

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-116**

PANEL: Ms Yvonne Tavares, Chairperson
Mr. Trevor Anderson
Ms Mary Lynn Brooks

APPEARANCES: The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.

HEARING DATE: April 30, 2009

ISSUE(S): Entitlement to Personal Injury Protection Plan benefits

RELEVANT SECTIONS: Section 71(2)(a) 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, [text deleted], is appealing the Internal Review Decision dated September 24, 2008 with respect to his entitlement to Personal Injury Protection Plan ("PIPP") benefits as a result of an incident which occurred on June 7, 2008.

The facts giving rise to this appeal may be briefly summarized as follows:

1. [The Appellant] is the registered owner of a [truck], which is equipped as a commercial tow truck.

2. On June 7, 2008, the Appellant attended, with his truck, to a [text deleted] to help remove a metal gate. He had extended the towing boom and attached a cable from the boom to the gate. He was planning to use the boom to pull the gate free. While he was standing beside the stationary truck, operating the controls for the boom, the gate snapped free and struck [the Appellant] twice. He sustained a fractured ankle and an injury to his hip.
3. Power from the truck motor can simultaneously be directed to both the drive train (transmission) of the truck and to the boom.
4. The power needed for the operation of the towing boom is generated by the truck motor, which must be running for the boom to operate. However, during the operation of the boom, the truck must be stopped.
5. As a result of the injuries which the Appellant sustained in this accident he was not able to work. He made a claim to MPIC for PIPP benefits arising from this accident.
6. In a decision dated July 9, 2008, MPIC's case manager found that the Appellant's loss was caused by the use of the equipment attached to the vehicle, which is excluded from PIPP coverage by virtue of Section 71(2)(a) of the MPIC Act.
7. The Appellant sought an Internal Review of that decision. In a decision dated September 24, 2008, the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the case manager's decision. The Internal Review Officer found that the Appellant's injury was caused by an attachment to the vehicle, rather than by the operation of the vehicle itself. As a result, she found that the Appellant was not entitled to benefits pursuant to s. 71(2)(a) of the MPIC Act.

The Appellant has now appealed that decision to this Commission. The issue which requires determination on this appeal is whether the Appellant is entitled to PIPP benefits as a result of the incident of June 7, 2008.

The Appellant submits that his truck is specifically insured and registered as a tow truck. Since he was operating his vehicle in accordance with the purpose for which it was insured, he maintains that he should be entitled to coverage for bodily injury contained in Part 2 of the MPIC Act. As a result, the Appellant argues that he is entitled to PIPP benefits in accordance with Part 2 of the MPIC Act.

Counsel for MPIC submits that the injuries resulting from this incident are excluded from coverage under PIPP. He notes several points that are not in dispute:

1. The tow truck was an “automobile” as defined in Section 70(1) of the MPIC Act.
2. The towing boom and controls were “mounted on or attached to” the truck.
3. A “bodily injury” as defined in Section 70(1) of the MPIC Act was sustained.
4. At all material times, the truck was:
 - on a “highway”, as defined in Section 1(1) of the MPIC Act; and
 - parked and stationary (i.e. “not in motion” within the context of Section 71(2)(a) of the MPIC Act).

Counsel for MPIC contends that while it is certainly arguable that the Appellant sustained a “bodily injury caused by [the use of] an automobile”, the entitlement to PIPP benefits which might otherwise arise is negated by the clear and unambiguous wording of the exception set out in Section 71(2)(a) of the MPIC Act.

Counsel for MPIC maintains that the circumstances of the incident on June 7, 2008 come clearly within each element of the exception:

1. The truck was “on a highway” and it was “not in motion”.
2. The towing boom was a “device” which was “mounted on or attached to” the truck.
3. The towing boom was “being operated independently” of the truck itself. [Counsel for MPIC argues that although the truck was running (in order to provide power to the towing boom), the truck was not at that point being used or operated as a truck (i.e. as a means of transporting people or goods, such as disabled motor vehicles, from one place to another).]
4. The injuries were caused “by, or by the use of” the towing boom.

As a result, counsel for MPIC submits that the injuries resulting from this incident are clearly excluded from coverage under PIPP. He maintains that the appeal should, therefore, be dismissed.

Relevant Legislation:

Definitions

[1\(1\)](#) In this Act, unless the context otherwise requires
"highway" includes every highway within the meaning of *The Highway Traffic Act*, and every road, street, lane, or right-of-way designed or intended for or used by the general public for the passage of vehicles, and every private place or passageway to which the public, for the purpose of the parking or servicing of motor vehicles, has access or is invited; (« route »)

[70\(1\)](#) In this Part,

"accident" means any event in which bodily injury is caused by an automobile; (« accident »)

"automobile" means a vehicle not run upon rails that is designed to be self-propelled or propelled by electric power obtained from overhead trolley wires; (« automobile »)

"**bodily injury**" means any physical or mental injury, including permanent physical or mental impairment and death; (« dommage corporel »)

"**bodily injury caused by an automobile**" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile, but not including bodily injury caused

(a) by the autonomous act of an animal that is part of the load, or

(b) because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile; (« dommage corporel causé par une automobile »)

Bodily injury to which Part 2 does not apply

[71\(2\)](#) Notwithstanding subsection (1), this Part does not apply to bodily injury that is

(a) caused, while the automobile is not in motion on a highway, by, or by the use of, a device that can be operated independently and that is mounted on or attached to the automobile;

Decision:

Upon a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing the submissions of the Appellant and of counsel for MPIC, the Commission finds that the Appellant is not excluded from PIPP benefits by virtue of Section 71(2)(a) of the MPIC Act and that the Appellant is therefore entitled to PIPP benefits in accordance with Part 2 of the MPIC Act.

Reasons for Decision:

In order to come within the exclusion set out in subsection 71(2)(a) of the MPIC Act, four criteria must be met:

1. bodily injury is caused while the automobile is “not in motion on a highway”;
2. the bodily injury is caused by, or by the use of, a device;
3. the device can be operated independently; and
4. the device is mounted on or attached to the automobile.

While criteria number one, two and four have been met in this case, the Commission finds that the circumstances of this accident do not meet the criterion set out in point three above, that being that the device can be operated independently. Upon a careful consideration of the circumstances surrounding this incident, the Commission finds that the towing boom is not operated independently of the truck because it requires power from the truck motor in order to function. Therefore, it is not a separate device that can be operated independently of the tow truck.

Additionally, the Commission finds that the purpose of the legislation justifies a restrictive interpretation of the subsection in question. The purpose of the MPIC Act is to confer benefits upon individuals who sustain bodily injury in a motor vehicle accident. Any exclusion from liability must be strictly construed and must be clearly expressed. In this case, we find that the phrase “device that can be operated independently” requires that the device operate separately from the vehicle on which it is mounted or to which it is attached. Since the towing boom requires power from the truck motor in order to operate, we find that it is not a device that can be operated independently.

As a result, the Appellant’s appeal is allowed and the Internal Review Decision dated September 24, 2008 is, therefore, rescinded.

Dated at Winnipeg this 13th day of July, 2009.

YVONNE TAVARES

TREVOR ANDERSON

MARY LYNN BROOKS