

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [APPELLANT]
AICAC File No.: AC-18-056

PANEL: Laura Diamond, Chairperson.

APPEARANCES: [Appellant] (the “Appellant”) was self-represented but did not attend the hearing.
Manitoba Public Insurance Corporation (“MPIC”) was represented by Matthew Maslanka.

HEARING DATE: April 19, 2023.

ISSUE(S): Whether the Appellant has failed to diligently pursue her appeal, and if so, whether the Commission will dismiss the appeal.

RELEVANT SECTIONS: Section 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

The Appellant registered an injury claim with MPIC following an incident on March 24, 2017, when she stated she had been in a pedestrian/vehicle accident that fractured her ankle.

In a decision, dated May 31, 2017, the MPIC Benefit Administration Unit (BAU) found that the evidence did not establish that her injuries were the result of a motor vehicle accident (MVA).

She applied for internal review. An Internal Review Decision (IRD) from MPIC, dated February 26, 2018, confirmed the BAU decision and found that the evidence did not support that an accident had occurred or that bodily injury resulted from an accident.

Appeal

The Appellant filed a Notice of Appeal (NOA) from this decision on May 9, 2018. Following unsuccessful attempts at mediation, Commission staff gathered relevant documents from her counsel, the Claimant Adviser Office (CAO) and from MPIC. The parties were provided with an Indexed file of documents (Index) relevant to the appeal, compiled by the Commission staff.

CAO and counsel for MPIC continued to review the matter and provide further medical and RCMP reports. These were added to the Index and the parties advised that they were ready to set the matter down for hearing. A case conference hearing (CCH) was set to prepare the matter for hearing, but on March 2, 2021, the CAO advised that they were withdrawing their representation of the Appellant, and provided a new address and phone number for the Appellant.

Commission staff contacted the Appellant, who advised that she did not have a copy of the Index. A copy was sent to her by courier on April 12, 2021.

On May 13, 2021, the Commission began to leave messages for and attempt to reach the Appellant. Her cell phone line was out of service and the home line rang with no answering machine. Staff wrote to the Appellant on May 28, 2021, asking her to contact the Commission. Follow up letters were sent on June 3, 2021 and June 21, 2021.

On July 26, 2021, the Appellant contacted her appeals officer (AO) to advise that she had reviewed the Index and had further documents to submit for inclusion. The AO stressed the importance of maintaining regular contact with the Commission. She was provided with further time to gather medical information.

The Commission made further attempts to contact and follow up with the Appellant on August 10, 2021, August 31, 2021, and September 23, 2021. When the Appellant did not respond, the matter was scheduled for a case management CCH. Dates to choose from were provided by letter to the Appellant, but when no response was received, the matter was scheduled for July 13, 2022 at 9:30 a.m., by teleconference.

Notice of the CCH was provided to the Appellant. On July 12, 2022, the Appellant phoned the Commission to advise that she had received the notice and would be calling in for the CCH. The CCH was convened the next day and counsel for MPIC attended, but the Appellant did not attend.

Failure to Pursue (FTP) Correspondence

On July 14, 2022, the Commission wrote to the Appellant to review this history and to advise that her appeal file would be held in abeyance for two (2) months. If she did not contact the Commission and take active steps to pursue her appeal or provide an explanation as to why she was unable to pursue her appeal, the Commission may proceed to consider whether the appeal should be dismissed under s 182.1 (1) of the *MPIC Act* for failure to diligently pursue the appeal.

On July 28, 2022, the Appellant phoned the AO and advised that she had tried to call in for the teleconference but no one had answered the phone. She indicated that she was going to be hiring

representation. The AO advised her that, as stipulated in the letter of July 14, 2022, her file would be held in abeyance for two (2) months and that if the Commission did not receive further contact from her or her counsel within that period, the Commission would go on to schedule the appeal for a failure to pursue (FTP) hearing.

When no response was received by September 28, 2022, the Commission wrote to the parties to advise that, as the Appellant had not contacted the Commission to take steps to pursue her appeal, the matter would now be scheduled for an FTP hearing.

In October 2022, the Commission received some voice messages asking to call the Appellant, but when the AO followed up, she was unable to reach her. Finally, the Appellant called the AO, and was advised that the appeal had been set for an FTP hearing, as she had made no progress to move the appeal forward. She was advised that she would be receiving notice of the date and time for the FTP hearing from the Commission. The Appellant called again in December 2022 and this information was repeated for her when she indicated that she did not recall the discussion from the call with the Commission in October.

Notice of Hearing (“NOH”)

The matter was scheduled to be heard by teleconference as an FTP hearing on April 19, 2023 at 9:30 a.m.

On February 27, 2023, the Notice of Hearing (NOH) for the April 19, 2023 FTP hearing, which the Commission had sent to the Appellant by courier, was returned as there was no answer to the courier. The NOH was then sent by Xpresspost and a notice of delivery from Canada Post

confirmed a delivery date of March 3, 2023. A copy sent by regular mail was not returned and assumed delivered.

The NOH provided that should either party fail to attend the hearing, the Commission may proceed with the hearing and dismiss the appeal, adjourn the hearing to a new date or take such other steps as it deems appropriate.

In preparation for the FTP Hearing, the Commission compiled an FTP Indexed File (FTP Index) which contains all documents relevant to the FTP Hearing. These documents constitute evidence that either party may rely upon at the hearing. The Commission numbers these documents for ease of reference by the parties and the tribunal.

[Text Deleted].

The Commission sent the Appellant a copy of the FTP Index by Xpresspost. A notice of delivery from Canada Post confirmed a delivery date of March 22, 2023 for the FTP Index.

On April 11, 2023, the AO received a voice message from the Appellant advising that she would call “next week”, but no call back number was provided.

Issue

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

Decision

The Commission finds that the Appellant failed to pursue their 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.

Appellant submissions

The Appellant did not appear at the scheduled time for the hearing. She did not file any written submission. In accordance with Commission policy, the Commission waited 15 minutes for the Appellant to attend the hearing. The Appellant did not appear and therefore the hearing proceeded without her.

The Appellant did not subsequently contact the Commission to explain her absence or request an adjournment of the FTP hearing.

MPIC submission

Counsel began by reviewing four (4) main principles which the Commission has identified in past decisions considering the question of a possible FTP:

1. S. 182.1 of the *Act* does not require a consideration of the merits of the appeal;
2. S. 182.1(1) requires the Commission to be of the opinion that the Appellant has failed to diligently pursue their appeal;
3. The Commission has adopted a definition of diligence to mean that an appellant is required to show care and effort in pursuing the appeal, also defined as careful, steady and persistent application of effort;
4. The onus is on the Appellant to show that they have not failed to diligently pursue the appeal.

In this case, counsel submitted, the Appellant did not participate in a CCH scheduled for July 13, 2022. She called later, on July 28, 2022 (after receiving the letter dated July 14, 2022 from the Commission which reported the result of the CCH) to say that she had tried calling in several times but had not been able to get through.

Counsel submitted that this does not really explain why she did not try to do anything about that between July 13 and July 28. She knew she had the ability to call Commission staff for help, and she did so on July 28, so it is hard to understand why she would not have been able to communicate with staff when she was not able to get through on the conference call line, or even in the days following. He therefore submitted, that even this showed a failure of diligence on her part.

When the Appellant finally did contact the Commission on July 28, she was told that she would still have to respond (or have her counsel respond) within the two (2) month period set out in the letter of July 14. She did not respond.

Further, the Appellant failed to attend or participate in the FTP hearing.

Given that a *prima facie* case of a failure to pursue the appeal has been established and the Appellant has not provided any evidence to rebut it, the appeal should be dismissed.

It has been almost five (5) years since the NOA was filed.

The last meaningful action taken by the Appellant was done on December 18, 2020 by her former representative (the CAO), who filed a Ready to Set Hearing form. Since then, two (2) years and four (4) months have elapsed where nothing has happened.

Written requests for updates went unanswered on at least two (2) occasions and a significant gap in communication from the Appellant between July 2021 and July 2022 went by, in spite of the Commission's attempts to phone her and communicate in writing with her. Still, she was unresponsive.

Counsel submitted that such conduct does not constitute diligence and submitted that the appeal should be dismissed.

Issue

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

Legislation

The applicable sections of the *MPIC Act* 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

The content of the most recent voice message from the Appellant to the Commission, along with the posting of regular mail (which was not returned and assumed delivered) and Canada Post confirmation of Xpresspost delivery to the Appellant, established that the Appellant had notice of the FTP hearing.

The Commission finds that she was given proper notice of the hearing, pursuant to s 184.1 of the *Act*, and that she was given an opportunity, as set out in the NOH, to make submissions to the Commission regarding the issue of whether the appeal should be dismissed.

Section 182.1 of the *Act* does not require the Commission to consider the merits of the appeal.

The Commission considers whether an appellant has diligently pursued their appeal and the word “diligently” requires some evidence of careful, steady and persistent effort. I find that the Appellant’s pattern of contact in this appeal does not constitute careful, steady, persistent or diligent effort.

I agree with counsel for MPIC that a *prima facie* case of the Appellant's failure to pursue the appeal has been established through her:

- a) failure to attend at the July 13, 2022 CCH, and then letting over a month go by without following up with the Commission regarding any difficulties or barriers she may have encountered;
- b) failure to respond to the Commission's inquiries and phone calls, or to contact the Commission in the two (2) months following the CCH (as requested by the Commission);
- c) failure, since December 2020, to take meaningful action to progress the appeal;
- d) failure to attend at or make submissions to the FTP hearing.

While at various times the Appellant may have contacted her AO by telephone, this basic attention to the Commission's communications is not sufficient to meet her responsibility to pursue her appeal with careful, steady and persistent effort.

The Commission further finds that the Appellant has provided no explanation for her failure to respond to Commission correspondence, to advance her appeal, to attend this hearing, or to advance a reason why the Commission should not dismiss this appeal for her failure to diligently pursue it.

Disposition

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

Dated at the City of Winnipeg, in the Province of Manitoba, this 2nd day of May, 2023.

LAURA DIAMOND