STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. X-6884
	)	
Kirk Jon Patch	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
H.P.Cummings Construction	)	Commissioner
and	)	
Liberty Mutual	)	Opinion No. 49A-02WC

This amended decision corrects an error that appeared in original paragraph 44 in the Conclusions of Law.

Hearing held in Montpelier on May 14, 2002
Record closed on July 10, 2002

APPEARANCES:

Mark H. Kolter, Esq. for the claimant
Keith J. Kasper, Esq. for the defendant

ISSUES:

1. Is Claimant's requested handicapped accessible van a reasonable and necessary medical service or supply?

2. Are Claimant's requested modifications to his parents' home reasonable and necessary medical services or supplies?

3. If either the van or home modifications are deemed compensable, what is the extent of the obligation, which Defendant owes to Claimant and what, if any, interest in these items is retained by Defendant?

4. Is Claimant's request for reimbursement for services performed by his mother compensable as reasonable medical or nursing services or supplies? If so, what is the value of the Claimant's mothers reasonable medical or nursing services?

5. What, if any, portion of Claimant's claim is barred by the statute of limitations?

6. What is the proper methodology for calculating Claimant's current and future entitlement to weekly permanent total disability benefits?

7. Is Mr. Patch entitled to receive cost of living adjustments on or after July 1, 1996, the date his compensation rate reached the equivalent of his average weekly wage?

8. Is Mr. Patch entitled to receive a lump sum payment of his permanent total disability indemnity benefits?

9. What remedies are available to Mr. Patch considering his complaints of slow claims adjustment service by Liberty Mutual Insurance Company?

10. Is Mr. Patch entitled to attorney's fees and litigation costs and, if so, how much is due?

CLAIMANT'S EXHIBITS:

1. Medical Records
2. R. Heaps's calculation of value of serves of Ms. Patch
3. Videotape re: proposed renovations and Rehabilitation Engineering Site visit report.
4. -
5. Gerald Weisman report on powered wheelchair and lift-equipped van, dated 2/19/02
6. –
7. Rehabilitation Engineering site visit, dated 12/20/01
8. Transcript of deposition of Carol Talley, M.D. dated 4/30/02
9. Functional capacity evaluation ("FCE") 5/19/99
10. FCE 3/20/02
11. Curriculum vitae of Diane Aja
12. Curriculum vitae of Carol Talley, M.D.
13. Letter b Linda Peet, P.T., 12/21/000
14. Table: Claimant's determination of financial impact of not receiving annual cost of living adjustments
15. Memorandum on Nursing Home and Assisted Care Facilities
16. Letter of Myron Smith 12/7/00
17. Letter of Myron Smith 12/22/00 with Dr. Kiely letter
18. Curriculum vitae of Gerald Weisman, M.S., A.T.P., R.E.T.
19. Bid from Chris Nichols 3/02

DEFENDANT'S EXHIBITS:

A: Eagle Builders, Inc., response
B: Liberty Mutual Material 2001
C. Intermediate bid

STIPULATION OF FACTS:

1. On October 1, 1985 claimant suffered a personal injury arising out of and in the course of his employment. The parties agree that as a result the Claimant is permanently and totally disabled.

2. On October 1, 1985 Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act ("Act").

3. On October 1, 1985 Defendant was an employer of Claimant within the meaning of the Act.

4. On October 1, 1985 Claimant's average weekly wage was $222.55, resulting in an initial compensation rate of $148.35.

5. Claimant's compensation rate reached his average weekly wage on July 1, 1996.

FINDINGS OF FACT:

1. On the day of his injury, October 1, 1985, Mr. Patch was first knocked down then run over repeatedly by a forklift operated by a co-employee. His legs, pelvis left arm and shoulder were crushed. Eventually, after more than a dozen surgeries, Claimant's right leg was completely amputated at the hip on March 20, 1992. In 1995 at the request of the insurance company, Dr. Peterson assessed Claimant's permanency and concluded that Claimant had a 39% impairment of the left leg.

2. Claimant lives in Elmore, Vermont, a rural community, with his parents.

3. Claimant drives himself to Copley Hospital, a four-mile trip, three times per week for physical therapy. He also drives to Burlington, a 52-mile trip, for medical appointments, supplies and personal business.

4. Claimant also has an overuse syndrome in his upper extremities from having been completely dependent on their use for mobility in a manual wheelchair for years.

5. Claimant is essentially totally wheelchair dependent. Because of his overuse syndrome, a manual wheelchair is no longer feasible to meet all of Claimant's mobility needs.

6. A powered wheelchair would relieve the dependence on the Claimant's upper extremities, whose strength and function are being compromised with constant manual wheelchair use. However, an electric wheelchair cannot be transported in a conventional automobile because it cannot fold in the way a manual wheelchair can. And it cannot be lifted into a vehicle because of its weight. Consequently, a lift-equipped van is necessary.

7. Claimant's primary care physician, Philip Kiely, M.D., his Physiatrist, Carol Talley, M.D. and occupational therapist, Diane Aja, all opined, and I find, that a powered wheelchair is a medical necessity for the Claimant. The immediate need is to relieve the constant stress on overused upper extremities that tests show have diminished in strength over the last three years and to make the transfer to a vehicle safer. In the event Claimant suffers an acute illness, such as flu, his dependence on a power wheelchair will be absolute.

8. In the house Claimant shares with his parents, he has an upstairs bedroom, with no second floor egress. His only egress is an electric "Stair Glide" into which he must transfer from a manual wheelchair upstairs to the glide and then to another manual wheelchair downstairs. He then must negotiate a narrow hallway into the kitchen in his wheelchair, through the kitchen, and out the home's back door. In the event of a power outage, he "bumps" down the stairs.

9. Claimant cannot access the bathroom or kitchen facilities in a reasonably convenient manner because of tight space and the location of fixtures. Laundry facilities are in the basement, which is inaccessible to the Claimant. At the present time, Claimant's mother does his laundry.

10. Home modifications proposed by the Claimant's Rehabilitation Engineer, Gerald Weisman are: 1) Move Claimant's bedroom to where front porch is now; 2) add a bathroom large enough for wheelchair with safe access to sink and bathtub; 3) install a ramp in front of the house from the Claimant's bedroom for the Claimant's safe egress; 4) move laundry facilities upstairs so that Claimant can do his own laundry; 5) install a driveway paving/heated snowmelt system; 6) replace the heating system; 7) install a full basement; 8) move the electrical box from basement to first floor; 9) provide a generator to be used in the event of a power outage; 10) Enclose the mud room for Claimant's scooter.

11. The total cost of the recommendations by Mr. Weisman is $178, 690.44.

12. If Claimant were to move out of his home into an institutional setting, the cost would be between $43,800 per year for assisted-care living to at least $59,495 per year for a nursing home.

13. Claimant's parents own the house they share with him. They will not accept a mortgage on the property. As an only child, Claimant will inherit the house on his parents' deaths.

14. Since his accident, Claimant's mother has helped him with his medications, changed wound dressings, provided sponge baths and linen changes when he was recovering from his many operations.

15. Since the accident, Claimant's mother has provided necessary housekeeping services, including laundry, meal preparation, food shopping and housecleaning. She also has driven him to medical appointments, renewed his prescriptions and cleaned the stair glide he uses to ascend the stairs from the ground floor to his bedroom.

16. Mrs. Patch estimates that she worked at least 27.5 hours per week on the Claimant's behalf after his hip disarticulation surgery on March 20, 1992.

17. Dr. Kiely opined that the services Mrs. Patch provided were medically necessary to enable Claimant to reside at home in a safe and healthful manner given his physical disabilities.

18. Nursing services in Lamoille County cost $15 per hour for the local Home Health Agency. An individual nurse earns $9 per hour.

19. On or about June 26, 2000 Claimant filed a Notice and Application for Hearing seeking reimbursement for Mrs. Patch's attendant care and nursing services.

20. Claimant has been receiving his "Average Weekly Wage" of $222.55 per week since July 1, 1996. If the average yearly increase of consumer goods is 2.67 per cent, the value of the Claimant's weekly will fall to $100.05 by 2025, the Claimant's estimated life expectancy.

21. Claimant submitted evidence of his contingency fee agreement with his attorney and detailed bills and expenses for the time spent in this case. Attorney hours total 574.5 and litigation expenses total $17,129, plus $1,430 for Dr. Kiely, ($4,208.67+ $3,641.12) for Myron Smith, and $6,297.50 for Chris Nichols.

DISCUSSION AND CONCLUSIONS OF LAW:

Powered Wheelchair, Van And Home Modifications

1. Whether an employer or its insurance carrier may be required to pay for home modifications or a specialized van to accommodate a wheelchair dependent claimant as a medical benefit under Vermont's Workers' Compensation Act is a question of first impression in Vermont. The section of the Act pertaining to medical benefits is 21 V.S.A. 640(a), which provides: "An employer subject to the provisions of this chapter shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee."

2. The defendant in this case does not dispute that it is responsible for providing a powered wheelchair to Claimant, and the need for a powered wheelchair due to upper extremity overuse is well supported by the medical evidence presented at the hearing. Because this is conceded, there is no need to engage in detailed analysis of this point—it is sufficient to note that it is the opinion of this Department that there is no question that a wheelchair is contemplated under the statute as a medical "supply." The less obvious question is whether the statute also extends to other services and materials to enable the claimant's use of the wheelchair in and outside of his home.

3. It is informative to review how other states have handled this question in view of their workers' compensation statutes as numerous jurisdictions have held that home modifications are compensable under their states' workers' compensation statutes. It should be noted at the outset of this sampling that the Commissioner, however logical the reasoning used by other states in their interpretations, is not bound by the law of other states, but by the provisions in Vermont's Workers' Compensation Act and the Vermont Supreme Court's interpretation of those provisions.

4. The Iowa Supreme Court upheld the finding that home modifications and modifications to a van fell within the context of "appliances." *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143 (Iowa 1996). Iowa's statute provided that the employer "shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances . . . ." *Id.* at 154. The court reasoned that the home modifications and van conversion[1] were merely an extension of the claimant's wheelchair. "[An] appliance has been held to be a device that serves to replace a physical function lost by injury. Just as a wheelchair seeks to replace the lost functions of standing and walking, a wheelchair ramp, a wheelchair shower, etc., also seek to replace physical functions claimant possessed before the work injury but has now lost." *Id.*

5. An Oregon appellate court found that home modifications could be covered either under the statutory language "other related services" or under the "general rubric of 'prosthetic appliances, braces or supports.'" *SAIF Corp. v. Glubrecht*, 967 P.2d 490, 496 (Or. App.1998) (in banc). "Structural modifications made to a home to accommodate the wheelchair have the function of facilitating the use of the wheelchair. Indeed, the structural modifications are an extension of the wheelchair itself, without which the wheelchair could not serve as the tool it is intended to serve. Without the structural modifications, a wheelchair could not assist a person without the use of his or her legs to be independently mobile in the home." *Id.* at 495. The Oregon court was also aided in its interpretation by an expressly codified purpose of the act to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." *Id.*

[1] The full purchase price of the van was not an issue. It had been denied and claimant did not appeal. The defendant in this case does not contest paying for the modifications, only the underlying cost of the van. This issue is discussed later in this opinion.

6. Among other cases finding statutory authority for home modifications are *Langford v. William Rogers Inc.*, 534 N.Y.S.2d 761, 763 (N.Y. App. Div. 1988) (holding that home modifications to facilitate the use of a wheelchair fall within the statutory language providing for "other attendance or treatment," but modifications requested by claimant were unreasonable.); *Derebery v. Pitt County Fire Marshall*, 318 S.E.2d 814, 818 (N.C. 1986) (holding that the statutory language "other treatment or care" requires employer to furnish handicap-accessible residence for injured employee); *Hall v. Fru Con Construction Corp.*, 46 S.W.3d 30, 34 (Mo. App. 2001) (relying on provisions in the statute requiring medical care and artificial devices, court held home modifications compensable under the reasoning that if "wheelchairs fall under the statute, it would logically follow that modifications to employee's home should be covered under the act to allow him to use his wheelchair."); and *Zephyr v. Industrial Commission*, 576 N.E. 2d 1 (Ill. App. 1991) (holding that broad interpretation of "medical treatment" or "medical service" is consistent with the mandate to liberally interpret the act and that structural modifications to a home are compensable).

7. Some other states have held home modifications to be compensable, but take a very narrow view of what modifications are necessary. In *R.T. Construction Co. v. Judge*, 594 A.2d 99 (Md. 1991), the Maryland Supreme Court held that the workers' compensation statute of that state included within the concept of medical treatment reasonable modification to a claimant's home that allow necessary access for claimants confined to wheelchairs as a result of their injuries. *Id.* at 107. However, the court denied the modifications in this case because it would not relieve the quadriplegic claimant's dependence upon full-time nursing care, paid for by the employer, to assist him in his daily life. *Id.* at 108. The court took particular note of the facts that claimant could not bathe or use the toilet without assistance and determined independent access to these "necessities" was not warranted and it was not the aim of the statute to allow for modifications that would only improve the quality of life for one in the claimant's situation. *Id.*

8. In *Squeo v. Comfort Control Corp.*, 494 A.2d. 313 (N.J. 1985), the New Jersey Supreme Court relied on statutory language providing for "other treatment" or "appliance" in ordering the employer to pay for the construction of a self-contained apartment attached to the home of the injured worker's parents. The court limited it's holding for such relief to "certain unique circumstances, when there is sufficient and competent medical evidence to establish that the requested 'other treatment' or 'appliance' is reasonable and necessary to relieve the injured worker of the effect of his injuries." *Id.* at 322. The court found the unusual relief warranted in this case because the quadriplegic claimant was 25 years old when injured, had been living independently for a number of years, and became so depressed over living in a nursing home that he tried to kill himself three times. *Id.* The court determined that the self-contained apartment was necessary to relieve the claimant of his severe mental depression caused by the work injury. *Id.* at 323. The court also upheld an order that the employer be protected against the employee's failure to use the apartment by ordering the claimant's parents to execute a mortgage in the employer's favor. *Id.* The order provided that should the claimant fail to use the apartment, the employer could be compensated for any significant value the apartment may have added to the property in the event of sale, lease or mortgage, and any dispute regarding that value would be resolved by the Division of Workers' Compensation. *Squeo v. Comfort Control Corp.*, 476 A.2d. 1265, 1268 (N.J. Super. Ct. App. Div. 1984).

9. In *Low Splint Coal Co. Inc. v. Bolling*, 224 Va. 400 (1982), the Virginia Supreme Court was so constrained by the specific language in its statute that it found it could only analyze the wheelchair confined paraplegic claimant's request for an entrance ramp and bathroom modifications under "medical attention, care and procedures" and determined home modifications not to be covered. The court did not analyze the request under other provisions in the statute because the claimant did not have one of the enumerated injuries covered by the statutory provision that "where the accident results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of any natural teeth or loss of hearing, the employer shall furnish prosthetic appliances . . .." *Id.* at 404. Apparently, although the claimant could not use his legs they remained attached to his body. One can only speculate the unfortunate result for the claimant had the employer contested paying for a wheelchair. Virginia has since changed its statute to extend the benefit of prosthetic appliances to cover for the loss of use of arm, hand, leg or foot, as well as for amputation, and now also provides specifically for home modifications, though not in excess of $25,000 per accident. *See* VA. CODE ANN. § 65.2-603.

10. Vermont's statutory subsection covering medical benefits is not as specific or delineated as Virginia's, as open ended as in other states that include "other related services," "other attendance or treatment," and "other treatment or care." Nor does it include, like Oregon's, the stated statutory purpose of restoring an injured worker to self-sufficient status. With this lack of specificity and expansiveness related to the statutory definition of "supplies" the Department is left to the plain meaning of the term and an interpretation of 21 V.S.A.§ 640(a) in a way that will serve the underlying purposes of the Act.

11. The Workers' Compensation Statute is remedial in nature and must be liberally construed to provide injured employees with benefits unless the law is clear to the contrary. *St. Paul Fire and Marine Ins. Co. v. Surdam* 156 Vt. 585, 590 (1991) (citing *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983). It is "to provide, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers, a liability which is limited and determinate." *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). "While the [Act] is to be construed liberally to accomplish the humane purpose for which it was passed, a liberal construction does not mean an unreasonable or unwarranted construction." *Herbert v. Layman*, 125 Vt. 481, 486 (1966).

12. It is the conclusion of this Department that under a liberal, humane, and reasonable construction of the workers' compensation act, modifications to a motor vehicle when a claimant is medically dependent upon a wheelchair for mobility is a covered benefit within the context of medical supplies under 21 V.S.A. § 640(a) so long as the request is reasonable. However, the Department does not agree with the conclusion of many of our sister jurisdictions that consider structural home modifications to allow for wheelchair access to be an "extension of the wheelchair itself." *See, e.g., SAIF Corp v. Glubrect*, 967 P.2d at 495, et al. *supra*.

13. This Department must presume that "the Legislature intended statutory language to convey its 'plain, ordinary meaning.'" *Carter v. Fred's Plumbing & Heating, Inc.,* Slip. Op. 2001-533 (Vt. Supreme Ct. Nov. 4, 2002) (quoting *Burlington Elec. Dept. v. Vt. Dept. of Taxes*, 154 Vt. 332, 335 (1990). "Supplies" in § 640, when given its plain, ordinary definition, are "materials or provisions stored and dispensed while needed." The American Heritage Dictionary of the English Language, 2000. Claimant argues that if a wheelchair is a "supply," home modifications must also be because they are a logical extension of the wheelchair. He also argues that if he were in an assisted care living facility, the carrier would be responsible for paying for his housing and treatment and the proposed home modifications in the long run would be less expensive. However, § 640 specifically provides for coverage for hospital services when an injured employee is "confined" in a hospital and an assisted care facility may logically be covered under that provision. But there is no analogous provision that can be extended to home modifications. An interpretation of the Act to include home modifications would bring this case outside the workers' compensation benefit scheme by expanding coverage beyond the plain meaning of the statute and beyond its intended purpose. Therefore, even if reasonable and necessary, the proposed modifications are not compensable because they do not fall into the statutory definition of supplies.

Claimant's request for the full purchase price of the van

14. The employer does not contest paying to modify the van, but objects that it should not be responsible for the underlying purchase price of the van. It is wholly unreasonable and inhumane for a claimant to be forced to incur the additional expense of vehicle modifications if he wants to be able to venture outside of his home when these expenses would not be incurred but for his workplace injury.

15. The question of the underlying cost of the van is another question entirely. Given the rural location of Claimant's home, he would need a motor vehicle even if he were not confined to a wheelchair. Claimant currently owns a motor vehicle, which was modified with a lift to accommodate his manual wheelchair. The employer paid for the cost of modifying claimant's existing vehicle.

16. Similar to the cases involving requests for home modifications discussed earlier in this opinion, there is no uniform approach to the compensability of the underlying purchase price of a specialized van or automobile. The decisions turn on statutory language and interpretation. *See, e.g., Ex Parte City of Guntersville*, 728 So. 2d 611, 616 (Ala. 1998) (holding that a motor vehicle did not come within the term "other apparatus" as used in the statute).

17. While some states find compensability for special modifications, but not the full purchase price of the van, others have awarded claimants the full purchase price. *See, e.g., Terry Grantham Co. v. The Industrial Commission*, 741 P.2d 313 (Ariz. App. 1987) (holding employer responsible for full purchase price of van for wheelchair dependent claimant where employee's current vehicle could not be modified to accommodate the wheelchair). While this was not the case in *Grantham*, a number of states that have upheld awards for the full purchase price of a van or motor vehicle base their conclusions on the fact the claimant had no need for a motor vehicle prior to the accident. See *Wilmers v. Gateway Transp. Co.*, 575 N.W.2d 796, 800 (Mich. App. 1998) (holding that employer was responsible for the full purchase price of the van because options for alternative transportation, such as bicycle, public transportation and carpooling, were foreclosed to claimant due to his disability, and he needed transportation to get to work); *Brawn v. Gloria's Country Inn*, 698 A.2d 1067, 1070(Me. 1997) (awarding full purchase price of van to quadriplegic and noting that claimant had no reasonable alternative methods of transportation and there was no evidence that she needed her own vehicle prior to the injury); *Manpower Temporary Servs. v. Sioson*, 529 N.W.2d 259, 262 (Iowa 1995) (holding that employer was responsible for full purchase price of specialized van for quadriplegic and noting that claimant did not own a vehicle prior to the accident but preferred to walk, bike or use public transportation).

18. As noted above, it is the opinion of this Department that the employer's liability is limited to those modifications that are directly related to the particular claimant's disability from a work related injury. Claimant had an automobile before his accident, and it is impractical to consider that someone could live in rural Vermont without an automobile for transportation. There is no evidence that Claimant relied on alternative methods of transportation prior to his injury. Therefore the costs of owning and maintaining an automobile were normal, ordinary expenses for Claimant prior to his injury. However, Claimant should not be expected to incur extraordinary expenses because his injury requires a more expensive form of transportation that he would have purchased for himself prior to the injury.

19. Claimant will be awarded the difference between the cost of the van and the cost of an average, standard sized vehicle he would use but for the injury. See *Crouch v. West Virginia Workers' Compensation Commissioner*, 403 S.E.2d 747, 751 (Supreme Court of Appeals W.V. 1991) (holding that the cost of an average, mid-price automobile, of the same year as the purchased van, must be deducted from the cost of the van.); *Meyer v. North Dakota Workers' Compensation Bureau*, 512 N.W.2d 680, 681 (N.D. 1994) (holding the "injured worker is entitled to reimbursement for the difference between the cost of a handicap accessible van and the cost of a vehicle he would have otherwise owned.").

20. Claimant also seeks the cost of a cell phone service for emergency help in the event that his vehicle breaks down. However, such service is not within the ambit of medical services in § 640.

21. If the parties cannot come to an agreement on the amount to be paid on this issue, a hearing will be scheduled and evidence taken on the value of the average automobile to be deducted. Claimant may also sell or trade-in his existing vehicle and apply those funds toward his portion of the purchase price of the van.

Services performed by Claimant's mother

22. Arguably, the care Claimant's mother provided to him after the various surgeries could be considered nursing services under *Close v. Superior Excavating*, 166 Vt. 318 (1997). But the last instance of that care was in 1992 and no claim was made until 2000. Therefore, the claim is barred by the six-year statute of limitations in 21 V.S.A.§ 660.

23. The household cleaning, cooking and laundry tasks performed by Claimant's mother are not compensable as medical or nursing services under 21 V.S.A. § 640(a). Even if the statute covered household services, there is no clear evidence presented that Claimant is incapable of cleaning, cooking, or doing laundry. It also should be noted that Claimant's mother performed these tasks for Claimant before his injury and evidence was presented that it was difficult to distinguish the work Claimant's mother did for her son from the work she did for herself and her husband.

24. In the *Close* decision, the Vermont Supreme Court reviewed a number of cases from other jurisdictions where family members were compensated for services "when the services go beyond ordinary household duties." *Close*, 166 Vt. 318, 321-22. In *Close*, the Claimant suffered a severe head injury and required 24-hour care because of seizures, severe disorientation, and short and long-term memory loss. *Id.* at 320. The Court upheld compensation for a spouse for performing 24-hour care, even though some of that time was spent performing household chores, but reasoned that the compensation for all her time was because she was required to be in attendance 24-hours per day or "on call," not because of the nature of the work she was doing. *Id.* at 325.

25. In accordance with our Supreme Court's decision, it is the decision of this Department that household services, standing alone, are not compensable under §640(a). While Mrs. Patch's efforts on her son's behalf are admirable, they are not compensable.

Calculation of permanency benefits. Is Claimant entitled to cost of living adjustments after July 1, 1996?

26. Permanency benefits shall be paid for a number of weeks, depending on the degree of permanency, when an injured worker with a permanent impairment reaches medical end result. These benefits are "sixty-six and two-thirds percent of the average weekly wages, computed as provided in § 650 of this title and subject to the maximum and minimum weekly compensation for the periods stated." §§ 648(permanent partial), 645 (permanent total).

27. Section 650(a) specifies how the average weekly wage should be computed, that is "in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury…. For the purpose of calculating permanent total or permanent partial disability compensation, the provisions relating to the maximum and minimum weekly compensation rate shall apply."

28. The Act also provides that, "[c]ompensation pursuant to this section shall be adjusted annually on July 1, so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state as computed under this chapter as it did at the time of the injury." § 650(d). (COLA Provision).[2] Workers' Compensation Rule 16.2000 provides for annual adjustments, although it limits temporary benefits to the average weekly wage or weekly net income, "in no event may a claimant's compensation rate for temporary total disability exceed his or her average weekly wage or his or her weekly net income." (emphasis added).

29. However, in those cases where the "employee's average weekly wage computed under section 650 of this title is lower than the minimum weekly compensation, his weekly compensation shall be the full amount of his average weekly wages." § 601(19). As a result, a worker with a low wage receives 100% of his or her wage, not 66 2/3%, which is the case for most workers with wages over the statutory minimum.

[2] In 1973 when the legislature provided for the COLA in § 650(d), the statutory framework included a limit of 330 weeks on temporary total disability benefits. 1955, V.S. No.227; *Montgomery v. Brinver Corp*., 142 Vt. 461 (1983). It was in the context of that limitation that annual increases were awarded.

30. Claimant has been receiving $222.55 per week since July 1, 1996, an amount that had been capped when he reached what he was earning at the time of his injury. He argues that without a cost of living adjustment, and assuming a 2.67 per cent increase in the price of consumer goods, the value of his weekly wage will decrease to $100.95 by the end of 2025. If, on the other hand, he received cost of living adjustments based on the 4.1% average annual increase per year for the last ten years, his weekly benefit would increase to $713.74 by 2025, the year of his expected death, according to the Claimant. He contends that 21 V.S.A.§ 650(d) requires an annual adjustment in permanency benefits.

31. The defendant argues that a compensation rate—temporary or permanent—cannot exceed a worker's average weekly wage at the time of the injury. It also notes that no Form 22 has ever been entered in this case and no Form 27 changing benefits from temporary to permanent has been filed. But it cannot be ignored that the parties stipulated to Claimant's permanent total disability status, that on December 8, 1997 this Department approved a Form 27 Discontinuance filed by Liberty Mutual based on Medical end result, and from that point defendant voluntarily advanced permanent partial disability benefits. To now characterize payments in the interim as temporary benefits subject to the TTD cap would be to ignore clear, unambiguous action on the defendant's part, which this Department will not do. More appropriately is to address the clear legal issue presented: are permanent benefits capped at the average weekly wage?

32. Is § 601(19) a ceiling, as the defendant argues, that caps forever a wage earner's permanency benefits at his average weekly wage at the time of his injury? Or, as the Claimant argues, is it a floor at which the initial compensation rate is calculated and from which annual adjustments must be made?

33. In the case of one receiving temporary benefits, the § 601 (19) cap serves a strong public policy purpose by removing what could be a disincentive to return to work. Otherwise one could otherwise earn more on workers' compensation than by working. In three previous cases, this Department applied the cap. See, *Roethke v. Jake's Original Bar & Grill*, Op. No. 51-99WC (1999); *Fischer v. Karme Choling*, Op. No. 28-93WC (1994); *Runnals v. Can Do Special Events*, Op.No.56-96WC (Oct.5, 1996).

34. The Claimant asks us to reexamine Department precedent in light of the statutory framework and clear difference between the temporary and permanent provisions. He acknowledges that the Legislature knew how to limit benefits and did so with temporary benefits to assure that a worker did not receive a higher after-tax income while out of work on TTD than when working for a taxable wage. Otherwise, a worker might be discouraged from returning to work. However, he argues that such considerations do not affect weekly permanent disability benefits because the employee's return to work is not an issue. Had the Legislature wanted to limit permanent benefits in such a way, he argues, it would have done so. Otherwise, injured workers would be left to bear the considerable effects of inflation.

35. Claimant points to the limitation on temporary total benefits to support his position that no such limit applies to permanent benefits. That limitation is codified in § 642, to read in part, "the employer shall pay to the injured employee a weekly compensation equal to two-thirds of the employee's average weekly wages, but not more than the maximum nor less than the minimum compensation." In 1993, the phrase "provided that the weekly compensation shall not be greater than the injured employee's weekly net income" was added.

36. With the amendment to § 642 in 1993, the Legislature reduced benefits for some claimants by identifying the weekly net income as a limit. With the exception of those for whom the weekly net income is applicable, the Legislature did not change this Department's well-established statutory and regulatory interpretation of the Act to limit all benefits—temporary and permanent—to the average weekly wage.

37. To apply COLAs in this case involving a low wage earner would be to depart from this Department's precedent, which the Legislature has chosen not to change, and which would be contrary to the legislative will to change now.

Request for lump sum

38. Claimant's request for a lump sum is based on a 1999 amendment, which provides, "[u]pon application of the employee…the commissioner may order the payment of permanent disability benefits pursuant to section 644 or 648 of this title to be paid in a lump sum." § 652(b). However, defendant notes that the right to a lump sum payment, which it characterizes as substantive, was not available to the claimant at the time of his injury and it is the date of injury that controls. See, *Montgomery v. Brinver Corp*., 142 Vt. 461 (1983). Therefore, it urges this Department to deny the request. Claimant characterizes the amendment as a procedural changes, since it does not change the permanency award itself, but merely the way it is paid.

39. Under the Department Rules, retroactive compensation shall be paid in a lump sum and permanent disability compensation may be paid in a lump sum with commissioner approval if it is in the best interest of the claimant. Rule 19.3000. "Factors to be considered are: The claimant and/or the claimant's household receives a regular source of income aside from any workers' compensation benefit, the lump sum payment is intended to hasten or improve claimant's prospects of returning to gainful employment or the lump sum payment is intended to hasten or improve claimant's recovery or rehabilitation; the claimant presents other evidence that the lump sum award is in their best interests." Id.

40. However, "a lump sum payment shall NOT be approved if: the award was based upon a hearing decision for which an appeal has been filed and the employer or insurer objects to the payment of the lump sum; or the claimant is best served by receipt of periodic income benefits; or the payment is intended to pay everyday living expenses; or the lump sum payment is intended to pay past debts." Rule 19.5000.

41. Although new statutes generally do not apply to cases that are pending at the time of their effective date, there is an exception for statutes that are solely procedural or are remedial in nature. *Ulm v. Ford Motor Company*, 170 Vt. 281, 287 (2000). Such is the case in a matter such as this where the underlying statute is remedial and the payment at issue involves a procedural change in the timing of payment, not a substantive change in the law.

42. Nonetheless, an award of a lump sum must be an exception, not the rule, and without evidence demonstrating the applicability of the factors in Rule 19.000, the request must be denied.

Adjusting services

43. Finally, Claimant seeks a remedy from this Department for what he characterizes as slow adjusting on the part of the insurance company. If such a remedy exists, however, it lies in the courts, as it is not within the statutory framework under which this Department operates.

Summary

44. In sum, the Claimant is entitled to a powered wheelchair and the difference between the price of a car and a van that can accommodate that wheelchair. If the parties cannot resolve the specifics necessary for the purchase of that van, they may request another hearing or mediation through this Department. All other claims are denied.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, the claims for home handicap modifications, home care services, cellular phone service, annual adjustments, lump sum payments and attorney fees and costs are DENIED.

The Claimant is awarded:

A powered wheelchair and contribution toward the purchase of a van as outlined above.

Dated at Montpelier, Vermont this 2nd day of January 2003.

_____

R. Tasha Wallis
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.

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. X-6884
	)	
Kirk Jon Patch	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
H.P.Cummings Construction	)	Commissioner
and	)	
Liberty Mutual	)	Opinion No. 49-02WC

Hearing held in Montpelier on May 14, 2002
Record closed on July 10, 2002

APPEARANCES:

Mark H. Kolter, Esq. for the claimant
Keith J. Kasper, Esq. for the defendant

ISSUES:

1. Is Claimant's requested handicapped accessible van a reasonable and necessary medical service or supply?

2. Are Claimant's requested modifications to his parents' home reasonable and necessary medical services or supplies?

3. If either the van or home modifications are deemed compensable, what is the extent of the obligation, which Defendant owes to Claimant and what, if any, interest in these items is retained by Defendant?

4. Is Claimant's request for reimbursement for services performed by his mother compensable as reasonable medical or nursing services or supplies? If so, what is the value of the Claimant's mothers reasonable medical or nursing services?

5. What, if any, portion of Claimant's claim is barred by the statute of limitations?

6. What is the proper methodology for calculating Claimant's current and future entitlement to weekly permanent total disability benefits?

7. Is Mr. Patch entitled to receive cost of living adjustments on or after July 1, 1996, the date his compensation rate reached the equivalent of his average weekly wage?

8. Is Mr. Patch entitled to receive a lump sum payment of his permanent total disability indemnity benefits?

9. What remedies are available to Mr. Patch considering his complaints of slow claims adjustment service by Liberty Mutual Insurance Company?

10. Is Mr. Patch entitled to attorney's fees and litigation costs and, if so, how much is due?

CLAIMANT'S EXHIBITS:

1. Medical Records
2. R. Heaps's calculation of value of serves of Ms. Patch
3. Videotape re: proposed renovations and Rehabilitation Engineering Site visit report.
4. -
5. Gerald Weisman report on powered wheelchair and lift-equipped van, dated 2/19/02
6. –
7. Rehabilitation Engineering site visit, dated 12/20/01
8. Transcript of deposition of Carol Talley, M.D. dated 4/30/02
9. Functional capacity evaluation ("FCE") 5/19/99
10. FCE 3/20/02
11. Curriculum vitae of Diane Aja
12. Curriculum vitae of Carol Talley, M.D.
13. Letter b Linda Peet, P.T., 12/21/000
14. Table: Claimant's determination of financial impact of not receiving annual cost of living adjustments
15. Memorandum on Nursing Home and Assisted Care Facilities
16. Letter of Myron Smith 12/7/00
17. Letter of Myron Smith 12/22/00 with Dr. Kiely letter
18. Curriculum vitae of Gerald Weisman, M.S., A.T.P., R.E.T.
19. Bid from Chris Nichols 3/02

DEFENDANT'S EXHIBITS:

A: Eagle Builders, Inc., response
B: Liberty Mutual Material 2001
C. Intermediate bid

STIPULATION OF FACTS:

1. On October 1, 1985 claimant suffered a personal injury arising out of and in the course of his employment. The parties agree that as a result the Claimant is permanently and totally disabled.

2. On October 1, 1985 Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act ("Act").

3. On October 1, 1985 Defendant was an employer of Claimant within the meaning of the Act.

4. On October 1, 1985 Claimant's average weekly wage was $222.55, resulting in an initial compensation rate of $148.35.

5. Claimant's compensation rate reached his average weekly wage on July 1, 1996.

FINDINGS OF FACT:

1. On the day of his injury, October 1, 1985, Mr. Patch was first knocked down then run over repeatedly by a forklift operated by a co-employee. His legs, pelvis left arm and shoulder were crushed. Eventually, after more than a dozen surgeries, Claimant's right leg was completely amputated at the hip on March 20, 1992. In 1995 at the request of the insurance company, Dr. Peterson assessed Claimant's permanency and concluded that Claimant had a 39% impairment of the left leg.

2. Claimant lives in Elmore, Vermont, a rural community, with his parents.

3. Claimant drives himself to Copley Hospital, a four-mile trip, three times per week for physical therapy. He also drives to Burlington, a 52-mile trip, for medical appointments, supplies and personal business.

4. Claimant also has an overuse syndrome in his upper extremities from having been completely dependent on their use for mobility in a manual wheelchair for years.

5. Claimant is essentially totally wheelchair dependent. Because of his overuse syndrome, a manual wheelchair is no longer feasible to meet all of Claimant's mobility needs.

6. A powered wheelchair would relieve the dependence on the Claimant's upper extremities, whose strength and function are being compromised with constant manual wheelchair use. However, an electric wheelchair cannot be transported in a conventional automobile because it cannot fold in the way a manual wheelchair can. And it cannot be lifted into a vehicle because of its weight. Consequently, a lift-equipped van is necessary.

7. Claimant's primary care physician, Philip Kiely, M.D., his Physiatrist, Carol Talley, M.D. and occupational therapist, Diane Aja, all opined, and I find, that a powered wheelchair is a medical necessity for the Claimant. The immediate need is to relieve the constant stress on overused upper extremities that tests show have diminished in strength over the last three years and to make the transfer to a vehicle safer. In the event Claimant suffers an acute illness, such as flu, his dependence on a power wheelchair will be absolute.

8. In the house Claimant shares with his parents, he has an upstairs bedroom, with no second floor egress. His only egress is an electric "Stair Glide" into which he must transfer from a manual wheelchair upstairs to the glide and then to another manual wheelchair downstairs. He then must negotiate a narrow hallway into the kitchen in his wheelchair, through the kitchen, and out the home's back door. In the event of a power outage, he "bumps" down the stairs.

9. Claimant cannot access the bathroom or kitchen facilities in a reasonably convenient manner because of tight space and the location of fixtures. Laundry facilities are in the basement, which is inaccessible to the Claimant. At the present time, Claimant's mother does his laundry.

10. Home modifications proposed by the Claimant's Rehabilitation Engineer, Gerald Weisman are: 1) Move Claimant's bedroom to where front porch is now; 2) add a bathroom large enough for wheelchair with safe access to sink and bathtub; 3) install a ramp in front of the house from the Claimant's bedroom for the Claimant's safe egress; 4) move laundry facilities upstairs so that Claimant can do his own laundry; 5) install a driveway paving/heated snowmelt system; 6) replace the heating system; 7) install a full basement; 8) move the electrical box from basement to first floor; 9) provide a generator to be used in the event of a power outage; 10) Enclose the mud room for Claimant's scooter.

11. The total cost of the recommendations by Mr. Weisman is $178, 690.44.

12. If Claimant were to move out of his home into an institutional setting, the cost would be between $43,800 per year for assisted-care living to at least $59,495 per year for a nursing home.

13. Claimant's parents own the house they share with him. They will not accept a mortgage on the property. As an only child, Claimant will inherit the house on his parents' deaths.

14. Since his accident, Claimant's mother has helped him with his medications, changed wound dressings, provided sponge baths and linen changes when he was recovering from his many operations.

15. Since the accident, Claimant's mother has provided necessary housekeeping services, including laundry, meal preparation, food shopping and housecleaning. She also has driven him to medical appointments, renewed his prescriptions and cleaned the stair glide he uses to ascend the stairs from the ground floor to his bedroom.

16. Mrs. Patch estimates that she worked at least 27.5 hours per week on the Claimant's behalf after his hip disarticulation surgery on March 20, 1992.

17. Dr. Kiely opined that the services Mrs. Patch provided were medically necessary to enable Claimant to reside at home in a safe and healthful manner given his physical disabilities.

18. Nursing services in Lamoille County cost $15 per hour for the local Home Health Agency. An individual nurse earns $9 per hour.

19. On or about June 26, 2000 Claimant filed a Notice and Application for Hearing seeking reimbursement for Mrs. Patch's attendant care and nursing services.

20. Claimant has been receiving his "Average Weekly Wage" of $222.55 per week since July 1, 1996. If the average yearly increase of consumer goods is 2.67 per cent, the value of the Claimant's weekly will fall to $100.05 by 2025, the Claimant's estimated life expectancy.

21. Claimant submitted evidence of his contingency fee agreement with his attorney and detailed bills and expenses for the time spent in this case. Attorney hours total 574.5 and litigation expenses total $17,129, plus $1,430 for Dr. Kiely, ($4,208.67+ $3,641.12) for Myron Smith, and $6,297.50 for Chris Nichols.

DISCUSSION AND CONCLUSIONS OF LAW:

Powered Wheelchair, Van And Home Modifications

1. Whether an employer or its insurance carrier may be required to pay for home modifications or a specialized van to accommodate a wheelchair dependent claimant as a medical benefit under Vermont's Workers' Compensation Act is a question of first impression in Vermont. The section of the Act pertaining to medical benefits is 21 V.S.A. 640(a), which provides: "An employer subject to the provisions of this chapter shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee."

2. The defendant in this case does not dispute that it is responsible for providing a powered wheelchair to Claimant, and the need for a powered wheelchair due to upper extremity overuse is well supported by the medical evidence presented at the hearing. Because this is conceded, there is no need to engage in detailed analysis of this point—it is sufficient to note that it is the opinion of this Department that there is no question that a wheelchair is contemplated under the statute as a medical "supply." The less obvious question is whether the statute also extends to other services and materials to enable the claimant's use of the wheelchair in and outside of his home.

3. It is informative to review how other states have handled this question in view of their workers' compensation statutes as numerous jurisdictions have held that home modifications are compensable under their states' workers' compensation statutes. It should be noted at the outset of this sampling that the Commissioner, however logical the reasoning used by other states in their interpretations, is not bound by the law of other states, but by the provisions in Vermont's Workers' Compensation Act and the Vermont Supreme Court's interpretation of those provisions.

4. The Iowa Supreme Court upheld the finding that home modifications and modifications to a van fell within the context of "appliances." *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143 (Iowa 1996). Iowa's statute provided that the employer "shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefore and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances . . . ." *Id.* at 154. The court reasoned that the home modifications and van conversion[1] were merely an extension of the claimant's wheelchair. "[An] appliance has been held to be a device that serves to replace a physical function lost by injury. Just as a wheelchair seeks to replace the lost functions of standing and walking, a wheelchair ramp, a wheelchair shower, etc., also seek to replace physical functions claimant possessed before the work injury but has now lost." *Id.*

5. An Oregon appellate court found that home modifications could be covered either under the statutory language "other related services" or under the "general rubric of 'prosthetic appliances, braces or supports.'" *SAIF Corp. v. Glubrecht*, 967 P.2d 490, 496 (Or. App.1998) (in banc). "Structural modifications made to a home to accommodate the wheelchair have the function of facilitating the use of the wheelchair. Indeed, the structural modifications are an extension of the wheelchair itself, without which the wheelchair could not serve as the tool it is intended to serve. Without the structural modifications, a wheelchair could not assist a person without the use of his or her legs to be independently mobile in the home." *Id.* at 495. The Oregon court was also aided in its interpretation by an expressly codified purpose of the act to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." *Id.*

[1] The full purchase price of the van was not an issue. It had been denied and claimant did not appeal. The defendant in this case does not contest paying for the modifications, only the underlying cost of the van. This issue is discussed later in this opinion.

6. Among other cases finding statutory authority for home modifications are *Langford v. William Rogers Inc.*, 534 N.Y.S.2d 761, 763 (N.Y. App. Div. 1988) (holding that home modifications to facilitate the use of a wheelchair fall within the statutory language providing for "other attendance or treatment," but modifications requested by claimant were unreasonable.); *Derebery v. Pitt County Fire Marshall*, 318 S.E.2d 814, 818 (N.C. 1986) (holding that the statutory language "other treatment or care" requires employer to furnish handicap-accessible residence for injured employee); *Hall v. Fru Con Construction Corp.*, 46 S.W.3d 30, 34 (Mo. App. 2001) (relying on provisions in the statute requiring medical care and artificial devices, court held home modifications compensable under the reasoning that if "wheelchairs fall under the statute, it would logically follow that modifications to employee's home should be covered under the act to allow him to use his wheelchair."); and *Zephyr v. Industrial Commission*, 576 N.E. 2d 1 (Ill. App. 1991) (holding that broad interpretation of "medical treatment" or "medical service" is consistent with the mandate to liberally interpret the act and that structural modifications to a home are compensable).

7. Some other states have held home modifications to be compensable, but take a very narrow view of what modifications are necessary. In *R.T. Construction Co. v. Judge*, 594 A.2d 99 (Md. 1991), the Maryland Supreme Court held that the workers' compensation statute of that state included within the concept of medical treatment reasonable modification to a claimant's home that allow necessary access for claimants confined to wheelchairs as a result of their injuries. *Id.* at 107. However, the court denied the modifications in this case because it would not relieve the quadriplegic claimant's dependence upon full-time nursing care, paid for by the employer, to assist him in his daily life. *Id.* at 108. The court took particular note of the facts that claimant could not bathe or use the toilet without assistance and determined independent access to these "necessities" was not warranted and it was not the aim of the statute to allow for modifications that would only improve the quality of life for one in the claimant's situation. *Id.*

8. In *Squeo v. Comfort Control Corp.*, 494 A.2d. 313 (N.J. 1985), the New Jersey Supreme Court relied on statutory language providing for "other treatment" or "appliance" in ordering the employer to pay for the construction of a self-contained apartment attached to the home of the injured worker's parents. The court limited it's holding for such relief to "certain unique circumstances, when there is sufficient and competent medical evidence to establish that the requested 'other treatment' or 'appliance' is reasonable and necessary to relieve the injured worker of the effect of his injuries." *Id.* at 322. The court found the unusual relief warranted in this case because the quadriplegic claimant was 25 years old when injured, had been living independently for a number of years, and became so depressed over living in a nursing home that he tried to kill himself three times. *Id.* The court determined that the self-contained apartment was necessary to relieve the claimant of his severe mental depression caused by the work injury. *Id.* at 323. The court also upheld an order that the employer be protected against the employee's failure to use the apartment by ordering the claimant's parents to execute a mortgage in the employer's favor. *Id.* The order provided that should the claimant fail to use the apartment, the employer could be compensated for any significant value the apartment may have added to the property in the event of sale, lease or mortgage, and any dispute regarding that value would be resolved by the Division of Workers' Compensation. *Squeo v. Comfort Control Corp.*, 476 A.2d. 1265, 1268 (N.J. Super. Ct. App. Div. 1984).

9. In *Low Splint Coal Co. Inc. v. Bolling*, 224 Va. 400 (1982), the Virginia Supreme Court was so constrained by the specific language in its statute that it found it could only analyze the wheelchair confined paraplegic claimant's request for an entrance ramp and bathroom modifications under "medical attention, care and procedures" and determined home modifications not to be covered. The court did not analyze the request under other provisions in the statute because the claimant did not have one of the enumerated injuries covered by the statutory provision that "where the accident results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of any natural teeth or loss of hearing, the employer shall furnish prosthetic appliances . . .." *Id.* at 404. Apparently, although the claimant could not use his legs they remained attached to his body. One can only speculate the unfortunate result for the claimant had the employer contested paying for a wheelchair. Virginia has since changed its statute to extend the benefit of prosthetic appliances to cover for the loss of use of arm, hand, leg or foot, as well as for amputation, and now also provides specifically for home modifications, though not in excess of $25,000 per accident. *See* VA. CODE ANN. § 65.2-603.

10. Vermont's statutory subsection covering medical benefits is not as specific or delineated as Virginia's, as open ended as in other states that include "other related services," "other attendance or treatment," and "other treatment or care." Nor does it include, like Oregon's, the stated statutory purpose of restoring an injured worker to self-sufficient status. With this lack of specificity and expansiveness related to the statutory definition of "supplies" the Department is left to the plain meaning of the term and an interpretation of 21 V.S.A.§ 640(a) in a way that will serve the underlying purposes of the Act.

11. The Workers' Compensation Statute is remedial in nature and must be liberally construed to provide injured employees with benefits unless the law is clear to the contrary. *St. Paul Fire and Marine Ins. Co. v. Surdam* 156 Vt. 585, 590 (1991) (citing *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983). It is "to provide, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers, a liability which is limited and determinate." *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). "While the [Act] is to be construed liberally to accomplish the humane purpose for which it was passed, a liberal construction does not mean an unreasonable or unwarranted construction." *Herbert v. Layman*, 125 Vt. 481, 486 (1966).

12. It is the conclusion of this Department that under a liberal, humane, and reasonable construction of the workers' compensation act, modifications to a motor vehicle when a claimant is medically dependent upon a wheelchair for mobility is a covered benefit within the context of medical supplies under 21 V.S.A. § 640(a) so long as the request is reasonable. However, the Department does not agree with the conclusion of many of our sister jurisdictions that consider structural home modifications to allow for wheelchair access to be an "extension of the wheelchair itself." *See, e.g., SAIF Corp v. Glubrect*, 967 P.2d at 495, et al. *supra*.

13. This Department must presume that "the Legislature intended statutory language to convey its 'plain, ordinary meaning.'" *Carter v. Fred's Plumbing & Heating, Inc.*, Slip. Op. 2001-533 (Vt. Supreme Ct. Nov. 4, 2002) (quoting *Burlington Elec. Dept. v. Vt. Dept. of Taxes*, 154 Vt. 332, 335 (1990). "Supplies" in § 640, when given its plain, ordinary definition, are "materials or provisions stored and dispensed while needed." The American Heritage Dictionary of the English Language, 2000. Claimant argues that if a wheelchair is a "supply," home modifications must also be because they are a logical extension of the wheelchair. He also argues that if he were in an assisted care living facility, the carrier would be responsible for paying for his housing and treatment and the proposed home modifications in the long run would be less expensive. However, § 640 specifically provides for coverage for hospital services when an injured employee is "confined" in a hospital and an assisted care facility may logically be covered under that provision. But there is no analogous provision that can be extended to home modifications. An interpretation of the Act to include home modifications would bring this case outside the workers' compensation benefit scheme by expanding coverage beyond the plain meaning of the statute and beyond its intended purpose. Therefore, even if reasonable and necessary, the proposed modifications are not compensable because they do not fall into the statutory definition of supplies.

Claimant's request for the full purchase price of the van

14. The employer does not contest paying to modify the van, but objects that it should not be responsible for the underlying purchase price of the van. It is wholly unreasonable and inhumane for a claimant to be forced to incur the additional expense of vehicle modifications if he wants to be able to venture outside of his home when these expenses would not be incurred but for his workplace injury.

15. The question of the underlying cost of the van is another question entirely. Given the rural location of Claimant's home, he would need a motor vehicle even if he were not confined to a wheelchair. Claimant currently owns a motor vehicle, which was modified with a lift to accommodate his manual wheelchair. The employer paid for the cost of modifying claimant's existing vehicle.

16. Similar to the cases involving requests for home modifications discussed earlier in this opinion, there is no uniform approach to the compensability of the underlying purchase price of a specialized van or automobile. The decisions turn on statutory language and interpretation. *See, e.g., Ex Parte City of Guntersville*, 728 So. 2d 611, 616 (Ala. 1998) (holding that a motor vehicle did not come within the term "other apparatus" as used in the statute).

17. While some states find compensability for special modifications, but not the full purchase price of the van, others have awarded claimants the full purchase price. *See, e.g., Terry Grantham Co. v. The Industrial Commission*, 741 P.2d 313 (Ariz. App. 1987) (holding employer responsible for full purchase price of van for wheelchair dependent claimant where employee's current vehicle could not be modified to accommodate the wheelchair). While this was not the case in *Grantham*, a number of states that have upheld awards for the full purchase price of a van or motor vehicle base their conclusions on the fact the claimant had no need for a motor vehicle prior to the accident. See *Wilmers v. Gateway Transp. Co.*, 575 N.W.2d 796, 800 (Mich. App. 1998) (holding that employer was responsible for the full purchase price of the van because options for alternative transportation, such as bicycle, public transportation and carpooling, were foreclosed to claimant due to his disability, and he needed transportation to get to work); *Brawn v. Gloria's Country Inn*, 698 A.2d 1067, 1070(Me. 1997) (awarding full purchase price of van to quadriplegic and noting that claimant had no reasonable alternative methods of transportation and there was no evidence that she needed her own vehicle prior to the injury); *Manpower Temporary Servs. v. Sioson*, 529 N.W.2d 259, 262 (Iowa 1995) (holding that employer was responsible for full purchase price of specialized van for quadriplegic and noting that claimant did not own a vehicle prior to the accident but preferred to walk, bike or use public transportation).

18. As noted above, it is the opinion of this Department that the employer's liability is limited to those modifications that are directly related to the particular claimant's disability from a work related injury. Claimant had an automobile before his accident, and it is impractical to consider that someone could live in rural Vermont without an automobile for transportation. There is no evidence that Claimant relied on alternative methods of transportation prior to his injury. Therefore the costs of owning and maintaining an automobile were normal, ordinary expenses for Claimant prior to his injury. However, Claimant should not be expected to incur extraordinary expenses because his injury requires a more expensive form of transportation that he would have purchased for himself prior to the injury.

19. Claimant will be awarded the difference between the cost of the van and the cost of an average, standard sized vehicle he would use but for the injury. See *Crouch v. West Virginia Workers' Compensation Commissioner*, 403 S.E.2d 747, 751 (Supreme Court of Appeals W.V. 1991) (holding that the cost of an average, mid-price automobile, of the same year as the purchased van, must be deducted from the cost of the van.); *Meyer v. North Dakota Workers' Compensation Bureau*, 512 N.W.2d 680, 681 (N.D. 1994) (holding the "injured worker is entitled to reimbursement for the difference between the cost of a handicap accessible van and the cost of a vehicle he would have otherwise owned.").

20. Claimant also seeks the cost of a cell phone service for emergency help in the event that his vehicle breaks down. However, such service is not within the ambit of medical services in § 640.

21. If the parties cannot come to an agreement on the amount to be paid on this issue, a hearing will be scheduled and evidence taken on the value of the average automobile to be deducted. Claimant may also sell or trade-in his existing vehicle and apply those funds toward his portion of the purchase price of the van.

Services performed by Claimant's mother

22. Arguably, the care Claimant's mother provided to him after the various surgeries could be considered nursing services under *Close v. Superior Excavating*, 166 Vt. 318 (1997). But the last instance of that care was in 1992 and no claim was made until 2000. Therefore, the claim is barred by the six-year statute of limitations in 21 V.S.A.§ 660.

23. The household cleaning, cooking and laundry tasks performed by Claimant's mother are not compensable as medical or nursing services under 21 V.S.A. § 640(a). Even if the statute covered household services, there is no clear evidence presented that Claimant is incapable of cleaning, cooking, or doing laundry. It also should be noted that Claimant's mother performed these tasks for Claimant before his injury and evidence was presented that it was difficult to distinguish the work Claimant's mother did for her son from the work she did for herself and her husband.

24. In the *Close* decision, the Vermont Supreme Court reviewed a number of cases from other jurisdictions where family members were compensated for services "when the services go beyond ordinary household duties." *Close*, 166 Vt. 318, 321-22. In *Close*, the Claimant suffered a severe head injury and required 24-hour care because of seizures, severe disorientation, and short and long-term memory loss. *Id.* at 320. The Court upheld compensation for a spouse for performing 24-hour care, even though some of that time was spent performing household chores, but reasoned that the compensation for all her time was because she was required to be in attendance 24-hours per day or "on call," not because of the nature of the work she was doing. *Id.* at 325.

25. In accordance with our Supreme Court's decision, it is the decision of this Department that household services, standing alone, are not compensable under §640(a). While Mrs. Patch's efforts on her son's behalf are admirable, they are not compensable.

Calculation of permanency benefits. Is Claimant entitled to cost of living adjustments after July 1, 1996?

26. Permanency benefits shall be paid for a number of weeks, depending on the degree of permanency, when an injured worker with a permanent impairment reaches medical end result. These benefits are "sixty-six and two-thirds percent of the average weekly wages, computed as provided in § 650 of this title and subject to the maximum and minimum weekly compensation for the periods stated." §§ 648(permanent partial), 645 (permanent total).

27. Section 650(a) specifies how the average weekly wage should be computed, that is "in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury…. For the purpose of calculating permanent total or permanent partial disability compensation, the provisions relating to the maximum and minimum weekly compensation rate shall apply."

28. The Act also provides that, "[c]ompensation pursuant to this section shall be adjusted annually on July 1, so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state as computed under this chapter as it did at the time of the injury." § 650(d). (COLA Provision).[2] Workers' Compensation Rule 16.2000 provides for annual adjustments, although it limits temporary benefits to the average weekly wage or weekly net income, "in no event may a claimant's compensation rate for temporary total disability exceed his or her average weekly wage or his or her weekly net income." (emphasis added).

29. However, in those cases where the "employee's average weekly wage computed under section 650 of this title is lower than the minimum weekly compensation, his weekly compensation shall be the full amount of his average weekly wages." § 601(19). As a result, a worker with a low wage receives 100% of his or her wage, not 66 2/3%, which is the case for most workers with wages over the statutory minimum.

[2] In 1973 when the legislature provided for the COLA in § 650(d), the statutory framework included a limit of 330 weeks on temporary total disability benefits. 1955, V.S. No.227; *Montgomery v. Brinver Corp*., 142 Vt. 461 (1983). It was in the context of that limitation that annual increases were awarded.

30. Claimant has been receiving $222.55 per week since July 1, 1996, an amount that had been capped when he reached what he was earning at the time of his injury. He argues that without a cost of living adjustment, and assuming a 2.67 per cent increase in the price of consumer goods, the value of his weekly wage will decrease to $100.95 by the end of 2025. If, on the other hand, he received cost of living adjustments based on the 4.1% average annual increase per year for the last ten years, his weekly benefit would increase to $713.74 by 2025, the year of his expected death, according to the Claimant. He contends that 21 V.S.A.§ 650(d) requires an annual adjustment in permanency benefits.

31. The defendant argues that a compensation rate—temporary or permanent—cannot exceed a worker's average weekly wage at the time of the injury. It also notes that no Form 22 has ever been entered in this case and no Form 27 changing benefits from temporary to permanent has been filed. But it cannot be ignored that the parties stipulated to Claimant's permanent total disability status, that on December 8, 1997 this Department approved a Form 27 Discontinuance filed by Liberty Mutual based on Medical end result, and from that point defendant voluntarily advanced permanent partial disability benefits. To now characterize payments in the interim as temporary benefits subject to the TTD cap would be to ignore clear, unambiguous action on the defendant's part, which this Department will not do. More appropriately is to address the clear legal issue presented: are permanent benefits capped at the average weekly wage?

32. Is § 601(19) a ceiling, as the defendant argues, that caps forever a wage earner's permanency benefits at his average weekly wage at the time of his injury? Or, as the Claimant argues, is it a floor at which the initial compensation rate is calculated and from which annual adjustments must be made?

33. In the case of one receiving temporary benefits, the § 601 (19) cap serves a strong public policy purpose by removing what could be a disincentive to return to work. Otherwise one could otherwise earn more on workers' compensation than by working. In three previous cases, this Department applied the cap. See, *Roethke v. Jake's Original Bar & Grill*, Op. No. 51-99WC (1999); *Fischer v. Karme Choling*, Op. No. 28-93WC (1994); *Runnals v. Can Do Special Events*, Op.No.56-96WC (Oct.5, 1996).

34. The Claimant asks us to reexamine Department precedent in light of the statutory framework and clear difference between the temporary and permanent provisions. He acknowledges that the Legislature knew how to limit benefits and did so with temporary benefits to assure that a worker did not receive a higher after-tax income while out of work on TTD than when working for a taxable wage. Otherwise, a worker might be discouraged from returning to work. However, he argues that such considerations do not affect weekly permanent disability benefits because the employee's return to work is not an issue. Had the Legislature wanted to limit permanent benefits in such a way, he argues, it would have done so. Otherwise, injured workers would be left to bear the considerable effects of inflation.

35. Claimant points to the limitation on temporary total benefits to support his position that no such limit applies to permanent benefits. That limitation is codified in § 642, to read in part, "the employer shall pay to the injured employee a weekly compensation equal to two-thirds of the employee's average weekly wages, but not more than the maximum nor less than the minimum compensation." In 1993, the phrase "provided that the weekly compensation shall not be greater than the injured employee's weekly net income" was added.

36. With the amendment to § 642 in 1993, the Legislature reduced benefits for some claimants by identifying the weekly net income as a limit. With the exception of those for whom the weekly net income is applicable, the Legislature did not change this Department's well-established statutory and regulatory interpretation of the Act to limit all benefits—temporary and permanent—to the average weekly wage.

37. To apply COLAs in this case involving a low wage earner would be to depart from this Department's precedent, which the Legislature has chosen not to change, and which would be contrary to the legislative will to change now.

Request for lump sum

38. Claimant's request for a lump sum is based on a 1999 amendment, which provides, "[u]pon application of the employee…the commissioner may order the payment of permanent disability benefits pursuant to section 644 or 648 of this title to be paid in a lump sum." § 652(b). However, defendant notes that the right to a lump sum payment, which it characterizes as substantive, was not available to the claimant at the time of his injury and it is the date of injury that controls. See, *Montgomery v. Brinver Corp*., 142 Vt. 461 (1983). Therefore, it urges this Department to deny the request. Claimant characterizes the amendment as a procedural changes, since it does not change the permanency award itself, but merely the way it is paid.

39. Under the Department Rules, retroactive compensation shall be paid in a lump sum and permanent disability compensation may be paid in a lump sum with commissioner approval if it is in the best interest of the claimant. Rule 19.3000. "Factors to be considered are: The claimant and/or the claimant's household receives a regular source of income aside from any workers' compensation benefit, the lump sum payment is intended to hasten or improve claimant's prospects of returning to gainful employment or the lump sum payment is intended to hasten or improve claimant's recovery or rehabilitation; the claimant presents other evidence that the lump sum award is in their best interests." Id.

40. However, "a lump sum payment shall NOT be approved if: the award was based upon a hearing decision for which an appeal has been filed and the employer or insurer objects to the payment of the lump sum; or the claimant is best served by receipt of periodic income benefits; or the payment is intended to pay everyday living expenses; or the lump sum payment is intended to pay past debts." Rule 19.5000.

41. Although new statutes generally do not apply to cases that are pending at the time of their effective date, there is an exception for statutes that are solely procedural or are remedial in nature. *Ulm v. Ford Motor Company*, 170 Vt. 281, 287 (2000). Such is the case in a matter such as this where the underlying statute is remedial and the payment at issue involves a procedural change in the timing of payment, not a substantive change in the law.

42. Nonetheless, an award of a lump sum must be an exception, not the rule, and without evidence demonstrating the applicability of the factors in Rule 19.000, the request must be denied.

Adjusting services

43. Finally, Claimant seeks a remedy from this Department for what he characterizes as slow adjusting on the part of the insurance company. If such a remedy exists, however, it lies in the courts, as it is not within the statutory framework under which this Department operates.

Summary

44. In sum, the Claimant is entitled to a powered wheelchair and the difference between the price of a car and a van that can accommodate that wheelchair. He is also entitled to a lump sum on his permanency. If the parties cannot resolve the specifics necessary for the purchase of that van and for the attorney fees and costs associated with the limited success, they may request another hearing or mediation through this Department. All other claims are denied.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, the claims for home handicap modifications, home care services, cellular phone service, annual adjustments, lump sum payments and attorney fees and costs are DENIED.

The Claimant is awarded:

A powered wheelchair and contribution toward the purchase of a van as outlined above.

Dated at Montpelier, Vermont this 6th day of December 2002.

_____

R. Tasha Wallis
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.