



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by M.L.
AICAC File No.: AC-03-104

PANEL: Ms. Yvonne Tavares, Chairperson
Mr. Paul Johnston
Mr. Bill Joyce

APPEARANCES: The Appellant, M.L., was represented by E.L.;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Ms. Dianne Pemkowski.

HEARING DATE: April 29, 2004

ISSUE(S): Entitlement to funding for resource aide/companion

RELEVANT SECTIONS: Sections 131 and 138 of The Manitoba Public Insurance
Corporation Act (the 'MPIC Act') and Sections 2, 10(1) and
Schedule A of Manitoba Regulation 40/94.

**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

E.F., as Committee of M.L., has appealed the decision of MPIC's Internal Review Officer dated May 6, 2003. The Internal Review decision confirmed the case manager's decision that MPIC would cease funding for a resource aide for the Appellant beyond February 28, 2003.

M.L. was involved in a motor vehicle accident on October 14, 1994, wherein she sustained a closed head injury and a cervical spine injury and was rendered a quadriplegic in a vegetative state. On October 26, 1996, M.L. was transferred to [text deleted] for a chronic care placement.

According to a letter dated November 7, 2002 from Ms. Gloria Sim, Program Manager Chronic Care, [text deleted], since admission to chronic care, M.L.'s basic needs have been met by nursing staff in accordance with her physical requirements. Ms. Sim further indicated that:

[M.L.] requires total care by nursing staff for all hygiene interventions. She is incontinent of bowel and bladder. She is transferred from/to bed/chair by mechanical lift with two-person assist. When in bed, [M.L.] is turned every two to three hours by nursing staff. Her skin is sensitive, and staff use prescription creams for her face and scalp in accordance with the physician's orders. She is fed by gastrostomy tube in accordance with a regimen from the dietician. Her weight is stable. [M.L.] has a tracheostomy tube in place, and nursing staff clean the inner cannula of the tracheostomy tube every shift on days, evenings, and nights, and at other times if necessary. The need for humidity is assessed by nursing staff and facilitated accordingly.

Since approximately 1995, MPIC had provided funding for a resource aide/companion for M.L. Ms. Sim, in her letter of November 7, 2002, also commented upon the activities of the resource aide/companion as follows:

The private attendants funded by Manitoba Public Insurance visit with [M.L.] four times a week from 10:00 am to 2:00 pm. Unit staff facilitate their visits by transferring [M.L.] to her wheel chair from bed. She is taken via wheelchair to various recreation activities that may include movies, bingo, music appreciation. The attendants talk and read to her. [text deleted] messengers transport [M.L.] to chapel, and the attendants meet her there and then take her throughout the Centre in an effort to provide stimulation. The Recreation worker or paid attendant sometimes accompany [M.L.] to the Snoezelen Room, a specialized environment that provides external visual/auditory/and tactile stimulation.

Correspondence from Martha Plotnikoff, Senior Staff Coordinator with Gentle Touch Home Health Care Services, advised that the following services were being provided by Ms. Sanchez, the Appellant's resource aide/companion:

I apologize for the delay in sending this letter. At the present time we have a Resource Aide/Companion going in to see [M.L.] four days per week. The Aide, going in to see [M.L.] at this time is Maria. Maria has been seeing [M.L.] for quite a while now. Maria

massages [M.L.'s] arms and legs. She does her Hair and Nails. She will read to her, and sometimes take her to a movie or bingo.

According to the testimony provided by Ms. Maria Sanchez and the information provided by E.L. at the appeal hearing, the following services are provided for the Appellant by Ms. Sanchez on a regular basis:

- Massage to [M.L.'s] neck, back, arms and legs;
- Trimming and polishing of [M.L.'s] fingernails and toenails;
- Washing and cleansing of face;
- Purchasing and applying special creams/moisturizers for [M.L.'s] sensitive skin;
- Combing [M.L.'s] hair and taking her to the hairdresser;
- Reading to [M.L.];
- Putting on music for [M.L.] to listen to;
- Exercises/stretching to her limbs;
- Interacting with her/comforting her/talking to her/stimulating her;
- Taking [M.L.] outdoors in warm weather for fresh air;
- Taking [M.L.] to activities and Deer Lodge Centre events, such as picnics, bingo, movies;
- Taking her to the park, on short walks;
- Previously, she would attend to shopping for items that [M.L.] might require, such as creams, oils, soap, shampoo, batteries and clothing, although Ms. Sanchez advised that nursing staff now take care of the shopping.

In a decision dated December 2, 2002, MPIC's case manager terminated funding for the resource aide/companion on the basis that the resource aide/companion was not medically required in the treatment or care of M.L. The case manager also noted that the services being provided fell outside of any rehabilitative or personal care provisions.

E.L., as Committee of M.L., sought an Internal Review of that decision. As already noted, the Internal Review Officer dismissed the Application for Review and confirmed the case manager's decision. In his decision, dated May 6, 2003, the Internal Review Officer stated that:

In my view the issue as to whether the resource aide/companion services are a medical requirement is addressed by the reports obtained from Dr. Maharaj and Ms. Sim. It appears from those reports that Deer Lodge Centre is capable of meeting [M.L.'s] basic

needs within the amount of their monthly charge. Similarly, when turning to the Personal Care Assistance Issue, it is unlikely that the definition of allowable personal care expenses should be expanded merely because, by virtue of [M.L.'s] living arrangement, the maximum amount of personal care assistance expense available under the legislation is not being paid. Again, it would appear that [M.L.'s] essential personal care needs are being provided by the [text deleted] facility. With the exception of the possible involvement of an Occupational Therapist relating to future seating requirements, there is no reasonable prospect of future rehabilitation taking place.

Given the above, it is my view that the Corporation's decision to terminate this funding is an appropriate one which is supported by the provisions of the legislation I have mentioned. In arriving at the decision to dismiss this Application for Review, I am cognizant of the impact the termination of the long-standing funding will have on [M.L.'s] family who are not resident in Winnipeg. In the meantime, the provisions of the Personal Injury Protection Plan provide for [M.L.'s] ongoing receipt of Income Replacement Indemnity benefits.

E.L., as Committee for M.L., has now appealed from the Internal Review decision dated May 6, 2003, to this Commission. The issue which arises on this appeal is whether or not M.L. is entitled to funding for the services of a resource aide/companion pursuant to the provisions of the MPIC Act.

The relevant sections of the MPIC Act and Regulations are as follows:

Reimbursement of personal assistance expenses

131 Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. 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 everyday life without assistance.

Corporation to assist in rehabilitation

138 Subject to the regulations, the corporation shall take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury, and to facilitate the victim's return to a normal life or reintegration into society or the labour market.

Section 2 of Manitoba Regulation 40/94:

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 *The Health Services Insurance Act* or any other Act, the corporation shall reimburse the victim for the expense in accordance with Schedule A.

Section 10(1) of Manitoba Regulation 40/94:

Rehabilitation expenses

10(1) Where the corporation considers it necessary or advisable for the rehabilitation of a victim, the corporation may provide the victim with any one or more of the following:

- (a) funds for an extraordinary cost required to adapt a motor vehicle for the use of the victim as a driver or passenger;
- (b) funds for an extraordinary cost required
 - (i) where the victim owns his or her principal residence, to alter the residence or, where alteration is not practical or feasible, to relocate the victim,
 - (ii) where the victim does not own his or her principal residence, to relocate the victim or, where relocation is not practical or feasible, to alter the victim's residence, or
 - (iii) to alter the plans for or construction of a residence to be built for the victim;
- (c) funds for an extraordinary cost required to alter the victim's primary residence, where the victim is moving in order to accommodate an approved academic or vocational rehabilitation plan, or the victim was a minor or dependant at the time of the accident who is moving from the family home;
- (d) reimbursement of the victim at the sole discretion of the corporation for
 - (i) wheelchairs and accessories,
 - (ii) mobility aides and accessories,
 - (iii) medically required beds, equipment and accessories,
 - (iv) specialized medical supplies,
 - (v) communication and learning aids,
 - (vi) specialized bath and hygiene equipment,
 - (vii) specialized kitchen and homemaking aides, and
 - (viii) cognitive therapy devices;
- (e) funds for occupational, educational or vocational rehabilitation that is consistent with the victim's occupation before the accident and his or her skills and abilities after the accident, and that could return the victim as nearly as practicable to his or her condition before the accident or improve his or her earning capacity and level of independence.

E.L. submits that the care and services provided by the resource aide/companion are needed to compliment the basic care provided by the nursing staff at the [text deleted]. She argues that the resource aide/companion provides additional care for [M.L.], and personal attention to M.L.'s needs and desires that the nursing staff is unable to provide. It is her position that the basic care provided by [text deleted] does not cover all of M.L.'s essential needs and the resource aide/companion helps to fill the gap between the basic level of service provided by the hospital and a more acceptable level of care provided by the companion, who is able to attend to all of the little extras that improve M.L.'s quality of care and her quality of life. E.L. insists that without the services of a resource aide/companion, there would be little, if any, attention or care provided to M.L. beyond attending to her basic needs.

Additionally, E.L. submits that M.L. has an acquired right to this benefit, since it has been provided for 8 ½ years and essentially MPIC is now estopped from denying this benefit. She maintains that nothing has changed in the past 8 ½ years which would entitle MPIC to change their decision.

Counsel for MPIC submits that any entitlement to funding for a resource aide/companion must fall within the provisions of Section 131 or Section 138 of the MPIC Act. She argues that the Appellant does not qualify within either of these provisions and accordingly there is no entitlement to funding for a resource aide/companion in this case.

Counsel for MPIC submits that the Appellant's basic needs are met by the care currently provided by Deer Lodge Centre. She maintains that, despite the fact that the Appellant would qualify for the maximum monthly amount payable to a victim under Section 131 of the MPIC Act, and somewhat less than that amount is being expended for her monthly care at Deer Lodge

Centre, there is no requirement for MPIC to allocate the difference to the care provided by the resource aide/companion. As a result, counsel for MPIC argues that the Appellant does not qualify for funding of this expense pursuant to Section 131 of the MPIC Act.

In addition, counsel for MPIC submits that there is no authority contained within Section 138 of the MPIC Act to provide for the reimbursement of this expense, since the care is not expressly provided for in Section 10 of Manitoba Regulation 40/94 and the care does not meet an occupational, educational or vocational rehabilitation purpose. Counsel for MPIC maintains that there is no rehabilitation benefit for the Appellant through the care provided by the resource aide/companion. As a result, counsel for MPIC submits that the appeal should be dismissed and the Internal Review decision dated May 6, 2003 confirmed.

Section 131 of the MPIC Act provides for reimbursement of personal assistance expenses, subject to the regulations. Section 2 of Manitoba Regulation 40/94 provides that MPIC shall reimburse a victim for an expense of personal home assistance in accordance with Schedule A. Schedule A provides a method of evaluating the needs of a victim relating to personal home assistance. Grid A provides for the evaluation of personal care assistance requirements for the following essential activities of everyday life: arising from bed, dressing, washing, bladder relief, bowel movement, undressing, going to bed, eating, and use of available facilities. The Appellant is completely dependent on assistance to carry out each of these activities.

While we agree that the nursing staff at [text deleted] is providing the requisite care to meet the Appellant's requirements respecting most of the essential activities of everyday life, we find that the treatment being provided by the nursing staff at [text deleted] does not provide the Appellant appropriate use of available facilities.

According to Schedule A of Manitoba Regulation 40/94, use of available facilities entails the ability to independently make use of the facilities (appropriately adapted) regularly used by family members (such as bathroom, telephone, radio, television) as well as use of public services and neighbourhood facilities. It is clear from the information provided by Ms. Sanchez and E.L. that the care provided by the [text deleted] does not take into account the requirements of the Appellant for the use of available facilities. We also rely on the note written by the case manager at the time of his meeting with Ms. Gloria Sim of [text deleted] respecting this issue. That note, dated November 5, 2001 stated the following:

I asked her what does [text deleted] do for recreational activities for her. Gloria advised that due to her significant functional deficits, [text deleted] would just do the basic ADL's (washing, feeding, turning her over in bed). She would not be taken to any recreational activities as they use volunteers for this. If the patient can't give a positive response back to the volunteer (i.e. smile, say thank you, converse) then [M.L.] wouldn't receive this. She said that their volunteer program works in that if the volunteer gets something back from the patient, then this will work. As [M.L.] can't respond, this service is not available for her.

Maria, the worker from Gentle Touch does things such as read to her, take her out for walks when the weather is nice, takes her to Polo Park on occasion (look for shoes for her), takes her to the in house recreational activities (such as bingo today).

I asked her if she knows about Dr. Fewer's comment that the stimulation is of no use given her vegetative state. She said that if the consulting neurologist assessed her today, they would say the same thing.

I asked her if she believes [M.L.] is receiving any benefit from the companion worker. She said that she does not know if [M.L.] can hear or is aware of anything. She does not appear to respond to any verbal or visual cues. She may understand but she can't express it. She said that the stimulation in her opinion is of "questionable benefit".

She said that having Maria here gives the mother some peace of mind as she lives in [text deleted]. She knows that someone is there for her daughter and does some activities versus staying in a bed all day.

Grid A contemplates that the use of public services and neighbourhood facilities is an essential activity of everyday life. The Commission finds that this includes many of the services provided

by the resource aide/companion for the Appellant. While the staff at the [text deleted] are responsible for transfers for the Appellant (in and out of bed, and to her wheelchair), it is Ms. Sanchez who accompanies the Appellant to [text deleted] events and recreational activities and interacts with her at those events. It is also Ms. Sanchez, who takes the Appellant out doors, for walks and to the park.

Pursuant to Section 131 of the MPIC Act, an entitlement to reimbursement of personal assistance expenses is established where the victim is unable because of the accident to perform the essential activities of everyday life without assistance. Pursuant to Grid A of Schedule A of Manitoba Regulation 40/94, the use of available facilities is an essential activity of everyday life. There is no further requirement that these services be medically required in the treatment or care of the victim. The Commission therefore determines that M.L. is entitled to reimbursement of the expenses incurred for the services provided by the resource aide/companion in order to assist her with the use of available facilities.

Based upon the chart of qualifying personal care expenses, we have determined that, as a guideline, the Appellant should be entitled to a minimum of 8% of the maximum amount prescribed by Section 131 of the MPIC Act, to be applied towards reimbursement of expenses for the resource aide/companion to assist her with the use of available facilities. However, since we did not receive any evidence on this point, we will refer the determination of the actual amount of expenses to be reimbursed by MPIC, to the case manager for her determination. If the parties are unable to agree with respect to the actual amount of reimbursement for the Appellant, for the services of a resource aide/companion to assist her with the use of available facilities, the Commission shall remain seized of this matter and either party may refer that issue back to the Commission for a final determination.

Dated at Winnipeg this 28th day of July, 2004.

YVONNE TAVARES

PAUL JOHNSTON

BILL JOYCE