Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appelant]
AICAC File No.: AC-95-16

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Ms Laura Diamond** **Mr. Paul Johnston**
APPEARANCES:	**The Appellant, [text deleted], was represented by [text deleted];** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kevin McCulloch.**
HEARING DATE:	**December 8, 2006**
ISSUE(S):	**Application to review previous decisions of the Commission**
RELEVANT SECTIONS:	**Sections 6(1) & (2), 171(1) &(2), 174(1) & (2), 175, 182(1), 184(1), 187(1), (2) & (6) 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

[The Appellant] was involved in a motor vehicle accident on November 20, 1994. His initial claim for Income Replacement Indemnity ('IRI') benefits for the first 180-days following the accident was declined by MPIC's case manager. The Appellant made an application to have this decision reviewed by MPIC's Internal Review Officer, who issued a decision on July 31, 1995 dismissing the Appellant's Application for Review and confirming the case manager's decision.

The Appellant filed a Notice of Appeal with this Commission in respect of the Internal Review Officer's decision. A hearing was conducted by the Commission on November 9, 1995. The Commission issued a decision on November 21, 1995 wherein it determined that the Appellant was a "non-earner" pursuant to Section 85(1)(a) of the MPIC Act and, as a result, the Appellant was not entitled to IRI benefits for the first 180-days following the accident. This decision was subject to an unsuccessful application by the Appellant for a leave to appeal to the Court of Appeal of Manitoba.

The Appellant's second appeal was heard by the Commission on December 9, 1996. This appeal had three (3) facets to it:

1. The first two dealt with the Appellant's right to reopen his earlier unsuccessful appeal for IRI benefits during the first 180-days following his accident. The Commission found that 'new information' sought to be adduced by the Appellant at that time was insufficient to warrant reopening the earlier decision.
2. The third ground of his appeal was a claim for IRI benefits for the period following the 180th-day of this accident. The Commission rejected the third ground of the appeal on the grounds that the Appellant had attained his pre-accident status long before the first 180-days had expired. In addition, the Commission further found there was no new information which would permit the Commission to find that the Appellant had suffered a relapse which may have entitled the Appellant to some IRI. The Commission again reaffirmed its earlier decision that many of the problems the Appellant was suffering could not be attributed to the motor vehicle accident which occurred in the month of November 1994. In its decision dated May 13, 1998 the Commission stated:

> . . . It follows, therefore, that his appeal must be dismissed, not only for the foregoing reasons but, primarily, for the reason that we have no jurisdiction to deal with it. The remedy that he seeks has already been denied him and his appeal to this Commission from that denial was dealt with in December of 1996. Nothing new has been adduced that would allow us to revisit the earlier decision of this Commission, even if the right to do so exists.

The Appellant has now made a application to the Commission to reopen the hearing which was held by the Commission on November 9, 1995. The basis of the Appellant's request to reopen the hearing is the allegation that there was a reasonable apprehension of bias arising out of certain things alleged to have been said by a Commission member after the hearing. MPIC's legal counsel has raised a number of procedural objections to the Appellant's appeal and asserted that the Commission does not have the jurisdiction to hear this application for a rehearing. A Pre-Hearing Meeting was held on December 8, 2006 for the purpose of dealing with these questions, which included the issues of:

1. the Commission's lack of statutory authority;
2. *functus officio*;
3. *laches* on the part of the Appellant;
4. abandonment and/or withdrawal on the part of the Appellant.

The parties agreed that it would be more appropriate and expeditious for the Commission to hear and determine whether it had jurisdiction to inquire into allegations in respect of the Commission's proceedings arising out of a Commission hearing on November 9, 1995 on the questions of whether the Commission:

1. lacks statutory authority;
2. is *functus officio*;

without hearing from the parties in regard to the other procedural objections which had been raised. It was also agreed by the parties that the Commission would deal only with these further issues if the Corporation's procedural objections relating to the Commission's lack of statutory authority and its *functus officio* status were not sustained by the Commission.

Submission for MPIC

Lack of Statutory Authority

Counsel for MPIC took the position that the Commission does not have jurisdiction to hear an application by the Appellant to rehear a matter eleven (11) years after the 1995 decision of the Commission in the appeal, as the Commission lacks the requisite statutory authority to hear an application to determine a rehearing of a matter.

Counsel submitted that there is no statutory authority in the MPIC Act for the Commission to conduct a hearing to review, revise or vary its previous decisions, as is common with many other administrative tribunals. Rather, this statutory authority was conferred on the Court of Appeal under Section 187(6) of the MPIC Act, which gives the Court of Appeal power to:

(a) make any decision that in its opinion ought to have been made;

(b) quash, vary or confirm the decision of the Commission; or

(c) refer the matter back to the Commission for further consideration in accordance with any direction of the Court.

Under Section 171 of the MPIC Act, counsel submitted that MPIC has the power to reconsider its decisions either at the internal review or case manager level. However, there is nothing in the MPIC Act providing the Commission with the power which the legislature gave to the Court of Appeal and MPIC to review such decisions.

Counsel further submitted that without the requisite statutory authority, the Commission could not make a determination to rehear a matter. There is no provision in the enabling statute to allow the Commission to conduct this rehearing and for the Commission to reopen a hearing without this power would create confusion relating to and be ultavires of the powers conferred upon the Commission by statute.

Functus Officio

Counsel for MPIC also submitted that the Commission does not have jurisdiction to hear an application to determine whether they should rehear a matter already decided in 1995, based on the principle of *functus officio.* That doctrine provides, as noted by the Canadian Encyclopedic Digest (CED) that "*once adjudicators have done everything necessary to perfect their decisions, they are barred from revisiting them other than to correct clerical or other minor technical errors."*. Counsel emphasized the importance of finality in decision making for administrative tribunals and submitted that they generally lack the capacity to reopen or reconsider a matter which has been finally adjudicated.

Counsel for MPIC distinguished the leading case in the area of *functus officio*, a decision of the Supreme Court of Canada in *Chandler v Alberta Association of Architects* [1989] 6 W.W.R. 521. That case took a more flexible and less formalistic approach to reopening decisions of administrative tribunals, which are subject to appeal only on a point of law.

The Supreme Court in *Chandler* (supra) stated that:

> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.

MPIC's counsel submitted that:

1. the MPIC Act contains no indication that a decision of the Commission can be reopened by the Commission to enable it to discharge the function granted to it by the Act.
2. the Commission discharged its function under the enabling legislation when it heard and decided the Appellant's appeal in 1995.
3. the principle of *functus officio* applies in the absence of any indications that the Commission can rescind, vary, amend or reconsider a final decision.

MPIC's counsel distinguished the facts in *Chandler* (supra) where the administrative tribunal, the Practice Review Board, was not functus, since it had failed to fully dispose of the matter before it in a manner permitted by the *Architects Act.* In this case the Commission did fully dispose of the matter before it and exhausted its mandate by making a final award. There is no legislative authority for the Commission to amend its decision and, therefore, on the facts, *Chandler* (supra) is not applicable where the Commission, in the present case, has exhausted its mandate.

MPIC's legal counsel further distinguished *Chandler* (supra) by pointing out that the statute examined by the Court in *Chandler* (supra) allowed for an appeal only on a point of law and not on a question of jurisdiction. However, MPIC's legal counsel further submitted that in this case Section 187(1) and (2) of the MPIC Act permits an appeal not only on a question of law, but also on a question of jurisdiction.

MPIC's legal counsel asserted that:

1. a breach of natural justice such as is alleged by the Appellant to have been committed by the Commission would constitute a jurisdictional error which would cause the Commission to lose or exceed its jurisdiction.
2. where either an Appellant or MPIC believes that a jurisdictional error has occurred, either party, pursuant to Section 187(1) and (2) of the MPIC Act can appeal such an error only to the Manitoba Court of Appeal.
3. the Appellant had never pursued such an appeal.
4. as a result, the Commission should find that it did not have the statutory authority to review or reopen the Appellant's appeal.
5. the Commission, which is subject to appeals on questions of law or jurisdiction, had completed its mandate and should decline to hear the appeal on the grounds that it is *functus officio*.

Submission of the Appellant

Counsel for the Appellant submitted that the Commission is a specialized tribunal created by statute which must conduct itself according to the principles of natural justice. He referred to the *Chandler* (supra) decision of the Supreme Court of Canada, where the Court noted the importance of administrative tribunals in providing speedy determination of administrative problems. In order to achieve this objective, the Commission must have the jurisdiction to acknowledge that one of its panels had violated the principles of fundamental justice and to deal with this 'in house'. As a result, counsel submitted that the Appellant is entitled to adduce evidence regarding the allegation of a breach of natural justice, and the Commission has the jurisdiction to hear the merits of such allegations and determine whether or not a decision by a previous Commission panel is void on the grounds of an apprehension of bias.

The Appellant's counsel further submitted that the Commission has the statutory authority to proceed in this manner. He noted that Section 184(1)(b) of the MPIC Act allowed the Commission to make any decision that the Corporation could have made. He also referred to Section 171, which gave the Corporation the power to make fresh decisions regarding a claim, where it is satisfied that new information is available in respect of that claim. Therefore, he asserted that if the Corporation could make a fresh decision, the Commission, which can make any decision that the Corporation could have made, has the jurisdiction to hear and determine any allegation of an appearance of bias. As well, the Commission also has the power to quash that decision upon finding that the Commission panel has been guilty of a breach of natural justice.

The Appellant's counsel, in his submission, also referred to:

(a) Section 6(2) of the MPIC Act which bestows certain powers upon the Corporation including, in Subsection (g), the power to do all things necessary for the purpose of settling, adjusting, investigating, etcetera, claims; and

(b) Section 150 of the MPIC Act which obligates the Corporation to advise and assist claimants.

Having regard to these statutory provisions he urged that the Commission should not, as counsel for MPIC suggested, distinguish the Supreme Court of Canada decision in *Chandler* (supra) on narrow, technical grounds.

In this respect the Appellant's counsel noted that in *Chandler* (supra) the Court stated that having regard to the legal principle of *functus officio*, this principle:

> . . . should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. . .

The Appellant's legal counsel further submitted that as a result of its broad powers under the Act:

1. the Commission does have the authority and responsibility to oversee decisions of the Corporation; and.
2. this authority is in the enabling statute and is broad enough to allow the Corporation to reopen a decision.

Counsel for the Appellant further argued that:

1. decisions of the Commission should not have any finality if the Commission finds that it has conducted itself with an appearance of a reasonable apprehension of bias.
2. it is not uncommon for administrative tribunals, such as the Labour Board, to rehear and review their own decisions.
3. the allegations made by the Appellant are not a matter of jurisdiction, but rather a matter of fundamental natural justice, and there is no express provision in the statute which says that only the Court of Appeal can decide this issue.
4. while the Court of Appeal is available to provide guidance in regard to the statute, as a specialized tribunal, the Commission was the more appropriate forum to deal with the question expeditiously.

In the alternative, counsel for the Appellant submitted that, should the panel find it did not have jurisdiction in this matter, the Commission should exercise its discretion under Section 186(1) of the MPIC Act to, on its motion, state a case in writing for the opinion of the Court of Appeal, on a question of law or jurisdiction.

MPIC's Reply

In reply, counsel for MPIC submitted that:

1. there is no link between Section 184 and 171 of the MPIC Act.
2. the Commission's function on an appeal under Section 184 is very different from the Corporation's ability to reconsider new information under Section 171.
3. the Commission's powers must be read in view of its overall jurisdiction to consider Internal Review decisions and to make decisions that in its view, the Internal Review Officer should have made.
4. Section 184 does not provide the Commission with the power to do anything and everything the Corporation can do, including the powers set out for the Corporation in Section 6 of the Act.

Discussion

The MPIC Act contains the following provisions regarding the role and jurisdiction of MPIC, the Commission, and the Court of Appeal.

> **Corporation may reconsider new information**
> **171(1)** The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.
>
> **Claims corporation may reconsider before application for review or appeal**
> **171(2)** The corporation may, at any time before a claimant applies for a review of a decision or appeals a review decision, on its own motion or at the request of the claimant, reconsider the decision if
> (a) in the opinion of the corporation, a substantive or procedural error was made in respect of the decision; or
> (b) the decision contains an error in writing or calculation, or any other clerical error.
>
> **Powers of commission on appeal**
> **184(1)** After conducting a hearing, the commission may
> (a) confirm, vary or rescind the review decision of the corporation; or
> (b) make any decision that the corporation could have made.

Appeal to Court of Appeal
187(1) The appellant or the corporation may appeal the decision of the commission to The Court of Appeal.

Appeal with leave
187(2) An appeal under subsection (1) may be taken only on a question of jurisdiction or of law and only with leave obtained from a judge of The Court of Appeal.

Powers of Court on appeal
187(6) The Court of Appeal on hearing the appeal may
(a) make any decision that in its opinion ought to have been made;
(b) quash, vary or confirm the decision of the commission; or
(c) refer the matter back to the commission for further consideration in accordance with any direction of the Court.

Lack of Statutory Authority

The Commission agrees with MPIC's submission that it has no statutory authority to review the Commission's November 21, 1995 decision in respect of the Appellant and that the power of review is given specifically to the Court of Appeal of Manitoba pursuant to Section 187 of the MPIC Act. As a result, the Commission determines it does not have jurisdiction to conduct a hearing to determine whether the previous Commission panel conducted itself in such a fashion as to create a reasonable apprehension of bias.

It should be noted that neither party raised an issue as to whether the Court of Queen's Bench of Manitoba had the jurisdiction to deal with such an application and, as a result, this matter is not an issue in this application before the Commission.

The Appellant has submitted that a combination of Sections 171 and 184(1)(b) of the Act permits the Commission to consider new information in order to determine whether the Commission's decision in 1995 is void and a nullity on the grounds of a reasonable apprehension of bias. It is trite to say that the Commission is a creature of the MPIC Act and can only exercise its powers

pursuant to the provisions of this Act. As a result, the Commission finds that it can only exercise its powers under Section 184(1)(b) of the Act to make any decision that the Corporation could have made only after conducting a hearing in accordance with the following provisions of the Act:

> **Automobile Injury Compensation Appeal Commission established**
> **175** The Automobile Injury Compensation Appeal Commission is established as a specialist tribunal to hear appeals under this Part.
>
> **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.
>
> **Hearing of appeal by commission**
> 182(1) The commission shall conduct a hearing in respect of an appeal filed under this Part.

The Commission is required to conduct a hearing of an appeal filed from an Internal Review decision, pursuant to Section 182(1) of the MPIC Act. The Commission panel, in conducting this hearing on November 9, 1995, did have the jurisdiction, pursuant to Section 182(1) of the MPIC Act to conduct these proceedings in respect of the Appellant's appeal from an Internal Review decision and rejected this appeal in its decision dated November 21, 1995. The Appellant unsuccessfully appealed the Commission's decision on a question of law to the Court of Appeal of Manitoba pursuant to Section 187(2) of the Act.

The Commission further notes that the present proceedings did not arise as a result of the Appellant's appeal from an Internal Review Officer's decision pursuant to Section 174(1) of the Act. The Appellant's request that the Commission conduct a hearing to determine whether or

not a previous Commission, in 1995, acted in such a way as to raise a reasonable apprehension of bias, does not constitute a hearing of an appeal within the provisions of Sections 174 and 182(1) of the MPIC Act. The Commission therefore determines that:

1. it has no jurisdiction to conduct the hearing requested by the Appellant, having regard to the provisions of Sections 174 and 182(1) of the MPIC Act.
2. the right to review the Commission's decision of November 21, 1995 in these circumstances is within the jurisdiction of the Manitoba Court of Appeal pursuant to Section 187(1) and (2) of the MPIC Act

The Appellant further submitted, in support of its position, that the Commission has the statutory authority to conduct a hearing having regard to the following provisions of the Act:

1. Section 6(1) and (2) of the Act entitled "Objects and Powers" (which provisions are attached as Appendix "A" to this decision), sets out the powers granted to MPIC to permit, conduct and administer the universal compulsory automobile insurance program as detailed in the Act, including Section 62(2)(g) which gives MPIC the power to do all things necessary for the purpose of settling, adjusting, and investigating claims.
2. Section 150 of the Act which obligates MPIC to advise and assist claimants.
3. 184(1)(b) of the Act which provides that the Commission has the power to make any decision that MPIC can make.

The Appellant asserts, having regard to the above mentioned provisions of the Act, that the Commission has the power to make any decision MPIC could make under Section 6 of the MPIC Act and, as a result, the Appellant's legal counsel submits that the Commission has the power to conduct a hearing requested by the Appellant.

The Commission notes that Section 175 of the MPIC Act establishes the Commission as a specialist tribunal to hear appeals of claimants from decisions made by MPIC in respect of their benefits, and not to operate the no-fault insurance program in the Province of Manitoba, which is within the sole jurisdiction of the Corporation. The purpose of the Commission is fundamentally different from the purpose of the Corporation as defined in Section 6(1) and (2) of the MPIC Act.

The Commission finds that the Legislature never intended to permit the Commission to exercise its powers to review decisions of the Corporation (under Sections 175 and 182(1) of the MPIC Act) while at the same time administering the activities of the Corporation under Section 6(1) and (2), and exercising the Corporation's powers under Section 150 and 184 of the MPIC Act. To do so would be to place the Commission in a conflict of interest and adversely affect is status as an independent quasi judicial tribunal.

For these reasons, having regard to the functions of the Commission and the Corporation, it would be unreasonable to interpret Sections 150 and 184(1) as granting the Commission the power to administer all of the provisions of the Act as set out in Section 6. As a result, the Commission rejects the Appellant's submission in this respect.

Functus Officio

MPIC's legal counsel submitted that, having regard to the principle of *functus officio* the Commission did not have the power to review the previous 1995 Commission decision on the grounds of an allegation of a reasonable apprehension of bias. The Appellant's legal counsel disagreed with this submission and cited the decision in *Chandler* (supra) in support of his submission that the decision of the Commission's panel in 1995 was not *functus officio.*

The Commission notes that in *Chandler* (supra) the Supreme Court found that the tribunal in question had not completed its mandate and the Supreme Court referred the matter back to the tribunal in question to complete its task. The majority of the Supreme Court, in its decision, found that once an administrative tribunal had reached a final decision, that decision cannot be revisited except if authorized by statute, or if there had been a slip or error with certain exceptions.

Unlike the tribunal in *Chandler* (supra) the Commission panel, when it issued its decision on November 21, 1995, reached a final decision in accordance with the MPIC Act. In this decision the Commission panel determined that the Appellant was a "non-earner" under Section 85(1)(a) of the MPIC Act and therefore was not entitled to IRI benefits. The Appellant unsuccessfully sought leave to appeal from a Judge of the Court of Appeal of Manitoba in respect of this question of law.

The Appellant's legal counsel, in support of his submission, referred to the decision in *Chandler* (supra) wherein Sopinka, J. at page 862, stated:

> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. . . .

Appellant's legal counsel argued that, having regard to the broad powers of the Act, there were indications in the MPIC statute that permitted the Commission to reopen the hearing and to determine whether the previous Commission panel, in 1995, had exercised its power in such a fashion that there was a reasonable apprehension of bias. The Commission, upon examination of the MPIC statute, does not find that there are indications that permit the Commission to reopen

the hearing and determine whether in 1995 a previous Commission panel exercised its power in such a fashion that there was a reasonable apprehension of bias.

In *Chandler* (supra) Sopinka, J. reviewed the history and application of the principle of *functus officio* as it related to Courts and to some administrative tribunals. At page 541 of the decision, he observed that the *functus officio* rule applied to Courts as follows:

> The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: (1) where there had been a slip in drawing it up, and, (2) where there was an error in expressing the manifested intention of the Court.

On the other hand, Sopinka, J. stated that an administrative board, from which there was no appeal except on a question of law was not deemed to be *functus* if that board, pursuant to its mandate, continued its function. In that context, the rigidity of the *functus officio* principle is to be relaxed.

At pages 541 and 542, Sopinka, J. notes the policy reasons in respect of the principle of *functus officio* and states at page 861:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisted because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error . . .
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours the finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal <u>only on a point of law</u>. Justice may require the re-opening of administrative proceedings in order to provide relief <u>which would otherwise be available on appeal.</u> (emphasis added)

The Commission notes that the enabling legislation under the MPIC Act permits either the Appellant or MPIC, upon leave from a Judge of the Manitoba Court of Appeal, to appeal the Commission's panel's decision of November 21, 1995 not only on a question of law, but also on a question of jurisdiction pursuant to Section 187(2) of the MPIC Act.

The Commission therefore determines, pursuant to the *Chandler* (supra) decision, that the principle of *functus officio* applies in respect of the Commission panel's decision dated November 21, 1995 and that this present Commission panel has no jurisdiction to review the 1995 decision on the grounds that there was a reasonable apprehension of bias. For these reasons, the Commission rejects the Appellant's submission that this Commission panel is not *functus officio* and can review the 1995 decision of the Commission panel to determine if there was a reasonable apprehension of bias as a result of the Commission's proceedings at that time.

Decision

In summary, the Commission finds:

a. it does not have the statutory authority to review the Commission's decision dated November 21, 1995 on the grounds that there was a reasonable apprehension of bias as a result of the Commission's proceedings at that time;
b. the Commission's decision dated November 21, 1995 was a final decision in accordance with the MPIC Act, subject to possible appeal on a question of law or jurisdiction and, on the principle of *functus officio*, this Commission has no jurisdiction to review the 1995 decision on the grounds that there was a reasonable apprehension of bias as a result of the Commission's proceedings at that time.

For these reasons the Commission dismisses the Appellant's Application for Review of the Commission's decision dated November 21, 1995.

Dated at Winnipeg this 18th day of January, 2007.

MEL MYERS, Q.C.

LAURA DIAMOND

PAUL JOHNSTON