

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-09-073**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Trevor Anderson
Ms Jacqueline Freedman

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

HEARING DATE: May 17, 2012

ISSUE(S): 1. Whether the Appellant received the Notice of Hearing pursuant to Sections 184.1(1) and (2) of the MPIC Act.
2. Whether the Appellant's Permanent Impairment benefits had been properly assessed in accordance with the provisions of Schedule A of Manitoba Regulation 41/2000.

RELEVANT SECTIONS: Sections 184.1(1) and (2) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Schedule A of Manitoba Regulation 41/2000.

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

A Notice of Appeal was filed by [the Appellant] on July 10, 2009 in respect of an Internal Review Decision relating to MPIC's denial of a permanent impairment award to the Appellant. The Notice of Appeal contained the Appellant's address as [text deleted].

The Commission was advised by the Appeals Officer that:

1. A Mediation package was sent to the Appellant by the Commission on June 23, 2011 which contained an application for him to seek mediation of his dispute with MPIC.
2. Between June 7 and August 17, 2011 she attempted to contact the Appellant by telephone on thirteen occasions but was unable to reach him.
3. On July 29, 2011 she sent a letter to the Appellant requesting him to contact her upon receipt of this letter.
4. On August 17, 2011 she discussed the matter with the Chief Commissioner who directed that a Case Conference be scheduled with the Appellant and if he did not attend then an abandonment hearing would be scheduled.
5. On October 20, 2011 a Case Conference took place which was attended by the Appellant and MPIC's legal counsel. At this meeting the Appellant undertook to begin the process of finding a new doctor and requesting a further medical report and to provide an update to the Appeals Officer by January 4, 2012.
6. On January 3, 2012 she contacted the Appellant and asked whether he had found a doctor and whether he had a medical report. The Appellant replied that he would call the Appeals Officer back on either January 4 or 5, 2012 as this was not a good time.
7. On January 10, 2012 she called and left a message with the Appellant asking him to contact her with respect to whether or not he had found a doctor and whether a report would be forthcoming.
8. On January 11, 2012 she spoke to a Deputy Commissioner who advised her to call the Appellant again and if she did not hear from him by January 16, 2012 the matter would be scheduled for a Case Conference.

9. On January 12, 2012 the Appeals Officer phoned the Appellant and left a message for him to provide her with an update by January 16, 2012 or the matter would be set down for another Case Conference.
10. A Case Conference was scheduled for March 8, 2012 and the Appellant was provided with a Notice of Hearing (attached as Exhibit A).
11. The Appellant did not attend the March 8, 2012 Case Conference and the Deputy Commissioner set the matter down for hearing on May 17, 2012.
12. A Notice of Hearing dated March 9, 2012 (attached as Exhibit B) was forwarded to the Appellant by Canada Post Xpresspost to the Appellant's address at [text deleted], being the Appellant's address as shown on the Notice of Appeal.
13. Attached as Exhibit C is a delivery confirmation received from Canada Post indicating that Exhibit B was claimed by R.K. on March 15, 2012 at [text deleted].

The appeal hearing was held on May 17, 2012 at 9:30 a.m. at the Commission's office. The Appellant did not attend at that time and the hearing was adjourned until 10:00 a.m. When the hearing was reconvened, the Appellant was not in attendance. MPIC's legal counsel was present.

The Commission found that the Appellant had been properly served with a Notice of Hearing pursuant to Sections 184.1(1)(b) and 184.1(2) of the MPIC Act which 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.

Service of the Notice of Hearing – Commission’s Jurisdiction:

MPIC’s legal counsel submitted that since the Appellant had been properly served with a Notice of Hearing by mail, pursuant to the provisions of the MPIC Act, the Commission had jurisdiction to determine whether or not the Appellant had abandoned his appeal and whether or not, on a balance of probabilities, the Appellant had established that MPIC had not properly assessed the permanent impairment benefits that he received.

Abandonment of the Appeal:

MPIC’s legal counsel further submitted that the Commission was entitled to dismiss the Appellant’s appeal on the grounds that the Appellant had abandoned his appeal and had not established, on a balance of probabilities, that the permanent impairment benefits awarded by MPIC had not been properly assessed.

On October 21, 2007 the Appellant was walking down a street and was hit by a car. As a result of the accident he suffered multiple bruises and lacerations, but no fractures.

The [Hospital] Emergency Report form documented a swollen left eye, swelling to the right lower leg and a two centimetre bruise to the right side of the Appellant's scalp. A report from [Appellant's doctor] based on his examination of October 31, 2007 documented multiple contusions to the face and right leg.

The Commission notes that on October 31, 2007 the Appellant made an Application for Compensation in which he indicated that there was injury to his left eyelid and possible injuries to his right leg.

On October 9, 2008 MPIC requested that [Appellant's physiotherapist] of [text deleted] provide an assessment of the "cut on left leg, road rash around left eye". This request also indicated scars to the Appellant's left leg and left eye.

On November 4, 2008 [Appellant's physiotherapist] provided a report to MPIC indicating that he had assessed the Appellant at his home on October 30, 2008. [Appellant's physiotherapist] measured the scar tissue and reported that:

1. There was a reddish Class 2 discoloration to the Appellant's left eyelid.
2. There was a light brownish Class 1 discoloration to the Appellant's left foot.
3. There were two brownish Class 1 discolorations and a scar to the Appellant's lower right limb.
4. There was a scar to the Appellant's right forearm.

MPICs' case manager sent a memo to her supervisor setting out the determination of the Appellant's permanent impairment assessment calculation at 10% of the maximum applicable at the date of accident (\$130,489.00) in the amount of \$13,048.90 payable to the Appellant.

Case Manager's Decision – January 19, 2009:

The case manager wrote to the Appellant on January 19, 2009 and advised him:

“The following is a list of your injuries that are rated as permanent impairments with the corresponding percentage entitlement as outlined in Schedule A.

INJURY/IMPAIRMENT	%	APPLICABLE SECTION	APPENDIX #
Right Lower Limb Scarring Maximum Entitlement for Limb is 8%	8	Division 13: Subdivision 2, Item 13.3	3
Left Eyelid Discolouration	$\frac{2}{10\%}$	Section 129(2)	4

The case manager advised the Appellant by separate letter that he would forward a cheque in the amount of \$13,048.90.

The Appellant made an Application for Review to the Internal Review Officer claiming that MPIC had not considered the scarring and discoloration to his right arm and left foot.

Internal Review Officer's Decision:

The Internal Review Officer's Decision of May 25, 2009 advised the Appellant that his Application for Review was dismissed and confirmed the case manager's decision of January 19, 2009. In her decision the Internal Review Officer stated that at the time of the accident the [Hospital] Emergency Report indicated that the Appellant had a swollen left eye, swelling to the right lower leg and a two centimetre bruise to the right side of the scalp. The report from the Appellant's physician of an examination on October 31, 2007 indicated multiple contusions to the Appellant's face and right leg.

The Internal Review Officer therefore concluded that the permanent impairment assessment awarded the correct entitlement for the documented injuries to the Appellant's right lower limb and left eyelid injury. The Internal Review Officer further stated:

“All medical information available has been reviewed and assessed for permanent impairment award. There is no new information to change the decision to date. Therefore, based on my review of your file, the permanent impairment award as documented in the decision of January 19, 2009 is properly calculated. I am therefore confirming the case manager's decision and dismissing your Application for Review.”

Notice of Appeal:

On July 10, 2009 the Appellant filed a Notice of Appeal to the Commission and attached a letter to the Commission. In this letter the Appellant indicated that he did sustain an injury to his left foot and scarring to his right arm, which were not recorded or assessed by MPIC.

Pursuant to the Notice of Appeal, the Appeals Officer contacted the Appellant who indicated that he would undertake to provide a report to substantiate his claim but he failed to do so.

Discussion:

At the appeal hearing, MPIC's legal counsel referred the Commission to a decision by the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004. In that case the Applicant was seeking an order restoring his appeal following its deemed abandonment as a result of the Appellant's failure to comply with The Court of Appeal Rules (Civil). In arriving at her decision in respect of this application, Madam Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99 and stated:

“I also agree with Freedman J.A. in *Elias*, at para. 8, that the appropriate criteria to be considered are those set out in *Bohemier v. CIBC Mortgages Inc.* (2001), 160 Man. R. (2d) 39, 2001 MBCA 161 (Man. C.A.), and 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.

Madam Justice Steel found that the Appellant had a continuous intention to prosecute the appeal but failed to satisfy the last two (2) criteria and, as a result, dismissed the Appellant's Application to the Court.

The issue for determination by the Commission is whether the Appellant has discontinued his appeal and/or abandoned his appeal.

The Commission finds that the legal principles set out by the Manitoba Court of Appeal in *Fegol v Asper* (supra) relating to the issue of abandonment are relevant in this appeal to the issue of whether or not an abandonment has occurred. The Commission finds, based on the evidence before the Commission that the only actions the Appellant took in pursuing the appeal was:

1. To file the Notice of Appeal dated July 10, 2009 which was received by the Commission on July 22, 2009. The Appellant also attached a letter to the Notice of Appeal stating that MPIC had failed to properly assess the injuries he sustained to his left foot and scarring to his right arm.
2. To attend a Case Conference Hearing on October 20, 2011.

The Commission notes that the Appeals Officer had difficulty in contacting the Appellant who had undertaken to provide a medical report which would substantiate his claims. As a result the Commission conducted a Case Conference to determine the status of the appeal.

On October 20, 2011 the Appellant appeared at a Case Conference accompanied by his mother. The Appellant undertook to find a new doctor and to request a new medical report. He also

undertook to update the Appeals Officer in regard to his progress and to provide a new medical report by January 4, 2012. The Appellant was provided with the Appeals Officer's contact information; however he failed to provide an update as to the status of his appeal by January 4, 2012.

A Case Conference was set for March 8, 2012 to discuss the status of this appeal. A Notice of Hearing was served on the Appellant. The Appellant failed to attend the March 8, 2012 Case Conference. As a result the Commission scheduled a hearing for May 17, 2012 and forwarded a Notice of Hearing to the Appellant which indicated that if he did not attend the hearing the Commission would consider whether or not he had abandoned the appeal and alternatively the Commission could proceed with the hearing of his appeal and issue a final decision. The Appellant failed to attend the hearing at 9:30 a.m. on May 17, 2012. As a result the Commission proceeded with the appeal hearing.

The Commission has determined that the Appeals Officer took all reasonable steps by telephone and letter to contact the Appellant to set a date for the appeal hearing but was unable to contact him.

Decision:

The Commission determines that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal on the following grounds:

1. After providing an undertaking to the Commission on October 20, 2011 that he would be providing a new medical report by January 4, 2012, the Appellant did not provide such a report and as a result the Commission held a Case Conference on March 8, 2012.

2. The Appellant failed to appear at this Case Conference and the Commission scheduled a hearing to determine whether or not the Appellant had abandoned his appeal and whether the Commission should proceed to issue a final decision in respect of this appeal.
3. The Appellant was served with the appropriate Notice but failed to attend the hearing on May 17, 2012.

The Commission also finds that the Appellant has not provided a reasonable explanation for failing to proceed with his appeal. The Appellant failed to advise the Commission of the reason why he did not attend the hearing on May 17, 2012.

In respect of the merits of the Appeal, the Commission finds that the Appellant did not provide any arguable grounds to proceed with the appeal for the following reasons:

1. MPIC correctly determined the permanent impairment award in respect of the injuries to the Appellant's right lower limb and left eyelid sustained by him in the motor vehicle accident.
2. The Appellant has not provided sufficient medical documentation to support the allegations contained in his letter attached to his Notice of Appeal which claims that he sustained injury to his left foot and scarring to his right arm which would entitle him to an additional permanent impairment award.

The Commission therefore finds that the Appellant failed to establish, on a balance of probabilities, that MPIC incorrectly assessed his entitlement to permanent impairment awards in respect of his left foot and right arm.

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

1. There was no continuous intention by the Appellant to prosecute the appeal after he filed his Notice of Appeal.
2. The Appellant did not provide a reasonable explanation for delaying the processing of his appeal.
3. There were no arguable grounds of appeal.

For these reasons the Commission confirms the Internal Review Officer's decision dated May 25, 2009 and dismisses the Appellant's appeal.

Dated at Winnipeg this 13th day of June, 2012.

MEL MYERS, Q.C.

TREVOR ANDERSON

JACQUELINE FREEDMAN