

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [APPELLANT]  
AICAC File No.: AC-19-177**

**COMMISSIONER:** Jacqueline Freedman

**APPEARANCES:** [Text Deleted] (the “Appellant”) was self-represented; he did not attend the hearing; Manitoba Public Insurance Corporation (“MPIC”) was represented by Hayley Main.

**HEARING DATE:** April 12, 2023

**ISSUE:** Whether the Appellant failed to diligently pursue his appeal and, if so, whether the appeal should be dismissed.

**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:**

The Appellant was the driver of a vehicle when he was in an accident on January 13, 2019 (the “MVA”). The Appellant sustained injuries as a result of the MVA, and as a consequence he received benefits pursuant to the Personal Injury Protection Plan provisions of the MPIC Act, including Income Replacement Indemnity (“IRI”) benefits.

On July 2, 2019, MPIC's case manager issued a decision that ended the Appellant's entitlement to IRI benefits after March 4, 2019. An Internal Review Decision ("IRD") was issued, dated September 19, 2019, which confirmed the case manager's decision.

The Claimant Advisor Office ("CAO"), on behalf of the Appellant, filed an appeal of the IRD with the Commission on November 29, 2019. The CAO ceased to represent the Appellant in May 2020, when his appeal returned to the Commission from mediation, unresolved. He then became a self-represented party. In September 2020, the Appeals Officer spoke with the Appellant about the status of his appeal. The Commission proceeded to prepare an index in the Appellant's appeal and attempted to ready the appeal for hearing.

In December 2020, the Appellant advised the Commission that he was still interested in pursuing his appeal. However, apart from one contact in March 2021, subsequent attempts to contact the Appellant were unsuccessful. Further details of the appeal management process are described below.

Ultimately, the Commission wrote to the parties on July 25, 2022, advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission for an extended period. Therefore, the Commission would schedule a hearing to determine whether the Appellant had failed to diligently pursue his appeal and, if so, whether the Commission should dismiss his appeal.

**Issue:**

The issue before the Commission is whether the Appellant has failed to diligently pursue his appeal and, if so, whether the Commission should dismiss his appeal.

**Decision:**

For the reasons set out below, the Commission finds, on a balance of probabilities, that the Appellant has failed to diligently pursue his appeal, and his appeal should be dismissed.

**Procedural Matters:**

As noted above, the Appellant's appeal returned to the Commission from mediation, unresolved, in May 2020, at which point he became a self-represented party. On September 8, 2020, the Appeals Officer phoned the Appellant and discussed the status of the appeal with him. By letter dated September 18, 2020, the Commission sent to the parties their respective copies of the index in this appeal. The letter advised the Appellant that "It is required that you notify us in writing of any changes to your contact information". The package containing the letter and index was sent to the Appellant to the address provided by him in his Notice of Appeal (the "NOA Address").

The Commission sent emails to the Appellant on November 5, December 1 and December 8, 2020 to request an update, but no response was received. On December 22, 2020, the Appellant sent an email to the Commission that stated: "I am still appealing my Dr. app [sic] is Jan 15th."

The Commission sent an email to the Appellant on February 4, 2021, and left a phone message for him on March 4, 2021, but no response was received. On March 11, 2021, the Appellant sent an email to the Commission that stated: "I am seeing a specialist my next app [sic] is in a month. I have set a reminder on my phone to update you after this appointment."

The Commission then attempted to contact the Appellant by email, phone and/or letter on May 10, May 25, June 10, July 20, August 31, October 4 and November 5, 2021, but no response was received.

The Commission's records indicate that on November 30, 2021, the Appeals Officer contacted MPIC to determine whether MPIC had alternate contact information for the Appellant. On that date, MPIC provided an alternate mailing address for the Appellant (the "Alternate Address"). The Commission then forwarded its November 5, 2021 letter to the Appellant at the Alternate Address, but no response was received.

The Commission's November 5, 2021 letter advised the Appellant that in some cases where an appellant does not take active steps to pursue their appeal, the Commission does have the power to consider whether to dismiss the appeal under subsection 182.1(1) of the MPIC Act. The letter enclosed a Notice of Withdrawal form, in case the Appellant no longer wished to pursue his appeal. The Appellant was advised that if the completed Notice of Withdrawal form was not received within three weeks from the date of the letter, the appeal would be held in abeyance for six months. The Appellant was further advised that if he did not contact the Commission in the next six months to take steps to pursue his appeal, or to provide an explanation as to why he was unable to do so, this matter would be scheduled for hearing to determine whether he had failed to diligently pursue his appeal and, if so, whether the Commission would dismiss his appeal.

As noted above, the Commission wrote to the parties on July 25, 2022 advising that the Appellant had not provided any further documentation to the Commission or been in contact with the Commission. Therefore, the Commission would schedule a hearing to determine whether the Appellant had failed to diligently pursue his appeal and, if so, whether the Commission should dismiss his appeal.

On February 17, 2023, the Commission sent a Notice of Hearing for the present hearing (enclosing the Commission's Guidelines for Hearing) to the Appellant, via Canada Post Xpresspost and regular mail, to his NOA Address and to his Alternate Address.

The Notice of Hearing sent via Canada Post Xpresspost to the Appellant's NOA Address was returned to the Commission unclaimed. Canada Post records indicate that the Notice of Hearing sent via Canada Post Xpresspost to the Appellant's Alternate Address was accepted and signed for by "[the Appellant]" on February 27, 2023. The Notice of Hearing sent to the Appellant by regular mail to his NOA Address was returned to the Commission. The Notice of Hearing sent to the Appellant by regular mail to his Alternate Address was not returned to the Commission.

The Notice of Hearing provided instructions to the parties for their attendance at the teleconference hearing, including a telephone number to join the hearing remotely by telephone. The Notice further provided that the time and date of the hearing were firm and that postponements would only be granted under extraordinary circumstances. The Notice provided that at the hearing, the Commission would consider whether the Appellant had failed to diligently pursue his appeal, and that the parties would have the opportunity to make submissions on this issue. It further indicated that their submissions could be made orally or in writing. The Notice also 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 time and date, or take such other steps as it deemed appropriate.

On March 14, 2023, the Commission sent a package to the Appellant containing the indexed file for use at the present hearing. The package was sent via Canada Post Xpresspost to the Appellant's

NOA Address and to his Alternate Address. The package sent via Canada Post Xpresspost to the Appellant's NOA Address was returned to the Commission unclaimed. Canada Post records indicate that the package sent via Canada Post Xpresspost to the Appellant's Alternate Address was accepted and signed for by "[the Appellant]" on March 20, 2023. Attached to these Reasons and marked as Schedule "A" is a copy of the Table of Contents of that indexed file.

On April 6, 2023, the Commission sent to the Appellant via email four documents to be added to the indexed file for use at the present hearing, with a reminder of the date and time of the hearing.

On April 7, 2023, the Appellant sent an email to the Commission that stated: "I've been unable to get any lawyers because of conflict of interest I've witnesses to the same so what am I supposed to do."

The present hearing commenced by teleconference as scheduled on April 12, 2023, at 9:30 a.m. Counsel for MPIC was in attendance on the teleconference line. The Appellant was not on the line. In accordance with the Commission's practice, a grace period of 15 minutes was provided for the Appellant to join the hearing. When the Appellant did not attend or join the teleconference line by shortly after 9:45 a.m., the hearing proceeded in his absence. The Commission received written and oral submissions from counsel for MPIC. The Appellant did not provide any written submissions to the Commission. The Appellant did not subsequently contact the Commission to explain his absence or to request an adjournment of the hearing.

**Relevant Legislation:**

Section 182.1 of the MPIC Act provides that the Commission may dismiss an appeal in certain circumstances, 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.

Section 184.1 of the MPIC Act provides how notices may be given to the Appellant, as follows:

**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.

**Submission for MPIC:**

Counsel for MPIC provided a written submission in advance of the hearing, which was appreciated. She also provided a brief oral submission at the hearing.

Counsel noted that the issue in this hearing is whether the Appellant failed to pursue his appeal diligently within the meaning of section 182.1 of the MPIC Act and whether the Commission

should dismiss the appeal. She submitted that here, the necessary requirements for dismissal under subsection 182.1(1) are met, and accordingly the appeal should be dismissed.

She pointed out that Appellant received notice of the present hearing. The Notice of Hearing and the indexed file for the present appeal were sent via regular mail to the Appellant at his NOA Address, in accordance with the requirements of the MPIC Act. Service via mail is deemed effective on the fifth day after mailing, unless an appellant can establish that, acting in good faith, he 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.” Although these documents were “returned to sender”, MPIC is not aware of the Appellant having not received these documents at his NOA Address due to accident, absence, illness or other cause beyond his control. As such, counsel submitted that the Appellant is not entitled to argue ineffective service at his NOA Address. In any event, the Notice of Hearing and the indexed file for the present appeal were sent via Canada Post Xpresspost to the Appellant at his Alternate Address. The Commission received an Acknowledgement of Receipt signed by the Appellant, demonstrating that the Appellant received actual notice of the hearing. Counsel submitted that the notice requirement was therefore satisfied.

Counsel noted that subsection 182.1(2) of the MPIC Act requires that the Appellant be given the opportunity to be heard in respect of the proposed dismissal for failure to pursue. She pointed out that the Notice of Hearing states that the parties would have the opportunity to make submissions, orally or in writing, on this issue. Counsel submitted that this requirement therefore had been met.



Regarding whether the Appellant failed to diligently pursue his appeal, counsel noted that subsection 182.1(1) of the MPIC Act has been considered in past decisions, which reference a three-step test, as follows:

1. whether the Appellant failed to diligently pursue the appeal;
2. whether the Appellant had a reasonable explanation for the failure to pursue; and
3. whether there are other factors that should be considered.

Here, the Appellant has failed to diligently pursue his appeal. He has not taken any meaningful steps to move his appeal forward since the appeal returned to the Commission from mediation, unresolved, in May 2020, almost three years ago. Apart from the email received on April 7, 2023, the Appellant's last contact with the Commission was March 11, 2021, when he advised his Appeals Officer that he had scheduled a doctor's appointment and would get back to her. Notwithstanding clear indications in the Commission's letters of November 5, 2021 and July 25, 2022 that his appeal may be dismissed should he fail to respond or take active steps to pursue his appeal, the Appellant failed to respond to the Commission's communications and requests for over two years. Counsel submitted that the Appellant's complete lack of engagement in the appeal process since the conclusion of mediation in May 2020 demonstrates a clear lack of intent to pursue his appeal.

Counsel addressed the Appellant's email to the Commission dated April 7, 2023 that stated, in part: "I've been unable to get any lawyers because of conflict of interest". Counsel noted that if the Appellant did want to seek legal representation, it would be reasonable to allow him some time to do so. However, prior to his email on April 7, 2023, the last communication from the Appellant to the Commission was in March 2021, and he did not indicate at that time that he was seeking

legal representation. Further, when the CAO ceased to represent the Appellant at the conclusion of mediation in May 2020, the Appellant did not indicate to the Commission that he desired to seek legal representation at that time either. Accordingly, while MPIC acknowledges that the Appellant may want, and is entitled, to seek legal representation, three years is an unreasonably long period of time in order for him to do so.

The Appellant has not provided any reasonable explanation for his failure to pursue his appeal. He had an opportunity to attend the present hearing and provide an explanation, and he chose not to do so. Addressing specifically the issue of the Appellant's desire to seek legal representation, given that he did not attend, all we are left with is his email of April 7, 2023, without further explanation. He did not advise the Commission at any time that he was seeking representation, and counsel submitted that he has provided no reasonable excuse for his delay.

Finally, counsel submitted that there are no other factors that have been identified which would require the Commission to exercise its discretion and allow the appeal to proceed, notwithstanding the Appellant's failure to pursue it. Counsel therefore submitted that the Commission should exercise its discretion and dismiss the appeal in its entirety pursuant to subsection 182.1(1) of the MPIC Act.

**Discussion:**

As indicated above, the issue before the Commission is whether the Appellant has failed to diligently pursue his appeal and, if so, whether the Commission should dismiss his appeal.

### Notice of the Hearing

On February 17, 2023, the Commission sent the Notice of Hearing for the present hearing to the Appellant by regular mail to his NOA Address, in accordance with the requirements of paragraph 184.1(1)(b) of the MPIC Act.

As noted by counsel for MPIC, under subsection 184.1(2) of the MPIC Act, the Notice sent to the Appellant was deemed to have been received by him on the fifth day after mailing, unless the Appellant establishes that, acting in good faith, he did not receive the Notice at his NOA Address, “or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person’s control.” The Appellant did not establish the non-receipt of the Notice at his NOA Address for any of these enumerated reasons, nor did he establish the non-receipt of the Notice at his NOA Address, for any reason, in the presence of his acting in good faith. Therefore, under the legislation, the Appellant is deemed to have received notice of the present hearing at his NOA address on the fifth day after mailing.

In addition, on February 17, 2023, the Commission sent the Notice of Hearing for the present hearing to the Appellant by Canada Post Xpresspost to his Alternate Address. As indicated above, Canada Post records indicate that the Notice sent by the Commission via Canada Post Xpresspost to the Appellant’s Alternate Address was accepted and signed for by the Appellant on February 27, 2023. His signature on the Xpresspost confirmation of delivery, as well as his email to the Commission on April 7, 2023, establish that the Appellant had actual notice of the present hearing.

The Commission therefore finds, on a balance of probabilities, that the Appellant received proper notice of the present hearing pursuant to section 184.1 of the MPIC Act.

### Opportunity to be Heard

Subsection 182.1(2) of the MPIC Act requires that the Commission must give the Appellant the opportunity to make written submissions or otherwise be heard, prior to making a decision under subsection 182.1(1) of the MPIC Act.

As indicated above, the Notice of Hearing sent to the Appellant provided the date and time of the present hearing, along with instructions for attendance by teleconference. The Notice further provided that, at the hearing, the parties would have the opportunity to make submissions, and their submissions could be made orally or in writing. As indicated above, the Appellant was given proper notice of the hearing, more than six weeks in advance of the hearing. The Commission finds, on a balance of probabilities, that the Appellant was given the opportunity to make written submissions or otherwise be heard in respect of the dismissal of his appeal, within the meaning of subsection 182.1(2) of the MPIC Act. Therefore, the Commission has the jurisdiction to consider whether the Appellant failed to diligently pursue his appeal and, if so, whether the Commission should dismiss his appeal.

### Whether the Appellant Failed to Diligently Pursue the Appeal

The onus is on the Appellant to show that he has diligently pursued his appeal and that the appeal should not be dismissed. It is MPIC's position that the Appellant failed to diligently pursue his appeal and that he has not provided any reasonable explanation for his failure. MPIC submits that the Commission should therefore exercise its discretion to dismiss his appeal under subsection 182.1(1) of the MPIC Act.

As noted above, after the conclusion of mediation in May 2020, almost three years ago, the Appellant's appeal returned to the Commission, unresolved, and he became a self-represented party after the CAO withdrew representation. The Appellant's last active participation in his appeal was on March 11, 2021, more than two years ago, when he responded to an email from the Appeals Officer by return email, indicating that he had a doctor's appointment the following month. Although he advised that he would update the Appeals Officer after that appointment, he failed to do so. The Commission then attempted to contact the Appellant on several occasions, by email, telephone and letter. The Commission specifically wrote to the Appellant and advised him of the consequences of failing to actively pursue his appeal. However, the Appellant did not respond to the Commission, or take any further steps to pursue his appeal in response to the Commission's efforts to contact him.

The Commission has previously found that "diligence" is defined to mean "careful and persistent application or effort". The Appellant's conduct of his appeal over the last three years does not meet this definition. He did not provide an update to the Commission after his doctor's appointment in April 2021, as he had undertaken to do. He did not respond to the Commission's many attempts to contact him (apart from one email just days before the present hearing, which will be addressed below). He did not even advise the Commission of his change of address; the Commission only learned of what appears to be his current address as a result of inquiries directed to MPIC.

Turning to the Appellant's email to the Commission of April 7, 2023, as noted above, the email stated: "I've been unable to get any lawyers because of conflict of interest [...] so what am I supposed to do." This was the first communication received from the Appellant in over two years, and it should be noted that this email reflects the first time that the Appellant had expressed any

desire with respect to seeking legal representation. More specifically, after CAO withdrew representation, the Appellant had proceeded, over the following ten months, to act as a self-represented party in this appeal. As mentioned above, he had the following interactions with his Appeals Officer relating to his appeal:

- On September 8, 2020, the Appeals Officer phoned the Appellant and discussed the status of the appeal with him;
- On December 22, 2020, he sent an email to the Appeals Officer stating that: “I am still appealing my Dr. app [sic] is Jan 15th”; and
- On March 11, 2021, he sent an email to the Appeals Officer stating that: “I am seeing a specialist my next app [sic] is in a month. I have set a reminder on my phone to update you after this appointment.”

In each interaction above, the Appellant proceeded without mentioning a desire to seek legal representation. The Commission reasonably perceived that the Appellant was prepared to proceed in his appeal as a self-represented party, as many appellants do. We also note that the Appellant was expressly advised by the Commission that he could continue as a self-represented party. Specifically, the Commission’s Guidelines for Hearing were delivered personally to the Appellant with the Notice for the present hearing. Section 3.1 of the Guidelines states: “Parties to an appeal may represent themselves [...]”.

Appellants are entitled to seek and retain legal representation to pursue their appeals. The Commission does afford appellants a reasonable period of time to seek such representation. In this case, the Commission is satisfied that almost three years, from May 2020 (when the Appellant’s appeal returned to the Commission from mediation) until the date of the present hearing, is more

than a sufficient amount of time for the Appellant to have sought and retained legal counsel. No further delay for that purpose would be reasonable.

As noted above, the Appellant did not attend the present hearing, nor did he provide any written submissions, although he was provided with notice of the hearing and the opportunity to do so. He did not provide any explanation for his failure to respond to the Commission's attempts to contact him. Apart from the April 7, 2023 email, he did not provide any explanation for his failure to appear, or for his failure to pursue his appeal. His failure to retain legal counsel, notwithstanding a reasonable period of time in which to have done so, does not serve as a reasonable excuse for his failure to appear, nor is it a reasonable explanation for his failure to diligently pursue his appeal.

#### Conclusion

Upon a consideration of the totality of the evidence and submissions, and upon a consideration of the relevant legislation, the Commission finds, on a balance of probabilities, that the Appellant has failed to diligently pursue his appeal within the meaning of subsection 182.1(1) of the MPIC Act.

#### **Disposition:**

Based on the foregoing, the Commission has determined to exercise its discretion to dismiss the Appellant's appeal in its entirety, and accordingly the Appellant's appeal is dismissed.

Dated at the City of Winnipeg, in the Province of Manitoba, this 15<sup>th</sup> day of May, 2023.

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**JACQUELINE FREEDMAN**