

## Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]  
AICAC File No.: AC-18-145

**PANEL:** Pamela Reilly, Chairperson

**APPEARANCES:** The Appellant, [text deleted], was represented by [text deleted] (“the Representative”).  
Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Andrew Johnson. (“Counsel”).

**HEARING DATE:** April 5, 2023.

**ISSUE:** Whether the Appellant failed to pursue her 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 October 14, 2010, the Appellant was standing in a city transit bus when it stopped suddenly, causing her to fall (“the MVA”). She claimed personal injury protection plan (PIPP) benefits for injuries, which involved a cut to the back of her head that required stitches, a concussion, bruising to her left hip, elbow, knees and a stiff neck.

A January 6, 2012 report from the Appellant's physician stated that the Appellant's cataracts and osteoarthritis compounded her post-concussion syndrome and neck pain. In 2012 and 2013, the Appellant's physicians reported her complaints of dizziness, unsteadiness and balance problems. MPIC's Health Care Service ("HCS") consultants concluded that the Appellant's medical records revealed multiple potential causes for her dizziness, and concluded that her MVA was not the likely cause of her balance difficulties.

In a June 21, 2018 decision ("the CMD"), the Appellant's case manager denied her PIPP benefits, based upon the HCS opinion. The Appellant requested an internal review. MPIC's Internal Review Office upheld the CMD in its September 27, 2018 decision ("the IRD"). The Appellant appealed MPIC's IRD to the Commission.

On December 12, 2018, the Commission received the Appellant's October 10, 2018 Notice of Appeal ("the NOA"). In the NOA, the Appellant named her [text deleted], [text deleted], as her representative ("Representative") and requested mediation with the Automobile Injury Mediation ("AIM") service. On June 27, 2019, the Commission received notice from the mediation office that the Appellant did not proceed with mediation.

On September 30, 2019, the Commission used Xpresspost to deliver the Indexed File of documents to the Appellant and MPIC, and requested a response from both parties, confirming agreement of the documents. On October 16, 2019, the Commission received the Appellant's signed authorization appointing [text deleted] as her Representative, which did not speak to her position on the documents.

The Appellant did not communicate further with the Commission. On January 2020 and August 2020, the Commission telephoned the Appellant's Representative and left messages to return the call. Neither the Appellant nor her Representative responded. The Commission left further voice messages in August 2021 without receiving a return call from the Appellant or her Representative.

In September 2021, the Commission conducted searches and enquired whether MPIC had updated contact information for the Appellant. The searches and enquiries did not disclose alternate contact information. On September 7, 2021, the Commission utilized regular mail and Xpresspost, to both the Appellant and her Representative, to notify them that the Appellant's failure to contact the Commission had triggered the Commission to consider dismissing her appeal for failing to pursue, pursuant to section 182.1, as quoted in the letter. The Commission allowed the Appellant and her Representative three weeks to respond.

The Commission confirmed that on October 2, 2021, the Appellant's Representative signed a receipt for the Xpresspost letter. On October 12, 2021, Canada Post returned the Appellant's Xpresspost letter as "unclaimed". On October 13, 2021, the Commission sent further letters to the Appellant and her Representative advising that if they did not contact the Commission within six months, the Commission would schedule a Failure to Pursue ("FTP") hearing.

On October 19, 2021, the Appellant's Representative signed a receipt for the October 13, 2021 Xpresspost. On November 17, 2021, Canada Post returned the Appellant's letter as "unclaimed."

On May 12, 2022, the Commission used Xpresspost and regular mail to deliver another warning letter to the Appellant and her Representative. This letter detailed the Appellant's and Representative's history of not responding to correspondence or phone calls. The letter again explicitly quoted the MPIC Act "Dismissal for failure to pursue appeal" section 182.1. The letter advised that the Commission would proceed to schedule a hearing to determine whether the Appellant had failed to pursue her appeal diligently and, if so, dismiss the appeal.

On June 8, 2022, the Commission used Xpresspost to deliver the Indexed File for the FTP hearing to both the Appellant and her Representative. Canada Post returned the Appellant's Indexed File noting, "Moved." On June 18, 2022, Canada Post confirmed delivery to the Appellant's Representative. The Commission received no response.

On February 17, 2023, the Commission utilized a courier and regular mail to deliver Hearing Guidelines with a Notice of Hearing to the Appellant advising her that the Commission had set a FTP hearing date of Wednesday, April 5, 2023 at 9:30 a.m. The courier returned the correspondence, which noted, "Moved." Canada Post did not return the letter.

On February 17, 2023, the Commission used regular mail and Xpresspost to send the FTP Notice of Hearing and Hearing Guidelines to the Appellant's Representative. Canada Post confirmed successful delivery of both the regular mail and Xpresspost.

**Issue:**

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

**Decision:**

The Commission finds that the Appellant failed to pursue her 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.

In preparation for the hearing, the Commission compiled an Indexed File, which contains all documents relevant to the FTP hearing. 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 Indexed File Table of Contents.

The Chair explained that the only issue for the hearing concerned section 182.1 of the MPIC Act and whether the Commission should dismiss the appeal on the basis that the

Appellant had failed to pursue it diligently. The Chair explained that “diligently” meant whether the Appellant made careful, steady and persistent efforts to pursue her appeal.

**Appellant submissions:**

The Appellant’s Representative submitted that this matter has been ongoing since 2010, for 13 years. He explained that the Appellant is elderly and suffers declining health, declining cognition and depression. She has lost the ability to care for herself. He candidly admitted that the Appellant has probably not been as vigilant as she should have been in pursuing her appeal.

The Representative explained that he runs a busy [text removed] clinic in which he works 12 hours per day. In addition to being a small business owner, he cares for his mother and his children. He said that the COVID19 pandemic, his mother’s February 2018 fall, and consequent hip fracture were extenuating circumstances.

In addressing the failure to pursue issue, the Representative conceded that with his busy schedule, he found it difficult to “fill out forms and get to it”. Therefore, “things happen and I don’t get to it.” He admitted that he was probably negligent in not responding. The Representative referred to the IRD and argued there were flaws in the MPIC decisions that denied PIPP benefits to [the Appellant]. He said he was frustrated with MPIC and would not stop pursuing the matter on behalf of [the Appellant], until it was resolved.

In response to the Chair’s question as to why he has not pursued the matter with the Commission, the Representative candidly responded, “I will be honest – time. And, I’ll

take responsibility for this.” However, he said that the matter should have been resolved in 2013 when MPIC received [the Appellant]’s neurologist report.

The Chair noted that because the matter was not resolved with MPIC, the Appellant filed an appeal to this Commission, and reminded the Representative to address the failure to pursue issue. The Representative reiterated that he was accountable for “not being diligent and filling out the forms”. He emphasized that the matter should have been resolved in 2013.

He submitted that he was not the “only one who has dragged their feet a little bit with this.” He repeated, “I will own the fact that I haven’t been diligent”. He said that he is here now and if MPIC or the Commission would like to schedule something, he would make himself available.

**MPIC submissions:**

MPIC Counsel submitted that this issue deals with section 182.1(1) of the MPIC Act, which allows the Commission to dismiss all or part of an appeal at any time if the Commission determines that an appellant has failed to diligently pursue their appeal.

Counsel reviewed some factors that the Commission has considered in prior decisions on the failure to pursue issue, as follows:

- 1) Did the Appellant fail to pursue and/or diligently pursue their appeal?
- 2) Did the Appellant provide an adequate explanation for their failure?
- 3) Did the Appellant receive proper notice of the hearing?

4) Is there another reason the Commission should consider?

Starting with proper notice, Counsel submitted that the Representative's appearance at this hearing was evidence that the Commission provided proper notice of the hearing.

On the question of diligence, Counsel submitted that the Commission has previously stated that "diligence" means a careful, steady and persistent application of effort to a person's matter. An Appellant must show some care and effort. Counsel submitted that the burden of proof is on the Appellant to show she pursued her appeal with care and persistence.

Counsel referred to the Index File and the various letters and notices sent by the Commission to the Appellant and her Representative. He submitted that the Appellant's Representative acknowledged receipt of the letters and notices. Counsel submitted that notwithstanding the Representative's busy schedule, failing to respond in any way is not reasonable. This demonstrates a lack of care and persistent effort. Therefore, Counsel submitted that the Appellant has not diligently pursued her appeal, and has not provided any reasonable explanation for her failure.

Counsel reiterated that the onus is on the Appellant to show that she diligently pursued her appeal. In this case, the Appellant has not responded or followed up on her appeal for almost four years. MPIC submits that the Commission should dismiss the 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.

## **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 she has not breached s.182.1(1).

Since filing her NOA in December 2018, the only communication the Commission received from the Appellant was her October 2019 signed authorization appointing her Representative. From that time to the date of this hearing, three and a half years have elapsed without any response to numerous enquires from the Commission. In effect, the appeal has not progressed for three and a half years.

The Commission has little doubt that the Appellant's age and declining health were factors in her personal failure to respond. The Commission accepts the Representative's submission that he is a busy small business owner, with many responsibilities. However, the Commission does not find that these factors adequately explain why the Appellant, or her Representative failed to respond, in any way, to the Commission's numerous enquires.

The Representative spoke of 'filling out forms'. However, the Commission letters often simply asked for a response to straightforward questions. The Representative did not explain how his busy practice, the pandemic, or [the Appellant]'s health or broken hip prior to the appeal, prevented him from returning a phone call or sending a letter simply to inform the Commission of his or the Appellant's circumstances.

The Commission appreciates the Representative's candor in admitting that he and the Appellant have failed to pursue this appeal. Further, despite the Representative's offer to make himself available now, should the Commission wish to set a date, the

Commission finds that such a last minute offer is insufficient to address the long-standing lack of effort. The time for such offers has passed.

The Commission finds that the Appellant, through her Representative, received all correspondence, including the warning letter stating that the Commission may dismiss her appeal because of her failure to respond to Commission enquiries. The Commission finds that the Appellant, through her Representative, received the FTP Indexed File and the Notice that informed the Appellant of her hearing date. The Commission finds that the Appellant has not provided a reasonable explanation for failing to pursue her appeal.

**Disposition:**

The Commission finds, on a balance of probabilities that the Appellant has failed to pursue her appeal diligently. Consequently, the Commission dismisses the appeal.

Dated at the City of Winnipeg, in the Province of Manitoba, this 11<sup>th</sup> day of April, 2023.

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**PAMELA REILLY**