

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-11-032**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Paul Johnston
Ms Lorna Turnbull

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

HEARING DATE: August 16, 2012

ISSUE(S): Whether the Appellant is entitled to Personal Injury Protection Plan ("PIPP") benefits as a result of his motor vehicle accident of October 31, 2009.

RELEVANT SECTIONS: Section 71(1)(a) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Reasons For Decision

A Notice of Appeal was filed on March 6, 2011 by [the Appellant] in respect of an Internal Review Decision denying PIPP benefits to the Appellant.

A Hearing in respect of the Appellant's appeal was set down for Thursday, August 16, 2012 at 9:30 a.m. at the Commission's office in Winnipeg. The Notice of Appeal was sent to the Appellant, to his address as set out in the Notice of Appeal, by Canada Post Xpresspost on June 8, 2012. The Xpresspost envelope was returned "unclaimed" by Canada Post. The Notice of

Appeal was also mailed to the Appellant, to his address as set out in the Notice of Appeal, by Canada Post regular mail.

Appeal Hearing:

The appeal hearing commenced on August 16, 2012. The Appellant did not attend at that time, but MPIC's counsel, Mr. Andrew Robertson, was present at the commencement of the hearing. The Commission adjourned the proceedings and requested the Commission's secretary to contact the Appellant by telephone. The Commission's secretary apprised the Commission that she had telephoned the Appellant who informed her that:

1. He would not be attending the hearing.
2. He had forgotten that the hearing was taking place on August 16, 2012.
3. [text deleted].

The Commission's secretary further advised that in response, she informed the Appellant that the Commission would be contacting the Appellant within a few minutes by telephone. At the start of the hearing the Commission telephoned the Appellant and received a voicemail indicating that the Appellant was not responding to the telephone call. The hearing was adjourned. The hearing was reconvened after a fifteen minute wait and another attempt was made by the Commission to contact the Appellant with the same result.

The Commission finds that the Appellant was informed by the Commission's secretary of the date, time and place of the Commission's hearing which was acknowledged by the Appellant in his telephone discussion with the Commission's secretary on August 16, 2012.

The Commission determined that the Appellant had been properly served with a Notice of Hearing in accordance with Section 184.1(2) of the MPIC Act and, as a result, decided to proceed with the appeal hearing.

Abandonment of the Appeal:

MPIC's legal counsel 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 he was entitled to PIPP benefits and that there were no arguable grounds of appeal.

The Commission notes that the Appellant was involved in an accident on October 31, 2009 and that he had sustained injuries as a result of a rifle which discharged while operating the motor vehicle. The Appellant reported to MPIC that he had been returning from a firing range where he had shot rounds with a recently purchased rifle to sight-in the scope. In his statutory declaration to MPIC he stated that:

1. He had left the rifle on the rear seat of the car and that his neighbour's [text deleted] dog was in the vehicle.
2. The dog accidentally caused the rifle to discharge while jumping back and forth between the front and back seats of the vehicle, injuring the Appellant.

The Commission notes that Section 70(1)(a) of the MPIC Act states:

70(1) In this Part,

"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

In his decision dated December 23, 2010, the Internal Review Officer stated that in order to qualify for PIPP benefits the Appellant's injuries must fall within the definition in Section (70)(1)(a) of the MPIC Act. The Internal Review Officer further stated:

“By operation of this definition on the version of events outlined in your statutory declaration, you are not entitled to PIPP benefits.”

Notice of Appeal:

The Appellant filed a Notice of Appeal dated March 6, 2011. In the Notice of Appeal the Appellant stated:

“The claim is being denied pursuant to Section 70(1)(a) but there is no proof that the dog set the trigger off due to the dog jumping back and forth over the back seat as stated in original statement.”

Discussion:

MPIC's legal counsel referred the Commission to a decision by the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004 CarswellMan 287 (Man. C.A.). 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, 2004 CarswellMan 300 (Man. C.A.) 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.

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 had occurred.

The Commission agrees with MPIC's legal counsel's submission that there has been no continuous intention to prosecute the appeal. The Commission notes that the Appellant advised the Commission's secretary by telephone on August 16, 2012 that he had forgotten the date of the appeal and that he had no intention of attending the appeal hearing.

The Commission accepts MPIC's legal counsel's submission that the Appellant has not provided a reasonable explanation for his failure to attend the appeal.

The Commission also accepts MPIC's legal counsel's submission that there were no arguable grounds on the appeal. MPIC's legal counsel submitted that:

1. The Appellant provided an undated statement to MPIC which indicated that the Appellant had purchased a rifle at [text deleted] in late September or early October of 2009 for the purpose of deer hunting.
2. There is no information provided by the Appellant to MPIC that the trigger mechanism of the rifle was defective.

The indexed materials filed in the appeal hearing included a report from [text deleted], an investigator with the Special Investigations Unit ("SIU") at MPIC and who was an experienced police officer, together with his Curriculum Vitae. Upon examination of the Curriculum Vitae,

and having reviewed his history with the [text deleted] Police Department and his involvement with firearms, the Commission is satisfied that [MPIC's Special Investigator] is an expert and able to express an opinion on the manner in which the Appellant's rifle was discharged in the Appellant's car at the time of the accident.

MPIC's legal counsel referred to [MPIC's Special Investigator's] report which indicated that:

1. "a firearm should not discharge unless that trigger is depressed".
2. In his experience, animals and in particular, dogs have discharged firearms in the past.
3. "In the writer's opinion the most likely cause for this firearm to discharge is due to a depression of its trigger. In this case the dog is most likely responsible for its discharge. The claimant himself advises he *thought* the firearm was empty, left the bolt in action, and did not have the safety on. The mere fact that there was a discharge confirms this.

The claimant confirms the dog was jumping back and forth from the front and back seat and was in an excited state. He last jumped into the back seat where the firearm is located at which time there was a loud bang and the firearm discharged.

Conclusion:

It is the writer's opinion that the dog's actions caused the discharge of this firearm which was loaded, and in an unsafe mode."

The Commission agrees with [MPIC's Special Investigator's] opinion that the dog's actions caused the discharge of the firearm, which was loaded and in an unsafe mode, and resulted in the Appellant's injuries while operating his motor vehicle.

The Commission therefore confirms the decision of the Internal Review Officer dated December 23, 2010 which determined that under Section 70(1)(a) of the MPIC Act the injuries sustained by the Appellant were not covered because they were the result of an "autonomous act of an animal that is part of the load". The Commission therefore finds there are no arguable grounds for the Appellant's appeal.

For these reasons the Commission confirms the Internal Review Officer's decision dated December 23, 2010 and dismisses the Appellant's appeal.

Dated at Winnipeg this 5th day of September, 2012.

MEL MYERS

PAUL JOHNSTON

LORNA TURNBULL