

Donald Maurice v. Merchants Bank

(November 25, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Donald Maurice

Opinion No. 46-09WC

v.

By: Jane Dimotsis, Esq.
Hearing Officer

Merchant's Bank

For: Patricia Moulton Powden
Commissioner

State File No. H-14629

OPINION AND ORDER

Written filings completed on September 30, 2009

Record closed on September 30, 2009

APPEARANCES:

Carey Rose, Esq. for Claimant
Keith Kasper, Esq. for Defendant

ISSUES:

Is Claimant entitled to attendant care assistance for 6-8 hours per day as reasonable and necessary medical care pursuant to 21 V.S.A. § 640(a)?

EXHIBITS:

Joint Exhibit A - Relevant Medical Records
Joint Exhibit B - Attendant care notes
Joint Exhibit C - Nurse Case Manager Reports
Joint Exhibit D - Deposition Transcript of Dr. Empting
Joint Exhibit E - Deposition Transcript of Claimant
Joint Exhibit F - Deposition Transcript of Margaret Maurice
Joint Exhibit G - Deposition Transcript of Vaughan Schmutz
Joint Exhibit H - Deposition Transcript of Home Health Aide Nadia

CLAIM:

Medical benefits pursuant to 21 V.S.A. § 640
Reasonable costs and attorney's fees pursuant to 21 V.S.A. § 678 and 664

STIPULATED FACTS AS SUBMITTED BY THE PARTIES

1. Claimant began working for Defendant on October 6, 1987. Claimant suffered a compensable work injury to his back on January 5, 1995.
2. On March 24, 2006, Claimant was found to be at end medical result by Dr. Mark Bucksbaum with a 30% whole person impairment for his physical injuries of chronic back and leg pain, foot drop, levator ani spasms (pain, pressure and discomfort in the coccyx region), and L5-S1 lumbar laminectomy.
3. On April 24, 2006, Claimant was found at end medical result by Dr. Mann with a 55% whole person psychological impairment based on major depressive disorder and pain disorder.
4. On June 14, 2006, Defendant accepted Claimant's claim for permanent total disability.
5. In March of 2007 Claimant began receiving home care assistance with services provided by the Vermont Visiting Nurses Association. A May 2007 home health care assessment by the VNA tallied a potential of 41 hours of home health care needs.
6. In July of 2008, Claimant moved to Atlanta, Georgia to be closer to his daughter. Defendant again provided in-home care assistance for Claimant.
7. In August of 2008, Claimant's in-home attendant care was increased to 24 hour care seven days a week due to syncope (loss of consciousness) and other unresponsive episodes.
8. On November 14, 2008, a diagnostic evaluation was performed at the Shepherd Center to evaluate Claimant's needs and independence levels.
9. On December 1, 2008, a diagnostic evaluation was done by an occupational therapist.
10. On January 9, 2009, a neuropsychological evaluation was done at the Shepherd Center.
11. In February 2009, Dr. Larry Empting, Claimant's primary treating physician and both a neurologist and psychiatrist, issued an opinion that the maintenance of the home care was still necessary.
12. Also in February 2009, Dr. John Lin issued an opinion recommending the discontinuance of in-home care. On March 30, 2009, Defendant, relying on Dr. Lin's opinion, filed a Form 27 terminating 24 hour attendant care over a graduated two month basis.
13. Claimant did not file an objection to the Form 27, but notified Defendant through counsel of their objection.
14. In April of 2009 the Department rejected the Form 27 and sought an opinion as to an appropriate schedule for the weaning process for the attendant care.

15. Following clarification from Dr. Lin opining on an even shorter weaning process than that originally proposed by Defendant, Defendant filed another Form 27 on April 16, 2009, terminating attendant care over a one month period of time.
16. Claimant filed no objection to this Form 27, but notified counsel that they were awaiting a home care assessment by Dr. Empting.
17. On April 23, 2009 the Department approved the Form 27.
18. On May 7, 2009, Claimant filed an appeal of the previously approved Form 27.
19. On June 2, 2009, Dr. Empting provided a written assessment of Claimant's home health care needs stating he needed at least 6 to 8 hours of home care per day and that the care was medically necessary.
20. The Department treated this opinion as equivalent to a Form 6 and scheduled the matter for an informal conference resulting in the current expedited formal hearing.
21. The sole issue for resolution in this matter is :

Is Claimant's request for attendant care assistance pursuant to Dr. Empting's suggestion of 6 -8 hours per day reasonable and necessary compensable medical care pursuant to 21 V.S.A. §640(a)?

ADDITIONAL FINDINGS OF FACT:

22. At all times relevant to this case, Claimant was an employee and Defendant was an employer as defined by the Vermont Workers' Compensation Act.
23. Judicial notice will be taken of all correspondence and forms in Claimant's file.
24. Claimant has been unable to work since 2003. He was determined permanently totally disabled in 2006.
25. Medical records and testimony establish that Claimant has documented functional limitations which impact his ability to perform his activities of daily living. For example, Claimant has trouble with dressing due to pain, foot drop, limited range of motion with his arms, inability to lift over his head, and poor balance. Claimant has difficulty transferring out of bed to his wheelchair due to pain and weakness and will stay in bed due to lack of assistance. Claimant has difficulty preparing meals due to pain, lack of energy, and an inability to lift heavy items like a pot or milk jug.

26. Claimant is essentially wheelchair bound. He cannot drive. He cannot safely stand or walk due to leg weakness, foot drop and neurological symptoms, inability to lift above his head and limited range of arm motion. He also has shoulder pain and bilateral wrist pain from the use of his manual wheelchair. He has diminished sensation in both hands which leads to accidents and burns. He has also exhibited impaired judgment which has led to some unsafe activities and accidents.
27. In March of 2007 Defendant began to pay for medically necessary home care services for Claimant based on the recommendations of Dr. Brian Erickson, his pain management specialist and Dr. Steven Mann, his treating psychologist. Both doctors had concerns for Claimant's safety. They opined that Claimant needed an assisted living environment due to mishaps with medication usage, confusion, inability to care for himself, inadequate nutrition, missing medical appointments and an increased risk of further suicidal behaviors.
28. His home health care needs were assessed by a physical therapist, nurse and social worker in May of 2007, and it was determined that Claimant required 41 hours per week of medically necessary home health nursing and attendant care. The hours listed were to help Claimant dress, bathe, assist him with hygiene, toilet and bathroom use, assist with transfers, eating, medication management and meal preparation. These are separate from transportation needs, shopping and housekeeping functions.
29. Claimant moved to Atlanta in July of 2008 to be closer to his daughter, Margaret and her husband, Vaughn. Claimant stated that he required too much help from his wife of 30 years and they had separated. Thus, he moved closer to his daughter. She and her husband have assisted Claimant with some medication management, transportation, home health services, housekeeping and financial assistance.
30. On August 15, 2008, Achieve Services, Claimant's home health provider, assessed Claimant's functional limitations. They documented problems with walking, lifting, self-bathing, and cooking, decreased mobility, and safety issues, and created a service plan that stated Claimant needed 28 hours of home health care per week. Achieve Services' records from July of 2008 until September of 2009 document that the majority of the services performed for Claimant were for medication use and management, toilet and bathing issues, and encouraging fluid intake and meal preparation.
31. In late August 2008, Claimant began having episodes during which he would lose consciousness. Based on emergency medical needs he was determined to need 24 hour daily home care. Defendant paid for this service until April 27, 2009 based on the recommendations of Dr. Empting and Dr. Lin. Dr. Empting is Claimant's primary medical provider. He consulted with Dr. Erickson regarding Claimant's history and medical needs.

32. Dr. Empting is Director of the Independent Diagnostic Clinic in Atlanta, Georgia and the Director for Prospective Outcome Studies. He is board certified in psychiatry and neurology. He completed two residencies with Johns Hopkins Hospital. He is also a part-time instructor at Johns Hopkins Hospital in neurology and also serves on the Medical Advisory Committee for the Georgia State Board of Workers' Compensation. He is well published and has done much training for doctors regarding neurological back problems.
33. Dr. Lin works for the Shepherd Center in Georgia. Claimant was referred to Dr Lin, a physiatrist at the Shepherd Center to assess his level of independence in October of 2008. Physiatrists are medical doctors who, in addition to medical school, also complete four additional years of postdoctoral residency training. During this residency training, they spend one year studying fundamental clinical skills and three years specifically on physical medicine and rehabilitation.
34. In November of 2008, another "Comprehensive Diagnostic Evaluation" was done by the Shepherd Center regarding Claimant's home health needs. The recommendation was for continued 24 hour care unless otherwise determined by a neuropsychological evaluation.
35. In mid-November a registered nurse from Maxim Healthcare assessed Claimant's home health care needs and noted Claimant had decreased mobility and cognition after his recent hospitalization. She stated "he now required assistance with most transfers and assistance with daily living."
36. On December 1, 2008, a home evaluation was done by Sara Brockman, Occupational Therapist. She recommended home modifications, a speech evaluation, and no use of the toaster or oven due to Claimant's distractibility without supervision which would be a safety and fire hazard. She documented Claimant's history of falls and decreased balance.
37. In January of 2009 a neuropsychological evaluation was done at the Shepard Center, which showed that Claimant had highly functional general intellectual skills but severely impaired problem solving skills, limited bilateral impairment in fine motor speed and dexterity, mild visual perceptual impairment, mildly impaired processing skills, and digressive speech. Claimant's medication regime was noted as a significant factor in his ability to concentrate. The conclusion was that Claimant had the cognitive capacity necessary to perform most activities of daily living, but that his impaired problem solving and visual and motor impairment inattention impacted his abilities.
38. In February of 2009 Dr. Lin saw Claimant for the second time. Dr. Lin was asked to provide an opinion regarding the continuing need for home care for Claimant. Dr. Lin wrote a prescription for discontinuance of home health care services and, instead, the installation of a Medic Alert system. The note was very brief without much reasoning for the abrupt change.

39. Upon learning of this, Dr. Empting wrote a letter disagreeing with Dr. Lin's opinion regarding stopping all home health care finding it risky and unwise. It is Dr. Empting's responsibility to coordinate home health care as Claimant's primary physician. Dr. Empting requested home health care continue at the same hours as were in place until he had a chance to visit with Claimant.
40. Dr. Empting reviewed all of Claimant's history and home health care both in Vermont and Georgia. He did a thorough assessment of Claimant's needs. Dr. Empting contacted Dr. Lin to try to understand his reasoning behind discontinuing Claimant's home health care.
41. In May 2009 Dr. Lin refused to offer any reasoning and refused to comment on Dr. Empting's opinions. Dr. Lin would not be deposed and did not participate in this hearing.
42. In June of 2009 Dr. Empting issued a written opinion that Claimant needed between 6 to 8 hours per day of home health care assistance due to his work related injuries. He testified that the home health care was for help with transfers, toileting, dressing, medication issues, eating and nutrition activities and help in prevention of falls. Dr. Empting was extremely concerned with Claimant's safety. Claimant has fallen and was hospitalized due to the fall. Dr. Empting testified that in an ideal world Claimant would have 24 hour care, there has to be a compromise and having someone with him for 6-8 hours when he needs them the most would satisfy that.
43. Claimant's home health attendant is a certified nurse's aide. She testified that Claimant is unsafe alone at home. He cannot reliably take his medications. He is not good at decision making which places him at physical risk. She assisted Claimant with medications, bathing, fall prevention, transfers, dressing, hygiene, cooking and eating and some limited housework. She testified she is not a housekeeper. The majority of her time is devoted to preventing falls, assisting with transfers and bathroom needs.
44. The testimony of Claimant's home health attendant, his daughter and his son-in-law all agree that a home health attendant or nurse's aide needs to assist Claimant with medication doses, transfers, bathroom activities and safety, hygiene, dressing, doctor's appointments and some meal preparation for nutritional purposes. Claimant testified that when no one is present he sometimes does not leave his bedroom and bathroom all day.
45. There was testimony from both his daughter and son-in-law that Claimant loses his balance easily and needs assistance to ensure he will not injure himself. This is the basis of the need for transfer assistance. All the witnesses who observed Claimant in his home testified that since home health services were discontinued Claimant had fallen several times and he has had a decline in his daily functioning. Claimant fell in June and needed not only emergency treatment but hospitalization for several days. The physical therapist at the hospital did not find it safe for Claimant to return home without home health care but eventually released him.

46. Claimant requests six to eight hours of daily home health care and attorney's fees and costs. Claimant's counsel asks for thirty days from the date of decision to submit reasonable and necessary costs and attorney's fees if the Claimant prevails.

CONCLUSIONS OF LAW:

1. It is the Claimant's burden to establish all facts essential to support a workers' compensation claim. *King v. Snide*, 144 Vt. 395, 399 (1984). Sufficient competent medical evidence must be admitted to verify the extent of injury and disability as well as the causal connection to the work related injury. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five part test to determine which expert's opinion is the most persuasive: 1) the nature of treatment and the length of time there has been a patient provider relationship; 2) whether the expert examined all of the pertinent records; 3) the clarity, thoroughness, and objective support underlying the opinion; 4) the comprehensiveness of the evaluation; and 5) the qualifications of the experts including their training and expertise. *Geiger v. Hawk Mountain*, Opinion No. 37-03WC (September 17, 2003).
3. The two experts in the instant case, Dr. Lin and Dr. Empting, came to very different conclusions. Dr. Empting has more of a longstanding relationship with the Claimant and has seen him approximately 22 times over the past year whereas Dr. Lin only saw Claimant on two or three brief occasions. Dr. Empting also reviewed all of Claimant's home health care history and his current needs in a thorough, comprehensive manner as well as consulting his previous physician in Vermont.
4. As previously stated, Dr. Empting is both a psychiatrist and a neurologist and is a highly qualified expert in these types of cases having 30 years of experience with patients similar to Claimant.
5. Dr. Lin of the Shepherd Center, one of the leading rehabilitation centers in the country, terminated Claimant's home health attendant care abruptly. He failed to state his reasoning behind these recommendations when challenged by Dr. Empting and failed to participate in this appeal.
6. Vermont's Workers' Compensation Act covers medically necessary home medical and nursing services under 21 V.S.A. §640(a). The controlling provision states "[a]n employer subject to the provisions of this chapter shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee." The statute is remedial in nature and must be liberally construed to provide an injured employee with benefits unless the law is clear to the contrary. *St. Paul Fire and Marine Ins. Co. v. Surdam*, 156 Vt. 585, 590 (1992) citing *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983).

7. In *Close v. Superior Excavating Co.*, 166 Vt. 318 (1997), the Vermont Supreme Court upheld compensation for home care services performed by Claimant's wife. In *Close*, the Claimant suffered a head injury and required 24 hour supervision. Claimant's spouse provided care including administering and monitoring medications as well as logging and supervising the claimant's behavior for safety and well being. Claimant's spouse was paid for her services including housekeeping services when they were incidental to her medical and monitoring services. There is no disagreement that just housekeeping services alone have been found not compensable. *Patch v. Cummings Construction, et al.*, Opinion No. 49-02WC (2002).
8. The services requested for 6-8 hours per day in the instant case are not for housekeeping purposes. They are for medically necessary medical and or nursing services such as medication management, assistance with transfers, toileting and safety management. They were provided by a certified nursing aide.
9. Defendant tries to make a distinction between mere housekeeping being noncompensable and only skilled registered nursing services being compensable under the statute and case law. However, there is a middle ground and level of care that can be provided by a spouse, as in the *Close* opinion, or by a certified nurse's aide. Cases like this, as stated in the *Close* opinion, should be determined on a case by case basis at the discretion of the Commissioner. In my opinion, the certified nurse's aide in the instant case is performing similar services as the spouse in the *Close* case and such services qualify as compensable under the statute.
10. I find Dr. Emptying credible that Claimant needs this middle level of medical and nursing care, something less than a registered nurse would provide, but more than mere cooking and cleaning. Claimant needs help taking his medication, transferring from his bed to his wheelchair, toileting assistance, and care to ensure his safety.
11. Claimant has sustained his burden by a preponderance of the evidence for his need for home health care services for 6 to 8 hours per day due to his work related injuries. These services are found both medically necessary and appropriate.

ORDER:

Based on the foregoing findings of facts and conclusions of law, the DEFENDANT is hereby ordered to pay:

1. Medical benefits in the form of certified nursing aide care for Claimant for 6 to 8 hours per day beginning immediately and to continue until his primary care physician finds them no longer necessary or decreases the hours of care needed;
2. Reasonable and necessary costs and attorney's fees to be established. These costs and fees should be documented and filed with the Department within 30 days of the date of this opinion. Defendant will then have ten days to respond to the amounts if it argues they are unnecessary or inappropriate under the statutes and rules.

DATED at Montpelier, Vermont this 25th day of November 2009.

Patricia Moulton Powden
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.