

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-09-83**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Trevor Anderson
Mr. Guy Joubert

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];

Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby;

[Text deleted], appeared on behalf of [Insurance Company], the insurer of [the Homeowner]

HEARING DATE: December 14, 2009

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

RELEVANT SECTIONS: Sections 70(1) and 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 May 5, 2009 with respect to her entitlement to PIPP benefits arising out of an incident which took place on January 29, 2008. The Internal Review Officer, in his decision of May 5, 2009, determined that this incident did not constitute "bodily injury caused by an automobile" within the meaning of

Section 70(1) of the MPIC Act and therefore the Appellant was not entitled to PIPP benefits in connection with this incident.

Facts and Background:

In his decision dated May 5, 2009, the Internal Review Officer succinctly set out the facts in respect of this appeal:

- “1. On January 29, 2008, [the Appellant] tripped and fell on an extension cord while crossing a sidewalk near [text deleted]. The extension cord ran from within [text deleted] to a car parked on the street in front of that home. The extension cord was plugged into the car for the purposes of powering the block heater. As a result, [the Appellant] sustained personal injuries.
2. [The Appellant] put the homeowner at [text deleted] on notice that she intended to commence legal proceedings for her injuries. [Text deleted] homeowners’ insurance carrier, [text deleted], advised [the Appellant] that her claim is for PIPP benefits and not under [text deleted] homeowners’ insurance policy.”

As a result of the injuries which the Appellant sustained in this accident, she made a claim to MPIC for PIPP benefits.

In a decision dated December 17, 2008, MPIC’s case manager found that the Appellant’s injuries were a result of tripping over an extension cord and therefore the Appellant was not entitled to PIPP benefits as she had not established that her injuries were “caused by an automobile or the use of an automobile” pursuant to Section 70(1) of the MPIC Act. As a result, the case manager dismissed the Appellant’s claim for PIPP benefits.

The Appellant sought an Internal Review of that Decision. In a decision dated May 5, 2009, the Internal Review Officer found that the accident was not caused by the use of a motor vehicle and stated:

“Bodily injury caused by an automobile means any bodily injury caused by an automobile, or by the use of an automobile, or by a load. Under *McMillan v. Thompson*, (1997), 115 Man. R.(2d) 2(C.A.), there must be a connection between the

use of the automobile and the injuries. By use, it is understood it must be a normal, ordinary use of the vehicle which caused the injury.

In this case, I do not agree that it is an ordinary use of the vehicle to have an extension cord running across the sidewalk running from the block heater into the home. This is contrary to Section 2.15 of the City of Winnipeg Bylaw No. 1481/77 which reads:

No person other than a utility shall place or leave on or across any part of a City street, an unattended wire, cord or cable, that is capable of transmitting electrical energy from public or private property to or across a City street.

As such, I do not agree that this accident falls within PIPP coverage. It is a slip and fall case and is a matter for the homeowners' insurer, not the automobile insurer to cover.

I am confirming the case manager's decision denying PIPP benefits."

Appeal:

The Appellant has appealed the Internal Review Officer's Decision to this Commission.

The relevant legislation in respect of this appeal is:

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;

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

"**accident**" means any event in which bodily injury is caused by an automobile;

"**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;

"**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;

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;

The Commission convened a hearing on December 14, 2009. Legal counsel for MPIC, the Appellant and [Homeowner's Insurance Company], asked the Commission to restrict itself to determining whether, assuming the Appellant sustained bodily injury in the manner that she alleges, the bodily injury was caused by an automobile pursuant to Section 70(1) of the MPIC Act. The issue which requires determination is whether the Appellant is entitled to PIPP benefits as a result of the incident of January 29, 2008.

[Text deleted], who represented [the Appellant], made no submission. [Text deleted], legal counsel for [Homeowner's Insurance Company] and the insured [homeowner], in his submission referred to the decisions in the Manitoba Court of Appeal in *McMillan v. Thompson (Rural Municipality)*, 1997 CanLII 11522, and *Constantin v. Manitoba Public Insurance Corporation*, 2008 MBCA 5, and the decision of the Manitoba Court of Queen's Bench in *Ducharme v. Revy Home & Garden*, 2004 MBQB 251 and asserted that the injuries sustained by the Appellant were caused by the use of an automobile. [Homeowner's Insurance Company's] legal counsel referred extensively to the opinion of Madame Justice Helper in *McMillan v. Thompson* (supra) who stated in part:

“...The only question which required determination was: Were the respondents' injuries caused by (in the sense of being related to) the use of an automobile?...”

Legal counsel further stated:

“[The Appellant’s] injury was caused by (related to) [the homeowner’s] use of her automobile. Plugging in a block heater in the dead of winter is an ordinary use of a motor vehicle in [Manitoba]. In fact it is a form of vehicle maintenance. The extension cord was strung for the sole purpose of such maintenance/use. There is clearly a “connection” between the injury and [the homeowner’s] use of her vehicle. The accident would not have occurred if [the homeowner] had not plugged in her vehicle over night. The law does not require more than this connection. Therefore, [the Appellant’s] alleged injuries constitute “bodily injury caused by an automobile” and she is entitled to coverage under Part 2 of the Act.”

Counsel for MPIC submitted that the injuries resulting from this incident were excluded from coverage under the MPIC Act pursuant to Section 71(2). In his submission to the Commission dated December 16, 2009, he stated:

“In this case, the alleged injuries suffered by [the Appellant] are excluded from coverage under PIPP pursuant to s.71(2)(a) as:

- 1) [The homeowner’s] vehicle is an automobile not in motion on a highway;
- 2) The block heater to which was attached the extension cord is a “device” mounted on or attached to the automobile;
- 3) The block heater was “being operated independently” of the automobile itself as the power it was drawing was from an external source, independent of the automobile, being a plug in an outlet located on the exterior of [the homeowner’s] house.

The block heater in itself would work even if not connected to the oil pan of the automobile if it were plugged into an electrical outlet. Furthermore, the use of the automobile is not dependent upon a block heater, a device or piece of equipment which is an accessory and not an integral part of the automobile.

- 4) The alleged injuries were caused “by, or by the use of” an electric extension cord lying across a public sidewalk and highway.

It is submitted that the criteria set out in s.71(2) of the MPIC Act have all been met for the exclusion to apply in this case.

The presence of [the homeowner’s] automobile in this fact situation is merely incidental or fortuitous to the alleged injuries of [the Appellant] and, as [the Appellant] originally claimed, [the homeowner’s] home insurer is the proper insurer to be involved in the coverage of this claim and not MPI.”

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

Decision:

Upon a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing the submissions of counsel for the Appellant, counsel for [Homeowner's Insurance Company], on behalf of [the homeowner], and counsel for MPIC, the Commission finds that the Appellant falls within the exclusion of Subsection 71(2)(a) of the MPIC Act and is therefore not 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.

The Commission finds, for the following reasons, the four criteria have been met:

- 1) The bodily injuries sustained by the Appellant were caused while the automobile was "not in motion on a highway". The automobile in question was parked on [text deleted] in [text deleted] which is a highway within the meaning of the definition of "highway" as set out in Section 1(1) of the definitions in the MPIC Act.

2) The bodily injury was caused by the use of a device. The Merriam-Webster Ninth New Collegial Dictionary defines device as follows:

f. a piece of equipment or a mechanism designed to serve a special purpose or perform a special function.

[The homeowner's] automobile located on the street opposite [text deleted] contained a block heater consisting of an engine heater, attached to an oil pan, which in turn was attached to the automobile's engine.

The electric extension cord which crossed the sidewalk near [text deleted] was attached at one end to the block heater of [the homeowner's] automobile which was parked on this street in front of that home. The other end of this cord was plugged into an electrical outlet which was attached to the exterior of this home.

The Appellant tripped and fell on the extension cord while crossing the sidewalk near [text deleted] and was injured. The Commission finds that:

- I. the injuries claimed by the Appellant were caused "by or by the use of" an electric extension cord lying across a public sidewalk and highway;
- II. the electric extension cord was attached to the block heater which together constitutes a device within the meaning of Subsection 71(2)(a) of the MPIC Act.
- III. the purpose of this device was to heat the oil in the automobile's oil pan and the heat resulting therefrom warmed the engine which permitted the automobile to operate in below-freezing temperatures.

3) Upon a careful consideration of the circumstances surrounding this incident, the Commission finds that:

- I. the electric extension cord was operating independently of the automobile since the power to operate the electric extension cord did not emanate from the automobile;
 - II. the source of the power carried by the electric extension cord was provided from an electric outlet located on the exterior of [the homeowner's] home at [text deleted].
- 4) The block heater, to which the electric extension cord was attached, was mounted on or attached to the automobile.

For these reasons the Commission finds that the Appellant's application for benefits is excluded by the provisions of Subsection 71(2)(a) of the MPIC Act and therefore the Appellant is not entitled to PIPP benefits in accordance with Part 2 of the MPIC Act. Therefore, the Commission confirms the decision of the Internal Review Officer dated May 5, 2009 and dismisses the Appellant's appeal.

Dated at Winnipeg this 8th day of April, 2010.

MEL MYERS, Q.C.

TREVOR ANDERSON

GUY JOUBERT