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Indexed as:
D.M. (Re)

IN THE MATTER OF an appeal by D.M.
AICAC File No.: AC-98-101

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[1999] M.A.I.C.A.C.D. No. 4

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), L. Goodspeed and F.L. Cox
Heard: November 23, 1998.
Decision: March 11, 1999.
(36 paras.)

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Issue:

Whether MPIC properly terminated the appellant's Personal Assistance benefits.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993,
c. 36, s. 131.
Regulation 40/94, s. 2.
Evaluation Grids A & B in Schedule A thereto.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC'), represented by
Keith Addison.

D.M., the appellant, (not present in person) represented by
her son-in-law, V.H., by conference call from [text
deleted].

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REASONS FOR DECISION

[para1] The appellant was struck by a motor vehicle while crossing a street as a pedestrian. She was [text deleted] years old at that time, (April 3, 1997) and suffered a fractured right ankle, sore left knee, hip, neck and shoulder. The appellant was and is legally blind due to macular degeneration. The appellant applied for and received personal assistance benefits from MPIC under Section 131 of the MPIC Act.

THE LAW:

[para2] Section 131 provides as follows:

Reimbursement of personal assistance expenses

131 Subject to the regulations, the corporation may reimburse a victim for expenses of not more than \$3,000.00 per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of every day life without assistance.

[para3] Section 2 of Manitoba Regulation 40/94 provides:

Reimbursement of personal home assistance under schedule A

2 Subject to the maximum amount set under Section 131 of the Act, where a victim incurs an expense for personal home assistance that is not covered under Health Services Insurance Act or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

[para4] Schedule A forming part of Regulation 40/94 sets out a form of Grid system allocating a certain number of points to each area of daily life that a victim is either wholly or partly incapable of performing by reason of injuries sustained in a motor vehicle accident. The total number of points thus allocated must exceed 5 out of a possible 51 in order for the victim to become entitled to any compensation.

[para5] The benefits paid by MPIC to D.M. were adjusted monthly according to her score on Grid evaluations completed by Lorraine Mischuk, Occupational Therapist. Those scores were as follows:

For the period from	
May 16, 1997 to June 16, 1997	23.0 out of a maximum of 51.0
June 18, 1997 to July 18, 1997	16.5 " " " " "
July 18, 1997 to August 28, 1997	17.0 " " " " "
August 28, to September 11, 1997	16.5 " " " " "

[para6] The appellant's fractured ankle was being attended to by Dr. Douglas Birt, orthopaedic surgeon, who removed the 1st cast on her ankle and replaced it with a walking cast. However, progress was slow and, on June 16, 1997, Dr. Birt recommended she change her standard walker to a wheeled walker. She was able only to tolerate 10 minutes of standing

or walking at a time.

[para7] As of June 25, 1997 Ms Mischuk stated the appellant was showing poor tolerance for walking and standing. As a result she continued to require assistance for housekeeping, laundry and major meal preparation. However, she was able to prepare light meals and did not require assistance with bathing. The Victorian Order of Nurses had been attending upon D.M. regularly at the expense of MPIC but, when the insurer quit paying for that service, Dr. Swain arranged for her to receive home care through the Manitoba Department of Health. Her home care workers attend at D.M.'s home about once every week or two, sometimes to prepare meals for her freezer and at other times to do a more thorough cleaning than she, herself, is capable of doing.

[para8] On August 6, 1997 Ms Mischuk notes moderate edema to both knees of D.M., who is taking Tylenol extra strength; Ms Mischuk also suggests anti-inflammatory drugs to ease her condition in both knees.

[para9] The September 2, 1997 report from Ms Mischuk confirms that the appellant received some anti-inflammatory medication prescribed by Dr. Birt but, due to side effects, they had to be discontinued. The appellant reported icing her knees several times a day, due to increased pain from walking, edema, and stiffness for several days after exercising - following medical advice by walking in the hallway of her apartment block and then walking across the street to accompany a friend to the nearby shopping centre. That report indicates the appellant continues to require assistance as before.

[para10] On September 5th, MPIC's adjuster noted that D.M. was not using provincial Home Care Services for the preparation of meals - she was, as the adjuster puts it 'uncomfortable with that' - and was, instead, ordering in food from a variety of sources such as Chicken Delight, Perkins, Champs (Fried Chicken) and the like. She still needed home care for house cleaning, however, and assistance when going shopping, going to her doctor, going to her hairdresser, etc.

[para11] Later in September of 1997, MPIC assigned a new adjuster to D.M.'s file and decided to have Dr. Birt complete a new set of A and B grids, along with an up-dated report. MPIC also appears to have set aside the grids prepared by Ms Mischuk in August; MPIC staff attended the appellant's home on September 11, 1997 and completed grids giving D.M. a total of 7.5 points out of the maximum 51. In consequence, MPIC sent her \$510.88 under cover of a letter dated September 11, 1997.

The period intended to be covered by that payment is not stated in that letter.

[para12] On September 17, 1997 Dr. Birt reports to MPIC that the appellant continues to have residual pain and throbbing and swelling in and around her right ankle. The swelling increases when she is up for a prolonged time. Dr. Birt recommended a Ted stocking to control leg swelling and for her to continue physiotherapy. He felt she was reasonably functional. D.M. had told him that she had experienced imbalance since her motor vehicle accident ('MVA') but Dr. Birt could not explain that condition. She had not regained enough function to resume public transit travel. Dr. Birt had not found it possible to assign a specific permanent impairment rating to D.M.'s condition although, he said, she remained quite symptomatic but 'if she does end up with some degree of permanent impairment it would be rated quite low as she has regained good flexibility, has good alignment and has no evidence of arthritis or shortening as a result of her right tibular fracture.' Six days after MPIC's own had graded D.M. with a score of 7.5, Dr. Birt gave the appellant a grid score of only 2 out of 51 - a discrepancy which, we have to say, is hard to reconcile.

[para13] As a result of Dr. Birt's report and, in particular, by reason of his grid rating, MPIC notified the appellant on October 28, 1997 that she no longer qualified for benefits under Regulation 40/94.

[para14] The appellant engaged her son-in-law, V.H. of [text deleted], to make representations to MPIC on her behalf. V.H. phoned the adjuster and stated that the appellant could not use public transportation to get her groceries. He complained the Grid used was unfair to the appellant's condition. He wanted MPIC to pay for house cleaning and meal preparation.

[para15] The adjuster, sensibly, agreed that the insurer would pay for taxi services to allow the appellant to go grocery shopping as long as required. The adjuster also agreed to have the appellant's physiotherapist complete the grids and then, if necessary, to review those findings with MPIC's Medical Services team. Regarding house cleaning and meal preparation the adjuster noted that home care services were being supplied by another service provider but its identity was unknown to both V.H. and MPIC. V.H. subsequently pursued the personal care benefits denial to internal review with MPIC.

[para16] Mr. Brad Ross of Assiniboine Physiotherapy was asked by MPIC to complete a set of grids A & B and Dr. Swain, the appellant's personal physician, was asked to do likewise. Dr. Swain replied with grids totaling 12.5/51 but Mr. Ross produced totals of 4/51, not unlike those of Dr. Birt.

[para17] An Internal Review was held March 12, 1998 by telephone between MPIC and V.H. Subsequently, Dr. M. MacKay of the insurer's Medical Services Team was asked by MPIC's Internal Review Officer to comment on the grids completed by Mr. Ross, Dr. Birt and Dr. Swain.

[para18] Dr. MacKay's report of March 19, 1998 notes that Dr. Birt considered the appellant "has remained reasonably functional." He did review Ms Mischuk's assessment to the contrary but felt it pre-dated the grids done by Dr. Birt and Mr. Ross and was possibly outdated. He noted Dr. Swain's reference to osteoarthritis and felt that that might be the reason why the appellant could not support prolonged walking, standing, or carrying.

[para19] Dr. Swain's opinion was that the appellant was completely dependent on assistance for use of available facilities (as described on the back of the grid form) as a result of her symptoms stemming from the motor vehicle collision. Dr. MacKay, for his part, was uncertain how Dr. Swain could form that opinion, in light of the appellant's pre-MVA medical conditions and the injuries she sustained in the motor vehicle collision in question. Dr. MacKay concluded that the grid evaluations of Dr. Birt and Mr. Ross were more in keeping with the appellant's functional capabilities that had been somewhat impaired due to the injuries she sustained in the motor vehicle collision in question.

[para20] The internal review decision, quoting Dr. MacKay and affirming the adjuster's decision of October 28, 1997 discontinuing Personal Care benefits to the appellant, was relayed to the appellant through V.H. on April 6, 1998.

[para21] On August 14, 1998 MPIC wrote the appellant to advise that transportation expenses for hairdressing appointments of the appellant would be discontinued after August 14, 1998.

[para22] V.H. argues that the statutory provisions governing the Personal Injury Protection Plan and, in particular, the so-called grid system contained in Regulation No. 40/94 is flawed. He points out that, even using the grid evaluations of Dr. Birt and of Mr. Ross, both of which are favorable to MPIC, they indicate the following:

1. partially in need of assistance for: housekeeping
2. partially in need of assistance for: laundry
3. completely dependent upon assistance for: the purchase of supplies.

[para23] V.H. asks how someone who is completely dependent

upon assistance for the purchase of supplies, can be denied payment for transportation, because "she doesn't qualify under the grid". While the medical evaluations vary, V.H. points out that all the medical reports and grid evaluations agree that D.M. is not in the physical condition that she enjoyed prior to her accident. V.H. argues, further, that while some of D.M.'s transportation costs had indeed been paid by the insurer, that only seemed to have been done on an ex gratia basis, whereas, he submits, the appellant's right to be reimbursed for those expenses should be more formally established since, otherwise, when someone at MPIC decides to discontinue those payments she will have to use public transportation for her shopping, medical, hairdressing and other, similar needs and may sustain additional injuries as a result of her present medical condition.

[para24] When D.M.'s appeal came on for hearing before this Commission on November 23, 1998, the Commission was concerned by the apparent discrepancies between the several evaluations upon which MPIC had based its decision, namely:

- (i) on September 17th, 1997, Dr. Birt, who had been treating the appellant only for her ankle fracture, gives her a score of 2;
- (ii) at some point in late November or early December (the date is not clear to us) Mr. Brad Ross, physiotherapist (who, we note, had been provided with a copy of Dr. Birt's evaluation), gives her a score of 4;
- (iii) on December 6th, 1997, Dr. Swain, the appellant's personal physician, gave her a score of 13;
- (iv) Ms Mischuk, occupational therapist, who had performed a number of evaluations of D.M. as noted above, but whose most recent appraisal had been completed toward the end of August, 1997, assigned her a score of 17.

[para25] Since one of the reasons causing MPIC, on Dr. MacKay's advice, to disregard the evaluation by Ms Mischuk was that it pre-dated further physiotherapy treatments from Mr. Ross, the Commission decided to obtain an up-to-date grid evaluation and home assessment of the appellant from Ms Mischuk. (The only in-home assessment performed by anyone other than Ms Mischuk had been the one completed by MPIC staff on September 11th, 1997.) We received her report dated December 15, 1998. The Commission also requested an up-date from Dr. Swain.

[para26] Ms Mischuk reported that Dr. Swain had continued

to follow the appellant's condition, but that her physiotherapy treatments have been discontinued. The appellant still did some of her leg exercises. She has a wheeled walker but avoids, as much as is possible, using it in her home. She reported that she has had several near falls. She continues to have swelling in both knees, where the left is worse than the right. She also reported bilateral hip pain. She was able to dress and bath herself but requires a suction bath seat and a hand held shower. She reported that she received home care once every 2 weeks for cleaning and laundry. They also attend every 2 weeks to cook and freeze enough meals for the following 2 weeks. The appellant heats these meals in a toaster oven. The appellant takes a taxi to shop at a store where the staff assists her and delivers her purchases to her apartment.

[para27] The Mischuk report refers to mild to moderate edema in the appellant's left knee and mild edema in the right knee. Circumferential measurements at the knee crease were 34.0 cm for the left and 32.0 cm for the right. The appellant demonstrated reduced leg strength as measured by manual muscle testing. Functional leg strength was measured through squatting: the appellant is reported to have been 'able to perform one squat in the 1/3 range, but.....was unsteady due to weakness, and required to support herself on a counter.'

[para28] When D.M. walks about her home without her walker, she does so by holding on to various pieces of furniture for support. When asked to walk a distance in the hallway of her apartment building, she did so slowly and unsteadily, using the wall for support. She was forced to use her walker in her home during the interview and walking test, and managed a distance of some 50 feet, but as she progressed her gait became slower and unsteady. In the kitchen the appellant could reach shoulder level into cupboards. To get into lower cupboards a wide based stance was used with forward trunk flexion, and minimal squatting while leaning onto the counter for support. After 5-10 minutes of standing the appellant became unsteady and had to sit down. When dusting, the appellant sat down next to the item that she would dust with a long handled duster. Ms Mischuk did not attempt to test the appellant's functional capacity in the contexts of vacuuming, sweeping or laundry, due to her obvious unsteadiness in standing and walking.

[para29] In summary, Ms Mischuk reports that as of the date of her in-home assessment of D.M. on December 11, 1998, the appellant still needs assistance for housekeeping, laundry and major meals, as well as the continuance of food deliveries. Ms Mischuk completed a new set of evaluation grids, in which she gave D.M. a score of 11/51.

[para30] MPIC and the Medical Services Team expert Dr.

MacKay reviewed that assessment by Ms Mischuk. Dr. MacKay felt that the limited functional capabilities of the appellant involving her hips and knees had never, medically, been casually related to the MVA in question. Dr. MacKay states also that Dr. Swain had documented that the appellant had osteoarthritis, and felt that 'It may be worthwhile to obtain a report from Dr. Swain requesting his (sic) opinion pertaining to the cause of (the appellant's) bilateral knee and hip pain.

[para31] On February 9, 1999 a further medical report was received from Dr. Swain, who reported that her first attendance upon D.M. had been on May 5, 1997 regarding the appellant's injuries from her April 3, 1997 MVA. A review of the prior medical history supplied by her previous physician had not suggested any significant limitations. The appellant had told Dr. Swain that, before the MVA, she walked between her home and Polo Park Shopping Centre to shop and to bank, and did her own housekeeping and meal preparation. She stated she also walked 4 miles a day and attended aquasize classes at Centennial Pool 3 times a week. That description of D.M., reflecting a woman who, prior to her accident, had been an active, [text deleted] -year-old lady who functioned independently, was borne out by the evidence of V.H., who described his mother-in-law in similar terms. Since the MVA, Dr. Swain found, the appellant can do little more than walk around her home and is not able to stand long enough to prepare meals or do housecleaning.

[para32] Dr. Swain in her report of February 9, 1999 states there is no doubt that the appellant has osteoarthritic changes affecting her hips and knees. She further gives her opinion that "her present limitations are secondary to the motor vehicle accident of April 3, 1997 which triggered her osteoarthritis and her subsequent incapacity. If it had not been for this motor vehicle accident it is very unlikely that her osteoarthritis would have deteriorated to its present level with the associated decreased level of functioning."

CONCLUSIONS

[para33] If there are anomalies or inequities in the existing grid system, as there appear to be, it is not within the mandate of this Commission to correct them; that is for the Legislature to address. But, in the event, that is unnecessary in light of the conclusions we have reached.

[para34] We accept Dr. Swain's opinion and, taking that opinion into account with the most recent grid assessment of December 11, 1998 by Ms Mischuk, we are of the view that the appellant's current limitations are clearly due, in whole or in part, to her MVA which, if it did not cause, certainly accelerated, the degenerative process of her osteoarthritis.

In consequence, and although she has shewn some marked improvement over the intervening months, D.M. is entitled to assistance, to the extent that she appears to need it, in caring for herself and in performing the essential activities of every day life. The grid assessment of Ms Mischuk of 11/51 would result in an assessment of 24% of the \$3,000.00 limit or a payment of \$720.00 per month, adjusted for any increases in the Consumer Price Index since March 1st, 1994, pursuant to Section 165(3) of the MPIC Act. However, that \$720.00 is a maximum figure; it may well be that D.M.'s needs do not require reimbursement to that extent.

[para35] We find that D.M. is entitled to be reimbursed for all expenses necessarily incurred by her in ensuring an adequate supply of proper meals and in obtaining housekeeping and housecleaning services, including laundry, (to the extent that she is unable to prepare those meals or independently to carry out housekeeping or housecleaning activities for herself), and for transportation between her home and her doctor's offices, her physiotherapist, her hairdresser, her shopping destinations and any other public services and neighborhood facilities of which she may have need from time to time.

[para36] To the foregoing extent, the appellant is entitled to have her personal assistance payments reinstated from October 28, 1997, and to have those expenses covered by MPIC until the appellant has re-acquired a sufficient number of her pre-MVA functional capabilities that she no longer qualifies for assistance.

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