

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant] (ESTATE OF [the Deceased])
AICAC File No.: AC-10-123**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Paul Johnston
Ms Linda Newton

APPEARANCES: The Appellant, [text deleted] (Estate of [the Deceased]), was represented by [Appellant’s legal counsel]; Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Dianne Pemkowski.

HEARING DATE: October 14, 2011

ISSUE(S): Whether the accident falls within the scope of the Personal Injury Protection Plan

RELEVANT SECTIONS: Section 70(1) 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

On January 11, 2008, [the Deceased] was fatally injured in an accident when a truck grain box dropped on him. [The Appellant], the Deceased’s wife made an application for compensation to MPIC with respect of the fatal accident, seeking Personal Injury Protection Plan (“PIPP”) benefits for the estate.

On January 11, 2008, the Deceased was a farm labourer working alone on a [text deleted] one ton grain truck inside a grain cleaning building located on the farm near [text deleted], Manitoba. The Deceased was found pinned between the truck box and the frame of the truck on the passenger side at approximately 12:15 p.m. by [text deleted], who was employed at the farm. A member of the RCMP and members of Manitoba Workplace Health and Safety (WHS) and an ambulance attended at the scene. [Service station owner], the owner of [text deleted] (a service station located in [text deleted], Manitoba) also attended at the scene of the accident.

The Improvement Order Form completed by the WHS officer noted that no hydraulic leaks were observed, there were tools on the frame and a 7/16 wrench was found on the floor, and the set screw located on the hydraulic valve of the truck was bent. In this report, the officer indicated that when he inspected the truck it was difficult to start and that when the truck box was raised it started to creep down. He also stated that when the loose set screw was turned, the truck box started to slowly come down.

The WHS Investigation Report indicated that the deceased was working alone on a [text deleted] one ton grain truck inside a grain cleaning building located on the farm near [text deleted], Manitoba. In the Causation/Analysis section of the report it is noted:

A. Direct Cause: Worker was fatally injured when the hydraulically operated grain box pinned him between the frame of the truck and the grain box.

B. Indirect Cause:

Equipment:

[Text deleted] grain truck [text deleted] equipped with a hydraulic system for truck box – the truck box can be raised and lowered utilizing the hydraulic system. As explained to [text deleted] the hydraulic system works as follows:

When the rod that is connected to the valve body is manually pulled it directs the pressurized hydraulic fluid to extend the cylinder which in turn raises the truck box. The

rod is located on the driver's side of the truck, behind the cab and directly above the truck frame. (See photograph 8 – arrow a, photograph 11 – arrow a) The truck motor must be running in order to run the Power Take Off (PTO) which supplies the power to pressurize the hydraulic system.

To lower the truck box the rod must be manually pushed in which allows the hydraulic fluid to drain out of the cylinder. The truck motor does not need to be running in order for the box to be lowered. However, it is recommend (by 17(2)(b) – 17(2)(b) from [text deleted] as well as 17(2)(b) – employee of 17(2)(b) that the truck engine remain running while the box is being lowered to control the pressure in the hydraulic system which in turn controls the rate of descent.

The set screw is located on the valve that controls the hydraulic fluid that in turn pressurizes the cylinders allowing the pump to raise and lower the grain box. The valve is attached to the hydraulic pump which is attached to the Power Take Off – PTO shaft (measuring 1 inch in length with a 7/16 inch diameter). The set screw limits the travel of the valve which controls the speed of the box when being lowered (Photograph 9 – arrow a) also see Part 5 – description of evidence D – the set screw that was obtained as evidence.

A 7/16 inch combination wrench was used to adjust the set screw to change the travel of the valve when operated manually by the rod. The combination wrench used may have not been the appropriate tool to use to adjust the set screw. The head of the set screw shows evidence of being worn and the wrench being used could have easily slipped off the head of the set screw.

It is the officer's opinion that lack of blocking prior to working on the hydraulics would be considered a major contributing factor to the cause of the incident.

Task: Based on the location of the body (photograph 10 – arrow a) and the tools located on the truck frame (photograph 10 – arrow b), the worker was making adjustments of the set screw on the hydraulic system that raises and lowers the truck box.

The worker was working alone at the time of the incident. The majority of the work performed at this workplace is completed on an individual basis as the tasks requiring completion do not require two workers. Farming operations – more specifically operation of equipment – are set up to be performed by a single person.

There are two ways the task of adjusting the set screw can be completed:

ONE – the set screw can be accessed by crawling underneath the truck and working below the frame. The truck box does not necessarily need to be in the raised position. The worker is protected from the hazard of the box falling by being underneath the truck frame.

TWO – the truck box can be put in the raised position allowing access from above the truck frame – between the truck box and truck frame. When this option is used, the worker is exposed to the hazard of being pinned between the truck box and frame if the

hydraulic system were to allow the box to come down unexpectedly. When this option is utilized the truck box is to be blocked to ensure it will not descend and pin the worker against the frame.

According to 17(2)(b) statement the truck was not running when he found 17(2)(b).

Lack of a complete hazard assessment resulting in inadequate safe guarding (blocking) would be considered a contributing factor to the cause of the incident. In addition, the employer failed to provide working alone safe work procedures.

Environment: The incident occurred around 1200hrs – it was a sunny day according to The Weather network with a temperature of -15C.

17(2)(b) had several layers of clothing with hoods on at the time of the incident. If 17(2)(b) had the hoods of his jackets over his head it may have hindered his line of sight and prevented him from seeing the truck box lowering.

The truck was not running at the time of the incident so there was not any additional noise preventing 17(2)(b) from hearing the box descend.” (underlining added)

An Application for Compensation was made by the Appellant with respect to the fatal accident.

Case Manager Decision:

The case manager wrote to the Appellant’s legal counsel on December 7, 2009 and stated:

“This is further to our numerous telephone conversations in regards to this incident. As discussed, the information we received from the [text deleted] RCMP and the Workplace Safety and Health investigations indicates the deceased was in the act of performing maintenance or repairs to a vehicle at the time of his death. As a result there will be no coverage under Personal Injury Protection Plan (PIPP) in relation to this incident.

The definition of “bodily injury caused by an automobile” found under Section 70(1) of the *Manitoba Public Insurance Corporation Act* specifically excludes bodily injury caused because of an action performed by the victim in connection with the maintenance, repair, alteration or improvement of an automobile. It was concluded based on the tools found at the scene that the deceased was attempting to service a faulty set screw on the vehicle in an unsafe manner from above rather than below the vehicle.”

On February 8, 2010 the Appellant made an Application for Review of the case manager’s decision.

On May 27, 2010 [text deleted], the Appellant's legal counsel, made a written submission to the Internal Review Officer. In this written submission he asserted that:

1. Section 70(1) of the MPIC Act does not require anything more than a link between the injuries sustained and the use of the automobile and referred to *McMillan v. Thompson* (R.M.), [1997] 3 W.W.R.1, Manitoba C.A.
2. The exclusions found in the MPIC Act are to be read narrowly in favour of coverage rather than exclusions and referred to the decision from the Automobile Injury Compensation Appeal Commission (AC-08-116).
3. There is no direct evidence as to the manner in which the accident occurred and there is no evidence that the deceased was maintaining, repairing, altering or improving the vehicle.
4. At most the Deceased was merely adjusting the setting of the set screw as part of operating the truck.
5. Such an action is in the ordinary course and use of the farm truck and in this circumstance should not fall within the narrow exclusion.

As well, [Appellant's legal counsel] provided a statement to the Internal Review Officer dated May 27, 2001 from [service station owner], owner of [text deleted], a service station located in [text deleted], Manitoba. In this letter [service station owner] stated:

I am the owner of [text deleted], a service station located in [text deleted], Manitoba and have been so for the past 16 years. I am experienced and familiar with the operation and repair of farm vehicles and machinery including their hydraulic systems and have worked with such machinery on a consistent and regular basis for the past 16 years.

Following the incident of January 11, 2008 involving [the Deceased] I was asked by Workplace Safety & Health to attend the [text deleted] property and comment on the operation of the hydraulic system of the farm vehicle. The vehicle at issue is an older [text deleted] one ton grain truck owned by [text deleted]. The grain truck has a hydraulic system which raises and lowers the truck box. The truck motor must be running in order for the power takeoff (PTO) to supply power and pressurize the

hydraulic system. There is a set screw which controls the hydraulic control lever which in turn controls the amount of fluid through the hydraulic system. The set screw can only be adjusted manually.

It is unclear to me whether or not [the Deceased] was in any way dealing with the set screw on the day of the incident. However, I understand that a 7/16th inch combination wrench was found at the scene of the accident. From my experience and observation of this particular vehicle, even if [the Deceased] was using the 7/16th combination wrench, he could not have been repairing, altering or maintaining the set screw. Rather the 7/16th combination wrench would only be used to adjust the setting of the set screw (adjustment of the set screw on a farm truck with a hydraulic system is something which, in my experience, is done by someone in the ordinary course of using and operating a farm truck and truck box).

Following the incident the truck was brought to our shop for work. I examined the set screw and determined that it was not faulty. It is therefore my opinion, based on my firsthand knowledge of the incident and my professional experience with hydraulic systems on grain trucks, and in particular this grain truck, that the set screw was not being repaired but at most was being adjusted as to its setting as part of operating the farm truck. In my experience such an adjustment of the set screw is something that, if required, is done in the ordinary use of a farm truck.” (underlining added)

Internal Review Officer’s Decision:

On June 17, 2010 the Internal Review Officer issued her decision confirming the case manager’s decision of December 7, 2009 and dismissed the Application for Review. The Internal Review Officer determined that the accident of January 11, 2008 did not fall within the scope of PIPP. She stated:

“In administering and interpreting the *Act* and Regulations, I find that there is no entitlement to PIPP benefits for the January 11, 2008 accident. I am prepared to accept that the accident occurred as set forth in the Workplace Safety and Health Division’s Incident Investigation Report. However, this does not fall within the compensable definition of “accident” in Part 2 of the *Act*.

I am therefore dismissing the Application for Review and confirming the case manager’s decision of December 7, 2009.”

In her reasons for decision, the Internal Review Officer stated:

“As [the Deceased] was alone at the time of the accident, I accept that the findings within the Investigation Report are accurate regarding the circumstances of the loss. The investigating officers were obviously charged with the duty of investigating the loss and

providing their opinions on causation and contributing factors. There is no doubt that they have experience in doing so. It is also evident that the investigators considered [service station owner's] professional opinion when finalizing their report.

You have pointed out there is no direct evidence that [the Deceased] had been working on the truck when the accident occurred. Since he was alone, this is not surprising. All that the investigators can do is piece together the physical evidence and come to their own best conclusions. Direct evidence would not be required.

The investigation revealed that there were tools on the frame and a 7/16 wrench found on the floor and a bent set screw. Notably, the set screw was loose, and inspection and corrective maintenance were required on the truck. ([Service station owner's] opinion that the set screw was not faulty is inconsistent with the investigators' observations that it was bent and loose.) Given the identified problems with the set screw and truck, the tools on site, and the location of [the Deceased's] body, it is probable that [the Deceased] was engaging in the "maintenance, repair, alteration or improvement" of an automobile. This is specifically excluded by subsection 70(1)(b) of the *Act*.

Moreover, even if the adjustment of the set screw (used to control the hydraulic lever which in turn controls the amount of fluid through the hydraulic system) is used in the ordinary course of using and operating a farm truck and truck box, this would still be excluded by 70(1)(b). In my view, the four activities described in the exclusionary section (maintenance, repair, alteration or improvement) would include the adjustment of the set screw.

In my view, the cases you relied upon pertain to subsection 71(2), not subsection 70(1)(b) for which I base my decision. Because I find that there is exclusion pursuant to subsection 70(1)(b), it is unnecessary for me to consider the applicability of subsection 71(2).

A broad and liberal interpretation still requires reasonableness in the interpretation. For all the reasons stated above, I must find that the case manager's December 7, 2009 decision to deny fatal injury benefits/PIPP benefits was reasonable."

Appeal:

The Appellant filed a Notice of Appeal dated September 10, 2010.

The relevant sections and definitions of the MPIC Act are:

Definitions

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

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

[Service station owner] testified on behalf of the Appellant and confirmed the comments he made in his statement of May 27, 2010.

MPIC did not call any witnesses.

Submissions:

[Appellant's legal counsel] provided a written submission to the Commission and asserted:

1. The Deceased had worked as a farm labourer since 1996.
2. On January 11, 2008 he was helping with the farm's seed cleaning operation.
3. The farm vehicle involved in the incident had a grain box which is adjusted using a hydraulic system.
4. "A "set screw" controls the adjustment of a hydraulic control lever which in turn controls the amount of fluid in the system; the pressure of the hydraulic fluid raises and lowers the grain box."

5. There was no direct evidence that the Deceased was working on the farm vehicle.
6. It had been speculated by the investigators from WHS and the RCMP that the Deceased had been adjusting the setting of the set screw in part because a 7/16" combination wrench was found at the scene.
7. The evidence before the Commission does not establish that the Deceased was repairing, maintaining, or altering the hydraulics of the farm vehicle which constitutes exclusions under Section 71(2) of the Act.
8. "At most, he was merely adjusting the setting of the set screw as part of operating the truck. Such an action is in the ordinary course and use of the farm truck and in the circumstances should not fall within the narrow exclusion."
9. The exclusions found under Section 71(2) of the MPIC Act must be interpreted narrowly.
10. The MPIC Act had no application in this case and he referred to several decisions which demonstrate the inapplicability of the exclusion in the present case.
11. The fatal injuries sustained by the Deceased were clearly related to the use of the truck for the purpose of loading and unloading grain.

[Appellant's legal counsel] then referred to the Dictionary definitions in terms of maintenance, repair, alteration or improvement as set out under the definition of **"bodily injured caused by an automobile"** in Section 70(1)(b) of the MPIC Act. In his written submission he stated:

"38. However, there are no definitions provided for the terms "maintenance", "repair", "alteration" or "improvement". As such, it is submitted that this Commission may turn to the ordinary meaning of those terms as found, for example, in the Canadian oxford Dictionary, 2nd edition, 2004 – TAB 8:

"alter" – *verb* 1 *transitive and intransitive* make or become different; change

"improve" – *verb* 1 *transitive and intransitive* make or become better. b *intransitive* (foll. by on, upon) produce something better than.

“**maintain**” – *transitive verb* 1 cause to continue; keep up, preserve (a state of affairs, an activity, etc.) (*maintain friendly relations*). 2 (often foll. by *in*) support (life, a condition, etc.) by work, nourishment, expenditure, etc. (*maintained him in comfort*). 3 (often foll. by *that* + clause) support or uphold, esp. in speech or argument (*Maintain that she was the best; his story was true, he maintained*). 4 preserve or provide for the preservation of (a building, machine, road, etc.) in good repair. 5 give aid to (a cause, party, etc.). 6 pay for the upkeep, repair or equipping of (a garrison etc.).

“**repair**” – *transitive verb* 1 restore to good condition after damage or wear. 2 renovate or mend by replacing or fixing parts or by compensating for loss or exhaustion. 3 set right or make amends for (loss, wrong, error, etc.). • *noun* 1 (usu. In *pl.*) the act or an instance of restoring to sound condition (*in need of repairs; closed during repairs*). 2 the result of this (*the repair is hardly visible*). 3 good or relative condition for working or using (*must be kept in repair; in good repair*).

39. It is submitted that from a reading of the dictionary meanings, the actions alleged to have been taken by [the Deceased] with respect to the farm truck do not fall within any of the words used in the exclusion.

40. Rather, when you review the definition of “adjust”, it more accurately represents what actions [the Deceased] may have taken; namely, adjusting the set screw to put the grain box in the correct position:

“**adjust**” – *verb* 1 *transitive* a arrange; put in the correct order or position. B regulate, esp by a small amount. 2 *transitive* (usu. foll. by *to*) make suitable. 3 *transitive* assess (loss or damages). 4 *intransitive* (usu. foll. by *to*) make oneself suited to; become familiar with; adapt (*adjust to one’s surroundings*). 5 *transitive* (foll. by *for*) alter (a statistic etc.) to allow for circumstances (*income adjusted for inflation*).

41. Based on the overall broad and liberal interpretation to be given to the Act, and the narrow reading to be made of exclusions, it is submitted that, on the evidence available;

- a. [The Deceased’s] injuries were caused by an automobile;
- b. [The Deceased’s] death prima facie falls within Part 2 of the Act; and
- c. MPIC has failed to show that the circumstances surrounding [the Deceased’s] death fall within an exclusion under the Act.”

MPIC’s legal counsel relied on the decision of the Internal Review Officer in support of her position. She did not take issue with the Appellant’s submission that the accident was an event in which bodily injury was caused by an automobile.

In her submission MPIC's legal counsel asserted that pursuant to Section (70)(1)(b) of the MPIC Act provides that a motor vehicle accident excludes any bodily injury caused by maintenance, repair, alteration or improvements of an automobile. MPIC's legal counsel adopted the report of WHS which concluded that the Deceased was working on the truck's hydraulic system when the raised truck box fell, suddenly trapping him between the truck box and the frame. MPIC's legal counsel asserted that:

1. The Deceased's body was found pinned between the truck box and the frame on the passenger side of the truck.
2. Tools were found on the truck frame, together with a 7/16 wrench on the ground under the truck.
3. The 7/16 wrench was used to adjust the set screw to change the travel of the valve operated manually by the rod.
4. The combination wrench used may not have been the appropriate tool to use to adjust the set screw.
5. The head of the set screw showed evidence of being worn and the wrench being used could easily have slipped off the head of the set screw. The set screw was loose and bent on inspection and corrective maintenance was required on the truck.
6. Having regard to the identified problems with the set screw and truck, the tools on site and location of the Deceased's body it was probable that the Deceased was engaged in the "maintenance, repair, alteration, or improvement" of an automobile resulting in the motor vehicle accident..

MPIC's legal counsel therefore submitted:

1. That the actions of the Deceased were specifically excluded by Section 70(1)(b) of the MPIC Act.

2. Even if the adjustment of the set screw was made in the ordinary course of using and operating a farm truck, such an adjustment would be excluded by Section 70(1)(b) of the MPIC Act.
3. The four activities described in this section (maintenance, repair, alteration or improvement) include the adjustment of the set screw.

MPIC's legal counsel also submitted that the Internal Review Officer's decision confirming the case manager's December 7, 2009 decision was correct in denying fatal injury benefits/PIPP benefits for the Appellant and was reasonable. MPIC therefore asserted that the appeal should be dismissed and the Internal Review Officer's decision of June 17, 2010 be confirmed.

Discussion:

MPIC's legal counsel did not disagree with the Appellant's submission that the Deceased's injuries were caused by an automobile accident. The only issue in dispute between the parties is whether or not the Appellant's request for PIPP benefits was correctly denied by MPIC on the grounds of the exclusions as set out in Section 71(1)(b) of the MPIC Act relating to "bodily injury caused by an automobile"

MPIC's position is that although there is no direct evidence the Deceased had been working on the truck when the accident occurred, the WHS investigation clearly established that it was probable that the Deceased was engaged in the maintenance, repair, alteration or improvement of an automobile and these activities were specifically excluded by Section 70(1)(b) of the MPIC Act. MPIC's legal counsel contended that an adjustment of the set screw is included within the exclusions of Section 70(1)(b) of the Act and as a result the Appellant was not entitled to receive any benefits to the estate.

The Commission rejects MPIC's submission and finds that the Appellant is entitled to receive compensation in respect of the fatal accident in accordance with the provisions of the MPIC Act. The Commission determines that MPIC has not established on a balance of probabilities that the Appellant was engaged in the maintenance, repair, alteration or improvement of an automobile at the time of the accident.

In the WHS investigator's report, under the heading Part 2 Investigator's Summary of Incident, the investigator stated:

"We can speculate due to the tools found at the scene (the 7/16 inch combination wrench on the ground under the truck and the remaining combination wrenches on the frame of the truck) in addition to the location and position of the body that [the Deceased] had been working on the hydraulic system that raises and lowers the grain box of this truck." (underlining added)

The report from the RCMP constable dated April 22, 2009, after describing the operation of the hydraulic system on the truck, stated:

"From this we can only guess that [the Deceased] used the improper method of screw adjustment and caused the box to fall suddenly, trapping him inbetween." (underlining added)

The Commission concludes that the speculation by the WHS investigator and the guesswork of the RCMP constable cannot establish on the balance of probabilities that the Appellant was engaged in the maintenance, repair, alteration or improvement of the hydraulic system at the time of the accident. MPIC asserted that although there was no direct evidence that the Deceased had been working on the truck when the accident happened, it can be reasonably inferred, based on the WHS investigation report that the presence of the tools on the truck frame, the 7/16 wrench found on the floor under the truck, the loose and bent screw and the location of the Deceased's body, that the Deceased was engaged in the maintenance, repair, alteration or improvement of the automobile at the time of the accident.

The Commission notes that neither the WHS investigator nor the RCMP constable testified at the hearing and the Commission therefore has no knowledge of their experience and familiarity with the operation and repair of farm vehicles and machinery, including hydraulic systems.

The Commission however notes that [service station owner], who testified on behalf of the Appellant, stated that he was familiar with the operation and repair of farm vehicles and machinery including their hydraulic systems and worked with such machinery on a consistent and regular basis for the past 16 years. He further testified that he was specifically familiar with the hydraulic system of the grain truck involved in the motor vehicle accident. [Service station owner] was requested by the WHS inspector to attend the scene to look at the truck.

[Service station owner] disagreed with the WHS investigation report which stated:

“The head of the set screw shows evidence of being worn and the wrench being used could easily have slipped off the head of the set screw.”

[Service station owner] testified that:

1. He had examined the set screw and determined that it was not faulty contrary to the WHS investigator who found that the set screw was loose and worn.
2. He rejected the WHS investigator's opinion that the presence of the 7/16 wrench on the floor of the garage together with a loose and bent screw clearly indicated that the Appellant was engaged in maintenance, repair, alteration or improvement of an automobile.
3. The 7/16 combination wrench could not be used to repair, alter or maintain the set screw.
4. The 7/16 wrench could only be used to adjust the setting of the set screw.
5. Such adjustments to the set screw can be done by someone in the ordinary course of using and operating a farm truck and truck box.

6. The adjustment of a set screw on a farm truck with a hydraulic system does not constitute evidence that the Deceased was maintaining, repairing, altering or improving the hydraulic system of the truck

[Service station owner] testified in a direct and unequivocal manner and none of his opinions were challenged in cross-examination by MPIC's counsel. The Commission therefore accepts [Service station owner's] testimony that as a result of attending the scene of the motor vehicle accident, receiving the reports of the WHS inspector and the RCMP constable, and examining the truck and the set screw, he concluded it was unclear whether or not the Deceased was in any way dealing with the set screw on the day of the accident.

Having regard to the dictionary definitions of repairing, altering, maintaining or improving, and the dictionary definition of adjust to mean "arrange; put in the correct order or position; regulate, esp by a small amount", the Commission finds that the Deceased was not carrying out any actions within the meaning of the exclusions as set out in Section 70(1)(b). The Commission accepts [Service station owner's] testimony, which went unchallenged, that the 7/16 combination wrench found on the garage floor at the scene of the accident could only be used to adjust the setting of the set screw which, in his experience, would only be used by someone using and operating a farm truck and truck box.

The Commission finds that if the driver of an automobile wishes to put on the air conditioning on a hot sunny day, the driver would turn the appropriate dial to start the air conditioning or on a cold winter day, the driver would turn the appropriate dial to heat the car up. In the Commission's view these actions would constitute an adjustment of the dial on the panel of the automobile rather than a maintenance or repair of the panel dial. On the other hand, if a driver

noted that there was a requirement to add or replace oil in the oil pan or add water to the radiator, the driver and/or a mechanic would do so and in the Commission's view these actions would constitute maintenance of the appropriate oil or water levels in the automobile and not an adjustment. The Commission therefore accepts the submission of the Appellant's legal counsel that the adjustment of the set screw on the truck's hydraulic system did not come within the exclusions set out in Section 70(1)(b) of the MPIC Act.

Strict Construction of Section 70(1)(b) of the MPIC Act:

In *McMillan v. Thompson* (supra), Madame Justice Helper stated that the courts should take a large and liberal interpretation of the provisions of the MPIC legislation and stated:

“53 I also looked to s. 12 of *The Interpretation Act*, R.S.M. 1987, c. I80 for guidance:

Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects.

54 I have concluded that the legislature created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile. I find favour with the observations of Pitt J. In the case of *Economical Mutual Insurance Co. v. Lott*, [1955] I.L.R. 1-3205 (Ont. Gen. Div.):

I am of the view that the main objective of motor vehicle insurance legislation in the nineties is the reduction in the volume and costs of litigation. The means to achieve that objective is the limitation of access to the courts. For that reason alone I would agree with the observations of Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.*, dated October 21, 1994, that: the no-fault provisions of the Act were intended to constitute a comprehensive code determining the rights of insured persons against their insurers and the rights of insurers against other insurers.” (underlining added)

The Commission has adopted these principles when interpreting the definition of “bodily injury caused by the use of an automobile” as found in Section 70(1)(b) of the MPIC Act in its

decision in *Constantin v. Manitoba Public Insurance Corporation*, 2008 MBCA 5. (Leave to appeal to the Manitoba Court of Appeal refused.)

The Commission also notes that in respect of exclusion clauses the jurisprudence clearly indicates that such exclusion clauses should be read narrowly and in favour of coverage.

In *Disability Insurance Canadian Law and Business Practice* by Richard Hayles, Carswell

1998, the author (at page 231) states:

Strict Construction

Clauses which restrict the scope of the coverage provided by the policy, or which create exceptions to it, are to be strictly construed against the insurance company.⁹ The rationale behind the strict construction rule is that the insurer seeks to impose exceptions and limitations on the coverage described in another portion of the policy, and that the insurer should therefore express those exceptions and limitations in clear language. Insofar as the insurer fails to do so, it is only fair that the coverage language of the policy should prevail.

⁹ *Harris v. Boreal Insurance Inc.* [1996], 38 C.C.L.I. (2d) 211 (N.B. Q.B.); *Seitz v. Laurentian Imperial Co.*, [1993] I.L.R. 1-2912 (Ont. Gen. Div.), affirmed (1993), 12 O.R. (3d) 285 (C.A.); *Excel Cleaning Service vs. Indemnity Insurance Co.*, [1954] S.C.R. 169, affirming [1953] O.R. 9 (C.A.).

The onus is upon MPIC to establish, on a balance of probabilities that the exclusions set out in Section 70(1)(b) apply to the Deceased. The Commission agrees with the submission of the legal counsel for the Appellant who stated:

“It is a well established principle of insurance law that when an insurer attempts to apply an exclusion clause to the insured, it has the onus of proving that the exclusion applies. As held in the 1982 Supreme Court of Canada decision of *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.) – TAB 3, the same onus of proof rests on the insurer to bring the insured within the terms of the exclusion as it does on the insured to bring itself within the coverage of an insurance policy. The Supreme Court of Canada has more recently confirmed that the onus rests on the insurer to prove the exclusion once the insured comes within the policy (see for example *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66 at para. 22).

It is therefore submitted that the onus must be placed on MPIC to show that the circumstances of this case fall within the exclusion(s) provided in the Act.

In proving that an insured falls within the terms of an exclusion clause, it is important to note that the clause should be read narrowly and in favour of coverage rather than exclusion. In the Matter of an Appeal by [text deleted] in AICAC File No. AC-08-116 – TAB 4, this Honourable Commission considered a situation in which MPIC has excluded PIPP benefits on the basis of section 71(2)(a) of the Act. In reversing the decision, the AICAC reiterated that the exclusion must be read narrowly: At page 6, the Commission stated:

“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.”

Similarly, it is submitted, the exclusion found in section 70(1)(b) should be read restrictively, particularly when the claimant would otherwise fall within the provisions of the Act.”

The Commission therefore finds that on a strict construction of the exclusions as set out in Section 70(1)(b) of the Act, the Deceased was not altering, improving, maintaining, or repairing the hydraulic system of the farm truck, but at best was adjusting the set screw.

For these reasons the Commission finds that MPIC has failed to establish that the Deceased’s actions come within the exclusions as set out in Section 71(1)(b) of the MPIC Act and as a result allows the appeal and rescinds the Internal Review Officer’s Decision of June 17, 2010.

Dated at Winnipeg this 15th day of November, 2011.

MEL MYERS, Q.C.

PAUL JOHNSTON

LINDA NEWTON