

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-10-088**

**PANEL:** Ms Laura Diamond

**APPEARANCES:** The Appellant, [text deleted], was not present at the appeal hearing;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Alison Caldwell.

**HEARING DATE:** July 6, 2011

**ISSUE(S):** Whether the Appellant is entitled to Personal Care Assistance benefits.

**RELEVANT SECTIONS:** Sections 131 and 184 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

**Reasons For Decision**

A Notice of Appeal was filed by [the Appellant] on June 14, 2010 in respect of an Internal Review Decision relating to entitlement to Personal Care Assistance benefits. The Notice of Appeal contained the Appellant's address and telephone number in [text deleted], and indicated that she was represented by the Claimant Adviser Office.

On June 24, 2010 the Claimant Adviser Office advised the Commission they were no longer acting for the Appellant and provided contact information of [text deleted] with telephone numbers.

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

- a) On January 4, 2011 the Appeals Officer phoned the Appellant at her home telephone number of [text deleted] as listed on the Notice of Appeal and the number was out of service.
- b) The Appeals Officer then phoned the Appellant at her work telephone number of [text deleted], as listed on the Notice of Appeal and was advised that she no longer worked at that establishment.
- c) The Appeals Officer then phoned the Appellant at her cellular telephone number of [text deleted], as listed on the Notice of Appeal and spoke with the Appellant who advised that she had not yet received her Indexed file.
- d) On January 14, 2011 Canada Post indicated that the Appellant's Indexed file was successfully delivered to the Appellant in [text deleted], Manitoba.
- e) On January 18, 2011 the Appeals Officer telephoned the Appellant at her cellular telephone number but the number was no longer in service.
- f) On February 14, 2011, the Appeals Officer contacted MPIC to obtain updated contact information and was advised that the Appellant resides at [text deleted] and was provided with a telephone number of [text deleted]. The Appeals Officer phoned the Appellant at that number but there was no answer and no voice mail.
- g) At 9:30 a.m. and 4:07 p.m. On February 15, 2011, the Appeals Officer again phoned the Appellant at [text deleted], but again there was no answer and no voicemail.
- h) On February 16, 2011 the Appeals Officer again phoned the Appellant at [text deleted] but again there was no answer and no voicemail.
- i) The Appeals Officer then sent a letter to the Appellant at the address of [text deleted] requesting she contact the Commission to discuss her appeal. No response was received and the letter was not returned to the Commission.

- j) On March 24, 2011 the Appeals Officer phoned the Appellant at 9:31 a.m., 1:19 p.m., and 3:24 p.m., to [text deleted], but there was no answer and no voicemail.
- k) On April 19, 2011 the Appeals Officer phoned the Appellant at [text deleted] but there was no answer and no voicemail.

On May 31, 2011 the Commission issued a Notice of Hearing which stated:

“The Commission has fixed:

**Date:** Wednesday, the 6<sup>th</sup> day of July, 2011  
**Time:** 9:30 a.m.  
**Place:** 301-428 Portage Avenue, Winnipeg, MB R3C 0E2

for a hearing into your appeal.

The subject of the hearing is to determine whether the appeal has been abandoned.

At this hearing, you will have the opportunity to make submissions that you have not abandoned your appeal.

If you do not attend the hearing, the Commission may consider whether you have abandoned your appeal. Alternatively, the Commission may proceed with the hearing of your appeal and may issue its final decision.

The time and date are firm; postponements will only be granted under extraordinary circumstances.

This Notice, addressed to the Appellant was not sent by regular mail or Xpresspost to the Appellant due to a postal disruption.

The Commission was advised by the Secretary to the Chief Commissioner that the Commission telephoned the [text deleted] and was advised that if the Commission sent a fax to their offices they would ensure that the Appellant received the letter.

The Commission staff telephoned the [text deleted] on June 2, 2011 and spoke with the [text deleted] receptionist, [text deleted]. The receptionist indicated that the faxed notice of Hearing had been received at the [text deleted] through the [text deleted] Office. The [text deleted] receptionist also advised the Commission staff that the Appellant had picked up her Notice of Hearing.

Attached hereto and marked as Exhibit "A" is an Affidavit dated July 18, 2011, executed by [text deleted], indicating that on or about May 31, 2011 she did personally serve the Appellant with the Notice of Hearing. Accordingly, the Commission finds that, pursuant to Section 184.1(1)(2) of the MPIC Act, the Appellant is deemed to have received notice of the Commission's hearing scheduled for July 6, 2011, on May 31, 2011.

The hearing commenced on July 6, 2012 at 9:30 a.m. Ms Alison Caldwell, MPIC's legal counsel, attended the hearing. The Appellant did not attend. The Commission requested Ms Caldwell to make a submission in respect of the issue of abandonment of the appeal and as well to make a submission in respect of the merits of the appeal.

**Abandonment of the Appeal:**

MPIC's legal counsel submitted that the Commission was entitled to dismiss the Appellant's appeal on the grounds that the Appellant had abandoned her appeal and had not established on a balance of probabilities that she was entitled to Personal Care Assistance benefits.

"The Appellant was involved in a motor vehicle accident on July 17, 2001. In the decision of the Case Manager dated December 18, 2009, it was determined that the Appellant was not entitled to funding for Personal Care Assistance (PCA) in 2001 as she did not meet the minimum scoring requirement on a PCA Assessment. The decision was confirmed in the Internal Review Decision of May 7, 2010."

Counsel for MPIC reviewed the sequence of events beginning with the Appellant's filing with the Notice of Appeal on June 22, 2010 through the Commission's attempts to contact the Appellant in January and February of 2011.

Counsel for MPIC submitted that the Notice of Hearing had been properly served on the Appellant.

Counsel reviewed the Commission's consideration of the issue of abandonment of an appeal in several decisions, notably *[text deleted]* (AC-06-72) and *[text deleted]* (AC-04-71). In those decisions, the Commission adopted the criteria set out by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 1515 in determining whether an Appeal before that Court has been abandoned. The criteria to be considered are:

1. There must have been a continuous intention to prosecute the appeal from the time when the documents in question should have been properly filed;
2. there must be a reasonable explanation for the failure to file the documents; and
3. there must be arguable grounds of appeal.

Counsel for MPIC reviewed these three criteria as follows:

**1) Was there a continuous intention to prosecute the appeal?**

“The CAO withdrew from representing the Appellant in June of 2010. To MPI's knowledge, the Appellant has only once responded to the inquiries of the Commission since that time to advise that she hadn't received the indexed file. In particular she has failed to advise whether or not she intends to pursue the Appeal after various attempts to contact her by telephone and once by mail. There has been no contact with the claimant since January 4, 2011, approximately 6 months ago. It is therefore MPI's submission that the claimant's failure to confirm that she intends to pursue her appeal and suggests that she has no intention to prosecute her Appeal.

2) **Was there a reasonable explanation for the failure, in this case, to prosecute the Appeal?**

To MPI's knowledge, the appellant has not provided any explanation for failing to pursue her Appeal. Where no explanation has been provided, it is submitted there cannot be a determination of reasonableness and the Appellant cannot meet this requirement.

3) **Were there arguable grounds for the Appeal?**

The issue on Appeal is whether the Appellant was entitled to PCA Benefits after the accident in 2001. A Personal Care Assessment was performed one month following the Accident in which the Appellant scored 2 points out of a possible 51 total points. In 2001, a score of 5 or higher was required to be entitled to PCA benefits. Two further reports confirmed the Appellants level of functioning. No evidence has been provided that the PCA Assessment was incorrectly done or arrived at an incorrect score. It is submitted that there is no arguable ground for the appeal.”

Therefore, counsel submitted that the Appellant's appeal should be dismissed.

**Discussion:**

The Commission has reviewed the submission of counsel for MPIC and the decisions referred to, including the legal principles set out by the Manitoba Court of Appeal in *Fegol v. Asper* (supra).

The Commission finds, based on the evidence before the Commission that the only action the Appellant took in pursuing the appeal was to file the Notice of Appeal, dated June 14, 2010.

The only other participation which the Appellant had with her appeal was to answer her cellular telephone on January 4, 2011 and speak with the Appeals Officer to advise that she had not yet received her copy of the Indexed file.

During the months of January, February, March and April of 2011, the Appeals Officer attempted to contact the Appellant on many occasions but the Appellant had no further contact with the Commission after speaking with the Appeals Officer by telephone on January 4, 2011

and she took no further steps to contact the Commission to make appropriate arrangements to proceed with her appeal.

The Commission finds that:

- 1) The Appellant had an obligation after June 22, 2010 and January 4, 2011 to contact the Commission to make appropriate arrangements to proceed with her appeal and she failed to do so;
- 2) The Commission's office took all reasonable steps by telephone and by letter to contact the Appellant in order to set a date for the appeal hearing, but was unable to reach her.

**Decision:**

The Commission therefore concludes that the Appellant's conduct clearly indicated that she had no continuous intention of processing her appeal after June 2010 and January 2011.

The Commission also finds that the Appellant had not provided any reasonable explanation to the Commission for delaying processing of her appeal.

In respect of the merits of the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal. The issue on appeal was whether the Appellant was entitled to Personal Care Assistance benefits after an accident in 2001. A Personal Care Assessment was performed one month following the accident and the Appellant scored only 2 points out of a possible 51 total points. In 2001, a score of 5 or higher was required to be entitled to Personal Care Assistance benefits. Two further reports confirmed the Appellant's level of functioning and no evidence has been provided by the Appellant to show that the Personal Care Assistance Assessment was incorrectly done or that an incorrect score was arrived at.

Accordingly, the Commission therefore determines that the Appellant has failed to establish, on a balance of probabilities that MPIC incorrectly found that she was not entitled to Personal Care Assistance benefits.

In summary, the Commission concludes that the Appellant abandoned her appeal for the following reasons:

- 1) There was not a continuous intention by the Appellant to prosecute the appeal.
- 2) The Appellant did not provide a reasonable explanation for delaying the processing of her appeal.
- 3) There were no arguable grounds for her appeal.

The Commission, for these reasons, confirms the Internal Review Officer's Decision dated May 7, 2010 and dismisses the Appellant's appeal.

Dated at Winnipeg this 21<sup>st</sup> day of July, 2011.

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**LAURA DIAMOND**