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Indexed as:  
V.J.B. (Re)

IN THE MATTER OF an appeal by V.J.B.  
AICAC File No. AC-96-64

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[1997] M.A.I.C.A.C.D. No. 7

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Manitoba Automobile Injury Compensation Appeal Commission  
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C.  
and L. Cox

Heard: February 10, 1997.  
Decision: February 14, 1997.  
(8 pp.)

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Issue(s):

- (i) Entitlement to continuing I.R.I. - proper time of termination;
- (ii) whether aptitude testing a prerequisite in determining suitable employment under Part 2 of the M.P.I.C. Act ('the Act');
- (iii) personal assistance expenses - interpretation of Section 131 of the Act.

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Relevant Sections:

Manitoba Public Insurance Corporation Act, S.M. 1993, c.  
36, ss. 86(1), 106(1), 110(1)(c) and 131.  
Regulation 37/94, s. 8.

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Appearances:

Manitoba Public Insurance Corporation ('M.P.I.C.')  
represented by Joan McKelvey.  
Otto Ament, for the appellant, V.J.B.

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MAIC 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

THE FACTS:

[para1] The Appellant, V.J.B., is fifty-two years of age, married, with two adult children. On August 21st, 1994 V.J.B. was involved in an automobile accident in which she sustained several injuries, of which the only one that is now relevant to her appeal is a fracture of the mid-shaft of the right third metacarpal - that is to say, a fracture of the middle bone on the third finger of her right hand. Following the accident, her hand was placed in a cast but, when the cast was removed, it was found that the fracture was displaced. As a result, Dr. Anthony P. Lockwood, a specialist in plastic and reconstructive surgery (particularly in surgery of the hand), to whom V.J.B. was referred, gave the insurer his opinion that V.J.B. had sustained a severe disability, associated with mal-union of the fracture and reflex sympathetic dystrophy, which had severely affected her dexterity.

[para2] We note, here, that 'sympathetic reflex dystrophy' is, technically speaking, described as 'diffuse superficial and deep burning pain in an extremity associated with vasomotor disturbances, trophic changes, and limitation or immobility of joints as a result of some local injury' (see Stedman's Medical Dictionary, 25th edition, 1990, at page 482). Dr. Lockwood describes it as 'a dysfunctional response of the autonomic nervous system to a hand injury, and can be very difficult to treat'. In consequence, V.J.B. is unable to form her right hand into a fist, finds it difficult, if not impossible, to separate her middle finger from her forefinger on the right hand, experiences numbness and tingling sensation across the back of the hand and a resultant lessening of dexterity in that hand. For example, V.J.B. testified that she has trouble vacuuming her home, since it is difficult for her to move heavy furniture; she says that she cannot easily clean windows, cannot cut or chop with her right hand, cannot scrub her head when washing her hair, since only two fingers on her right hand are independently usable, and cannot readily dig in her garden or pull up weeds.

[para3] V.J.B. has been receiving help from her daughter, B., who is a trained and qualified hair stylist. B. was receiving about \$850.00 per month while her mother's hand was still in a cast; that amount tapered off to \$300.00 per month by December of 1995, as V.J.B. became less dependent upon others. B. testified that she still helps V.J.B. from time to time, helping her to cut meat, fill pots, vacuuming occasionally and helping to wash her hair. Prior to her mother's accident, B. would help out on the home front with meals, laundry, housekeeping and the like from time to time although not, she says, to the same extent as now appears to be necessary.

[para4] For some time prior to the accident, V.J.B. and her daughter, B., had been planning to set up a hairstylist salon together; B. would be running it with V.J.B. acting as her assistant.

[para5] V.J.B. further testified that she had no medical problems prior to her accident; the only medication that she has been taking since the accident has been the occasional Tylenol tablet for pain. Her evidence was that she is now able to do light housekeeping, feed her birds, water her plants and make beds. She drives in the summertime occasionally but is scared of driving in the winter - she does not feel that she can control the car in light of the problems experienced with her right hand.

[para6] We have carefully examined the written evidence of Dr. V.R. Adduri, who examined V.J.B. immediately after her accident and who applied the cast; the evidence of Dr. D. Johnson, of Dr. Douglas Eggertson, of Dr. A.P. Lockwood (to whom V.J.B. was referred by Dr. Adduri), and of Dr. Greg Storoschuk of the Pan Am Sports Medicine Orthopaedic and Rehabilitation Centre. We have also given careful consideration to a report from Dr. Marshall Stitz, medical consultant with the Claims Services Department of M.P.I.C., bearing date July 23rd, 1996, and to correspondence passing between M.P.I.C. and Dr. Reid Waters.

[para7] Finally, we were given a copy of a detailed report, bearing date October 23rd, 1996, prepared by Ms Leslie Johnson, an Occupational Therapist with PAR Health Services and, as well, we have had the benefit of hearing the oral testimony of Ms Johnson.

[para8] We do not think it necessary to attempt an analysis, in these Reasons, of all of the medical and paramedical evidence referred to above. It is sufficient to note, here, that we are persuaded that, to use the language of Ms Johnson's report, V.J.B.'s 'current functional abilities correspond to a LIGHT level of work as described in the Canadian Classification and Dictionary of Occupations'. This would include, but is by no means limited to, work in the area of retail sales, which is the field of employment determined for V.J.B. by M.P.I.C. under Section 86(1) of the Act. We find, also, that almost all domestic activities, including washing, preparing and eating meals (particularly with the use of certain simple devices recommended by Ms Johnson) and general housekeeping are within V.J.B.'s range of capability; the only assistance that she might occasionally need in order, for example, to move heavy furniture, should be no greater than had always been available to her from her husband or her daughters prior to her accident.

#### THE LAW:

[para9] We shall set out, on a separate scheduled annexed to these Reasons, those sections of the Act and Regulations that are relevant to the determination of V.J.B.'s appeal. Their effect may be summarized quite simply, this way: V.J.B.

was a non-earner, within the meaning of Section 85 of the Act, at the time of her accident; since she appeared to be disabled on the 181st day after her accident, the Corporation had an obligation, under Section 86(1), to determine for V.J.B. a level of employment which, but for the accident, she would have been able to perform; M.P.I.C., using the National Occupation Classification Guide, determined that V.J.B. would have been qualified for any one of a number of basic level occupations, had the accident not taken place (she had worked briefly as a cashier and had had some training as a hair stylist, but had not been gainfully employed for at least twenty years); using the minimum wage rate of \$10,400.00 per annum, and after deducting nominal income tax, Canada pension plan and unemployment insurance contributions, M.P.I.C. started paying her 90% of the net balance, or \$343.04 bi-weekly; as of January 13th, 1996, basing its decision on the provisions of Section 110(1)(c) of the Act and Section 8 of Regulation 37/94, the Corporation decided that V.J.B. was no longer unable to hold the employment that had been determined for her, and therefore discontinued the benefits that she had been receiving since February 18th, 1995.

[para10] Given our findings on page 4 of these Reasons, the issue that remains is not so much whether the insurer had the right to terminate V.J.B.'s benefits, but when that right arose. V.J.B.'s evidence was that she had not even been made aware of the intent of the Corporation to terminate those benefits until, when a cheque that she had been expecting from M.P.I.C. failed to materialize, she phoned her adjuster, only to be told that she would not be receiving any more funds. Although there is nothing in the Act that requires M.P.I.C. to give advance notice of termination, we are constrained to say that failure to do so smacks of inequity, rendering the victim unable to plan even such a simple thing as food purchasing.

[para11] In the event, we find that the insurer did not have sufficient, clear and persuasive evidence before it of V.J.B.'s functional capacity until about October 25th of 1996 which, we estimate, would be the date upon which M.P.I.C. would have received the final report of Ms Leslie Johnson of PAR Health Services. True, it had received on January 8th of 1996 a letter from Dr. Lockwood, indicating his tentative opinion that V.J.B. "probably could work as a sales clerk", but Dr. Lockwood strongly recommended an objective assessment by PAR Health Services. It is significant that M.P.I.C. itself, two months after discontinuing V.J.B.'s benefits, was still seeking an assessment from PAR Health Services. The same point applies to the discontinuance of both the I.R.I. benefits and home care assistance.

[para12] There are two other subsidiary questions that we should touch upon. Firstly, Mr. Ament, counsel for V.J.B., submitted that, when determining an occupation for V.J.B. pursuant to Section 106(1), the Corporation has an obligation

not only to assess her physical, functional capabilities but also to have aptitude tests and other assessments of intellectual ability conducted. While the section in question certainly makes reference to the "physical and intellectual abilities of the victim immediately before the accident", we do not interpret this as requiring the insurer, in every case, to retain the services of a professional psychologist in order to conduct formal aptitude tests. It is our view that, in many cases - that of V.J.B. being one such case - the insurer can gauge the intellectual capacities of a victim with reasonable accuracy by looking at all of the other required factors, namely the education, training and work experience of the victim, when trying to decide where the victim would fit into the workplace. V.J.B. had a Grade 11 education, had worked briefly as a cashier and as a junior hair stylist, but had been out of the marketplace for at least twenty years. We find that M.P.I.C. had not omitted to take any reasonable step when determining an occupation for her.

[para13] The other point to which we should refer is the suggestion that appears on M.P.I.C.'s file that V.J.B. had disqualified herself from further benefits by refusing to undergo some further nerve conduction studies of her wrist. This argument was not advanced by counsel for M.P.I.C. and is only mentioned here for greater certainty. V.J.B. did, at one point, indicate an unwillingness to undergo further testing, but she explained that to our satisfaction with her testimony that she had already been advised that her condition was irreversible and, in any event, she did submit to whatever additional tests were required of her by M.P.I.C.

DISPOSITION:

[para14] We therefore find that V.J.B. is entitled to the payment of income replacement indemnity in the amount of \$343.04 bi-weekly from January 14th, 1996 until October 25th, 1996, both inclusive, and to the payment of personal home care assistance calculated at the rate of \$300.00 per month for the same period, pro-rated to the extent required. She will also be entitled to interest on the total of the two, foregoing amounts, pursuant to Section 163 of the Act.

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