality of the evidence, the submission from counsel, and the relevant factors surrounding the delay, the Commission finds that the Appellant has not provided a reasonable excuse for his failure to appeal the Internal Review Officer's decision to the Commission within the 90 day time limit set out in subsection 174(1) of the MPIC Act.

The Commission agrees with counsel for MPIC that the main factor for consideration in this matter is the reason provided for the delay in filing. In response to the Commission's request for written reasons for his late filing, the Appellant provided a hand-written document that was received by the Commission on June 21, 2016. This document states that the Appellant's son was diagnosed with Autism Spectrum 3 and that the Appellant was spending his time attending various appointments. Unfortunately, the Appellant provided no details as to when the diagnosis was received or any other circumstances surrounding why the diagnosis prevented him from filing an appeal with the Commission within the timeline.

On November 17, 2016, MPIC provided the Commission with a second Internal Review Decision dated November 17, 2015 (Internal Review Decision 15-595) as well as a two-page Notice of Appeal dated February 8, 2016. The discovery of these documents certainly raised the question of what were the Appellant's intentions with respect to filing an appeal. Unfortunately, the Appellant has not responded to the Commission's attempts to get clarification on his

intentions, having not attended the November 24, 2016 CCH, not contacted the Commission in response to its November 28, 2016 letter and not attended the hearing.

In the absence of clarifying information as to his intentions and the circumstances surrounding his son's diagnosis and its impact, the Commission finds that the Appellant has not provided a reasonable excuse for his failure to appeal the Internal Review decision within the 90-day limit set out in section 174 of the MPIC Act. Accordingly, the Commission will not extend the time limit within which the Appellant may appeal the Internal Review decision dated November 17, 2015 (Internal Review Decision 15-596) to the Commission.

Dated at Winnipeg this 27th day of June, 2017.

KARIN LINNEBACH

LEONA BARRETT

DR. ARNOLD KAPITZ