W. P. v. Madonna Corp. (April 12, 2006)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| W. P. | Opinion No. 18-06WC |
| v. | By: Margaret A. Mangan<br>Hearing Officer |
| Madonna Corporation | For: Patricia A. McDonald<br>Commissioner |
| | State File No. J-07632 |

Hearing held in Montpelier on January 10, 11 and 12, 2006
Record closed on February 13, 2006

**APPEARANCES:**

Beth Robinson, Esq., for the Claimant
Glenn S. Morgan, Esq. and Marion T. Ferguson, Esq., for the Defendant

**ISSUES:**

1. What is a reasonable rate of reimbursement to meet William Perry's (Claimant) reasonable nursing needs, and how will his nursing care be paid?

2. What, if anything, does the Defendant owe Claimant for advertising expenses associated with his past efforts to recruit nursing care?

3. What is the applicable protocol with respect to payment or denial of medical bills, including without limitation the information that must be provided, timeliness of payment or denial, and notice to Claimant of denials with explanation?

4. How much, if any, does Defendant owe to Claimant for reasonable medical (nursing care) expenses paid to nurses other than Jan Allen and Meg Perry, or, in the alternative, how much, if any, has Defendant overpaid Claimant for medical expenses for nurses other than Jan Allen and Meg Perry?

5. How much, if any, does Defendant owe to Jan Allen, registered nurse (RN), for reasonable medical (nursing care) expenses on account of Claimant, or, in the alternative, how much, if any, has Defendant overpaid Jan Allen, RN, for medical (nursing care) expenses on account of Claimant?

6. How much, if any, does Defendant owe to Meg Perry, RN, for reasonable medical (nursing care) expenses on account of Claimant, or, in the alternative, how much, if any, has Defendant overpaid Meg Perry, RN, for medical (nursing care) expenses on account of Claimant?

7. Is Claimant entitled to a reinstatement of weekly permanent total disability benefits?

8. Is Claimant entitled to interest on any of the above arrearages, if any?

9. Is Claimant entitled to attorney's fees and costs in connection with this claim?

**EXHIBITS:**

Claimant's Exhibits:

1. CV of Elliot Mancall, M.D.
2. Elliot Mancall, M.D. deposition transcript
3. Dr. Mancall's letter/report dated 7/05
4. Elaine Buchanan CV
5. Buchanan Report 10/5/05
6. Supplemental Buchanan Report 11/15/05
7. Elaine Buchanan deposition transcript and video
8. Record of hours Meg Perry worked and reimbursements
9. 2005 AIG Pay stubs and time slips/ summary for Jan Allen
10. Claimant's scheduled 2004 to October
11. Compilation: Nurses and weekly payments
12. Ads called in to newspapers
13. Expenses for some advertising and summary
14. Mariah Fenton-Gladis deposition transcript and video
15. CV of Fenton-Gladis
16. BP readings on day of depositions
17. Letter from Insurer 3/31/73
18. Letter from Insurer 7/17/73
19. Claimant's proposed budget
20. CV Toby Huston, Ph.D
21. Report of Toby Huston
22. Sample billing from Bayada
23. Invoice; TLC 2004
24. Summary of Payments
25. List of care plan needs
26. Spreadsheet AIG 8/9/00 to 10/25/00
27. Bayada Nurses Home Health Plan of Care

Defendant's Exhibits:

A. Letter from Director of WC 1989
B. Records from Dr. Martynec (4 pages)
C. Multipage document by 2 nurses
D. CV of Suzanne Holland
E. CV of John Kraus, M.D.
F. Report of Dr. Kraus
G. CV of Robin Seidman
H. Seidman Report
I. Seidman Report 6/28/05
J. CV of Tracy Lombardi
K. Lombardi Report 11/21/05
L. Lombardi Report 12/05

**CLAIM:**

1. Medical benefits pursuant to 21 V.S.A. § 640.

2. Permanent total disability benefits pursuant to 21 V.S.A. §§ 642, 644.

3. Attorney's fees and costs under 21 V.S.A. § 678(a).

**STIPULATED FACTS:**

1. Claimant suffered a work-related spinal cord injury in Vermont over 30 years ago.

2. Madonna Mountain was his employer at the time of his injury, and American Home Assurance Corp. is the carrier on the risk.

**STIPULATIONS:**

1. Repairs To Lift And Van Modifications: Claimant has withdrawn his claim for repayment for the cost of repairing the lift and modifications to his van, without prejudice. He has submitted his invoices for future payment. If carrier denies payment, the parties may pursue a resolution of the conflict in the future.

2. Prescription Medications From May Of 2004: Defendant shall repay claimant for the prescription medications attached as Exhibit A of Stipulation.

3. Medical Equipment: Defendant shall repay Claimant for the medical equipment purchased from Adaptive Equipment Company in Englewood, Colorado. An invoice is attached as Exhibit B of the Stipulation.

4. Travel To Craig: Defendant shall repay Claimant for the costs of air travel to Craig Hospital in 2004 and 2005. Invoices for airfare and van rental are attached as Exhibit C of the Stipulation. With respect to payment for the prospective costs of travel to Craig Hospital, the parties agree to defer litigation of this potential issue. If and when Defendant identifies a specific potential alternative care provider that it believes is willing and able to provide Claimant reasonable medical care, Defendant may re-raise the medical reasonableness of travel to Craig Hospital, and the costs associated therewith.

5. Margaret Perry Hours: Defendant shall pay the Estate of Margaret Perry $22,110 for payment for hours she covered Claimant's care, including interest, and $1,890 to Claimant for attorney's fees associated with this claim. Claimant withdraws his claim for payment for the hours covered by his mother, Margaret Perry, with prejudice.

**FINDINGS OF FACT:**

1. On March 23, 1973, Claimant sustained a skiing injury while in the course of his employment as a ski instructor at Madonna Mountain. The injury left him completely paralyzed from the waist down. The use of his arms has decreased since the injury; he now has limited use of only his left arm; the right arm is completely paralyzed. Claimant is presently diagnosed with tetrapalegia (also known as quadriplegia) at C-4 on the right and C-6 on the left.

2. Claimant lives in rural Pennsylvania, approximately one hour outside of Philadelphia, in a small home on what was formerly his mother's property. He has resided on this property for most of his life.

3. In the years following his injury, Claimant obtained an undergraduate and two graduate degrees. He was able to work for a few years following his injury as a computer programmer and conducted research and writing for a former undergraduate professor. Claimant also had his own counseling service for those with disabilities following the completion of his graduate degrees.

4. The decline in Claimant's ability to use his upper extremities has limited his capacity to contribute to the workforce in recent years. However, he continues to maintain an antique map business out of his home. Claimant also remains active in his community by participating in the local Environmental Advisory Council and the Wrightstown Planning Commission.

5. As a result of the tetrapalegia, Claimant suffers from autonomic dysreflexia. The incidents of this condition surfaced after Claimant underwent an open rhizotomy over five years ago in Denver. Autonomic dysreflexia is characterized by abrupt and significant spikes in blood pressure that come about when the body is rushed with autonomic stimuli to which the brain cannot respond due to disruption of neurological signals caused by the tetrapalegia. These hypertensive episodes, if not treated timely and effectively, can pose a substantial danger of coma, stroke, seizure or even death. The condition is usually triggered by a skin irritant, bowel impaction, kink in the catheter, or even a wrinkle in the patient's shirt. The symptoms for autonomic dysreflexic episodes can include goose bumps, sweating, flushing, congestion, and headache.

6. When symptoms of autonomic dysreflexia arise, necessary treatment includes lowering of the head, serial assessment of the blood pressure and evaluation and elimination of the potential causes. This can include loosening or straightening out Claimant's clothes, checking his catheter for clogs, checking if his bladder is full, and checking whether there is impacted stool in his bowel. Medical intervention may also be necessary, if the blood pressure does not return to a normal level; nitropaste may have to be applied to Claimant's chest; blood pressure medication may have to be administered.

7. The interventions have to start as soon as the symptoms become noticeable. Unskilled Nursing Aides (Nursing Aides) can concededly perform some of the tasks required in responding to symptoms of autonomic dysreflexia. They can take Claimant's blood pressure and look for wrinkles in his clothing. However, they do not have the medical knowledge to assess the changes in blood pressure; they cannot catheterize him to check for residual urine in the bladder; they cannot check the bowel for impacted stool; and they cannot administer medications. Due to Claimant's limited use of his upper extremities, he is unable to apply the nitropaste himself, administer other medications, or intervene at all.

8. The incidence of autonomic dysreflexia for this Claimant is quite variable. He can have periods with no episodes, and then have three in one day. The assessment and treatment process is one of educated trial and error that surpasses the abilities of Nursing Aides. Because Claimant's episodes of autonomic dysreflexia require prompt assessment and action beyond the training and capability of unskilled care providers, Claimant needs to have a skilled nurse present at all times. The consequences of providing Nursing Aides during an autonomic dysreflexic episode could include death of the Claimant.

9. Other aspects of Claimant's overall diminishing condition of tetrapalegia are unusual and require ongoing assessment by skilled nursing. Claimant requires administration of as needed (prn) medications for pain and blood pressure throughout the day. A Nursing Aide may be able to place a pill in Claimant's mouth at his direction, but would not be able perform an assessment to evaluate whether Claimant's direction was appropriate. Further, Claimant suffers other life-threatening conditions such as sepsis; these conditions also require the sophisticated assessment skills of a licensed practical nurse (LPN) or RN.

10. For approximately 20 years prior to December 2004 Bayada Nursing provided the bulk of Claimant's care. This included mostly skilled care with the exception of one Nursing Aide in 2001. Out of necessity, Claimant's family members and friends have had to cover shifts over the years when different agencies were unable to provide care.

11. Three different agencies supplied by the Defendant have provided the bulk of Claimant's care since his release from the hospital in the mid-1970's until spring of 2005. During this time, the agencies began increasingly providing Claimant's care with Nursing Aides. On these occasions Claimant experienced the most difficulty obtaining the reasonable and necessary care ordered by his physicians. All three agencies have stated for various reasons they are unable to provide care to the Claimant. Claimant's current medical condition requires round-the-clock skilled care that is not reasonably satisfied by Nursing Aides.

12. Meg Perry, RN, Claimant's sister, left her home and career in Boston following their mother's death in February of 2005 to live temporarily in what was formerly their mother's home in order to secure safe additional nursing care for the Claimant. This move was due to the provider's decisions to sporadically use Nursing Aides instead of skilled care as ordered by the care plan.

13. Jan Allen, RN, Claimant's friend, has been providing care to the Claimant since her assignment from Bayada in 1986. She has devoted Herculean hours over the years to covering unfilled shifts and supplementing the care agencies were providing.

14. As of April 4, 2005, Claimant has managed his own round-the-clock nursing care. Meg Perry, Jan Allen, other RN, and LPN care have wholly filled the schedule since this time without the management or financial assistance of the Defendant. During this time, Claimant's health and safety have not once been compromised. The expenses for nursing care during this period have been paid out-of-pocket by the Claimant with partial reimbursement from the Defendant.

15. Approximately 20 years ago, the Defendant ceased paying indemnity benefits to the Claimant stating it was no longer required to do so under the workers' compensation statutes.

Medical Testimony

**Bohdan Martynec, M.D.**

16. Bohdan Martynec, M.D., is an internist with a qualification in geriatric medicine. He has been Claimant's primary care provider since he was a child and has reviewed and approved many of the care plans since Claimant's injury. Dr. Martynec opined that Claimant requires LPN or RN round-the-clock care primarily due to his autonomic dysreflexia. He clarified his March of 2005 care plan to include Nursing Aides as only a supplement to LPN or RN care.

**Elliot Mancall, M.D.**

17. Elliot Mancall, M.D., is a board certified neurologist. He has served as Director of the Division of Neurology at Hahnemann University Hospital, Chief of Neurology at Wills Eye Hospital, and Interim Chairman of the Department of Neurology at Jefferson Medical College. His training and practice as a neurologist has included treatment of spinal cord injuries. Dr. Mancall has treated Claimant since 1986; he sees Claimant once or twice a year to review his neurological status.

18. Dr. Mancall noted that Claimant has been cared for at home for many years and has responded remarkably well. He acknowledged Claimant as a unique case, who surpasses most severe trauma cases in levels of functionality in daily activities and social structure. Dr. Mancall opined that it would be more psychologically reasonable for Claimant to be cared for in his home under round-the-clock skilled care than for him to be placed in an institutional setting, while specifically citing to a possible onset of depression that Claimant would likely experience in such a setting.

19. While emphasizing Claimant's current level of involvement in his community, Dr. Mancall noted that placement in an institutional setting would remove him from these activities. It is the withdrawal from community involvement and the loss of control over one's personal affairs inherent to institutional settings, which led Dr. Mancall to opine the likelihood of incapacitating depression to occur. Provided the care can be safely managed, he concluded the most reasonable placement for Claimant would be in his home under round-the-clock care.

**Lorraine Buchanan, R.N.**

20. Ms. Buchanan is an RN with a Masters Degree in rehabilitation nursing. She has focused her career on caring for individuals with spinal cord injuries; she also has a series of publications on the topic. Ms. Buchanan currently specializes in managing rehabilitation and lifetime care programs for those with profound disabilities.

21. Ms. Buchanan opined that one of the primary goals of rehabilitation nursing is to promote a level of maximum patient independence within the confines of safety for as long as possible. Ms. Buchanan explained the culture and philosophy of rehabilitation nursing is very patient directed; patients more often direct the care providers as to what ought to be done. This is in contrast to medical and surgical environments, in which the nurse often tells the patient the care that ought to be provided. The tension between these two philosophies usually becomes apparent when non-rehabilitation nurses enter into the arena of rehabilitation nursing.

22. Ms. Buchanan opined that placing Claimant in an institutional setting would not promote the goals of rehabilitation—maximizing function and independence. She noted that an institutional setting might serve Claimant's most basic care needs, specifically his bowel and bladder care and treatment for his autonomic dysreflexia. However, an institutional placement would not promote an independent life or maximize the function of community involvement that Claimant has procured over the years. Ms. Buchanan concluded that if his care could be safely provided, the best environment for the Claimant would be in his home.

**Mariah Fenton Gladis, M.S.S, L.S.W.**

23. Mariah Fenton Gladis has a Masters Degree in social work and social research. She has practiced psychotherapy in Pennsylvania since 1971. Ms. Fenton Gladis has been the clinical director for the Pennsylvania Gestalt Center since 1971; she has since trained many professionals and graduate students in Gestalt therapy. Ms. Fenton Gladis does not exclusively treat patients with disabilities, but she does have considerable experience working with and treating individuals with disabilities similar to those of the Claimant. Ms. Fenton Gladis has treated Claimant on more than five separate occasions since 2003. She also worked with Claimant in a professional relationship while he was completing his graduate degrees.

24. Ms. Fenton Gladis opined that often clients who struggle with physical disabilities arrive with symptoms of depression resulting from their losses in life functioning, personal relationships and lowered self-esteem. Her primary goal through treatment is to help patients find their way back to realizing their current self-worth despite their physical and mental limitations. Ms. Fenton Gladis opined the promotion of personal autonomy and independence as critical to achieving the goal of improving a patient's level of self-worth. She emphasized that failing to maximize a client's ability to engage in the world through work, civil engagement, and activities of interest can lead to increased depression, loss of self-worth, self-esteem, direction and purpose. She further opined that Claimant's ability to remain active in his community, maintain some level of employment through his antique map business, and continue personal relationships with people in the community where he has spent most of his life has allowed him to maintain his feelings of self-worth and an appreciation for his purpose in life. Because of Claimant's current social and community involvement, Ms. Fenton Gladis concluded that a move from Claimant's home environment to an institutional setting would be extremely detrimental to his mental state and potentially life threatening.

**Toby Huston, Ph.D.**

25. Toby Huston, Ph.D. is a clinical rehabilitation psychologist at Craig Hospital in Englewood, Colorado, where he has worked since 2002. He works exclusively with people who have experienced spinal cord injuries. Dr. Huston has a Bachelor's Degree in psychology, a Ph.D. in clinical psychology, and post-doctoral training as a Postdoctoral Fellow specifically in the field of rehabilitation psychology. He is a member of and has served on a committee of the American Association of Spinal Cord Injury Psychologists and Social Workers and lectured on various psychological issues in the rehabilitation setting.

26. Dr. Huston provided information concerning rehabilitation concepts as they relate to quality of life following spinal cord injuries. He explained that the discipline of rehabilitation of patients with spinal cord injuries focuses on educating and empowering individuals to lead as independent lives as possible, despite their physical limitations. Patients are encouraged to become experts in their own care so they can take an active role in directing others to assist them in providing the necessary medical and nursing care. Dr. Huston also noted research studies that he has reviewed suggest that impairments resulting from spinal cord injuries can have minor effects in and of themselves; what affects a patient's wellbeing is the impact of the impairments on the ability to fulfill normal social roles and to participate in family and social life.

27. Dr. Huston further noted the majority of rehabilitation professionals encourage patients living with spinal cord injuries to remain in community settings as opposed to an institutional setting. He cited to the Supreme Court case *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999) to support his argument for Claimant to remain in his home for as long as it is safely feasible. The Court in *Olmstead* stated, "Institutional placements of people with disabilities who can live, and benefit from, community settings perpetuates the unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 583. Dr. Huston also emphasized that the Court added, "Confinement in an institution severely diminishes everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment." *Id.* at 601. After a review of the pertinent research literature available in light of his own experience, Dr. Huston concluded that individuals with spinal cord injuries who lose control over many of the basic life activities most people take for granted are benefited most by regaining as much control over their lives as possible.

**John Kraus, M.D.**

28. Dr. Kraus, board certified in physical and rehabilitation medicine, conducted the independent medical examination on Claimant on November 8, 2005. He acknowledged that a widely shared goal of rehabilitation medicine is to help patients achieve their maximal level of independence within the constraints of safety; that is his own goal when working with patients. Dr. Kraus opined that if reasonably possible, it is preferable for a patient to remain in the home; only if this is not possible, should a patient be transferred to an institutional setting. Dr. Kraus concluded that due to Claimant's unique circumstances, he would be best cared for in his own home provided it could be safely managed.

29. Dr. Kraus noted that under private hire in Pennsylvania a Nursing Aide or "nice person" could be trained to complete the duties of the LPN or RN (e.g., bowel and bladder program, dispensing of medication, assessing autonomic dysreflexia). He also stated that he was not aware of any environmental risks present in Claimant's home based on a review of the medical records and his personal evaluation of Claimant. Further, he was unaware of any incidents that may have compromised the Claimant's safety, since April of 2005 when Claimant took charge of scheduling his own care.

**Suzanne Holland**

30. The Defendant's Nurse Case Manager, Suzanne Holland, has worked as a Senior Case Manager for Concentra for 19 years. She has been in charge of Claimant's case management for the last five years. Ms. Holland opined that she strives to keep a patient such as the Claimant at home whenever possible. She concurred with the medical expert opinions that if his situation can be safely provided, the best scenario for someone such as the Claimant is to remain in his home.

31. Ms. Holland stated that providing care for Claimant over the last five years has been difficult due to the rural location and Claimant's personality conflicts with some of the staff provided. She also stated that Nursing Aides have been used to care for the Claimant in the last five years and that "comparison shopping" while providing nursing services is an aspect of her job. Ms. Holland opined that the level of care required by the Claimant ought to be guided by his doctor; she has used Dr. Martynec's written care plans for five years in her assessment of the case.

**Tracy Lombardi, R.N.**

32. Ms. Lombardi is a registered nurse, certified case manager, legal nurse consultant, and certified life care planner. She conducted a file review for Defendant and submitted a report on her findings. Ms. Lombardi acknowledged that the primary concern in designing and implementing care plans is the needs of the patient; these needs are reviewed over the costs associated with the care.

33. Ms. Lombardi provided a plan for Claimant to remain at home with round-the-clock care, which included a mix of providers (e.g., Nursing Aide, LPN, RN), a medication

dispenser, and a zero pressure bed. A Nursing Aide was recommended by Ms. Lombardi to live fulltime with the Claimant, an LPN would be scheduled for three, four-hour shifts per week to coincide with the bowel movement program, and an RN would be scheduled once every 30-60 days to consult with Claimant and reorder medications. Following this program, Ms. Lombardi concluded that Claimant would be able to safely remain in his home.

34. Ms. Lombardi opined in her report to Defendant dated November 21, 2005 that Claimant's home environment was previously jeopardized by past home nursing care conflicts. Ms. Lombardi confirmed that Suzanne Holland had conveyed written and verbal statements regarding past issues with safely providing care for Claimant in his home. However, she was unable to cite any safety issues since April of 2005 after Claimant took responsibility for his own home nursing care.

**Robin N. Seidman, R.N.**

35. Ms. Seidman is a registered nurse with over 18 years of experience in compliance consulting and case management for patients engaged in home care, hospice, long-term care, home care pharmacy/infusion, and medical equipment/respiratory. She does not maintain a specialty in spinal cord injuries or tetrapalegics. Ms. Seidman completed a medical records and care review at the request of the Defendant to offer her opinion in March and in June of 2005 on a care plan for the Claimant. In her reports she supplied recommendations for future care, problems with the current care plan, and missing documents she believed necessary to make a more complete consultation.

36. Ms. Seidman recommends round-the-clock skilled residential or institutional care based on the medical records provided. Specifically, she cites Claimant's need for ongoing skilled nursing intervention throughout the day. Ms. Seidman represents a concern for Claimant's safety if he remains at home without reliable, skilled care. She recommends Defendant contract with a life care planner in Pennsylvania to help establish Claimant's annual budget, as well as, contracting with a fiscal intermediary to ensure the funds provided by the Defendant are appropriately spent. She further recommends a zero pressure bed to prevent skin wounds and a medication dispenser to avoid the costs of hiring extensive LPN and RN care. Within the options of care provided in the March of 2005 report, Ms. Seidman offers a skilled long-term care facility, round-the-clock skilled home care, or a private hire situation for Claimant where he is responsible for hiring, firing, training, and fiscal management of his care; the Defendant establishes the monthly budget for this option.

<u>Request For Attorney's Fees And Costs</u>

37. Claimant submitted evidence of his fee agreement with his attorney, evidence of 205.55 attorney hours and $14,850.70 in costs.

**CONCLUSIONS OF LAW:**

<u>What Is A Reasonable Rate Of Reimbursement To Meet Claimant's Reasonable Nursing Needs, And How Will His Nursing Care Be Paid?</u>

1. This is a case of first impression for the Department on this issue. Claimant's unique circumstances require a narrow application of the applicable statutes to the facts presented.

2. The Workers' Compensation Act (the Act), having benevolent objectives is remedial in nature and must be given liberal construction; no injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits. *Montgomery v. Brinver Corp.,* 142 Vt. 461 (1983).

3. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks Morse & Co.,* 123 Vt. 161 (1962). An employer subject to the provisions of this chapter shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee. 21 V.S.A. § 640(a); *Berard v. The Silo and Dover Forge*, Opinion No. 28-00WC (2000).

4. In determining what is reasonable pursuant to 21 V.S.A. § 640(a), the decisive factor is not what the claimant desires or what he believes to be most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his functional abilities. *Quinn v. Emery World Wide,* Opinion No. 29-00WC (2000). Claimant has satisfied his burden to show that the reasonable rate of reimbursement for prospective reasonable nursing needs is not limited by the cost of institutional care in Claimant's geographic location. The competent medical experts on this issue consistently opined that the prospective reasonable nursing needs for Claimant would be to remain in his home with round-the-clock care.

5. Through the course of discovery Defendant argued that due to Claimant's diminishing condition and requisite round-the-clock skilled nursing care, he required institutional care. However, the medical expert opinions for the defense concluded that it was not medically reasonable to institutionalize Claimant at this time. Alternatively, the Defendant argues here that Claimant's in-home nursing care ought to be limited to the cost of institutionalized care in his geographical area. The Defendant has failed to establish the cost of institutional care as the benchmark for the cost of round-the-clock home nursing care. Therefore, the rate of reimbursement will be set by the reasonable rates in his geographic area for round-the-clock care in his home that is deemed reasonable and necessary by the persuasive medical experts.

6. The Defendant relies on *Patch v. H.P. Cummings Construction,* Opinion No. 49A-02WC (2003) to support its assertion that Claimant's reimbursement rate ought to be limited by the cost of institutional care in his geographic area. The *Patch* decision ultimately decided to limit the definition of supplies under 21 V.S.A. § 640(a). While the decision limited the claimant's available compensation for supplies under the statute, it did not stand for limiting nursing services opined by all medical experts as reasonable and necessary. These two cases are not analogous. All medical experts in the case at bar agreed that Claimant requires round-the-clock care in his home to ensure his health and safety, while the *Patch* decision limited compensation for home and van modifications deemed reasonable and necessary for the convenience of the claimant. The Department does not have the statutory authority to limit nursing care for a claimant that has been deemed by all medical experts as reasonable and necessary to ensure his health and safety. *Gintof v. Husky Injection Molding/Travelers Insurance*, Opinion No. 21-04WC (2004).

7. The Defendant also relies on *Close v. Superior Excavating Company*, Opinion No. 94-95WC (1996); *affirmed* 166 Vt. 318 (1997) to argue the benchmark for measuring Claimant's nursing care expenses ought to be the cost of institutional care in the same geographical area where Claimant currently resides; effectively limiting Claimant's available compensation for reasonable nursing care to the amount it would cost for institutional care in the same area. However, this is a misinterpretation of the *Close* decision. Even if Defendant had correctly interpreted the *Close* decision, its application is not appropriate under the circumstances of this case.

8. The *Close* decision is distinguishable because the medical experts opined that Mr. Close would be more reasonably cared for in an institution than at home with only his wife to provide care. Mr. Close and his wife chose not to follow the expert's opinions and proceeded with care at home; however, they still sought compensation for the wife's care services that were provided against the expert's opinions. Ultimately, this Department and the Supreme Court of Vermont decided to compensate Mrs. Close for these services at minimum wage due to her lack of nursing training. The rate of institutional care was considered only because it was the reasonable standard of care offered by the experts that was not followed by the claimant; thus, it was used only as a comparison to the amount the employer was ordered to pay. The Close's decision to manage care at home with only the wife providing untrained nursing services ended in a windfall for the defendant; the Department and the Court were simply making this fact apparent in their decision to grant compensation.

9. It is worth noting that institutionalizing those with disabilities who are capable of remaining in their own homes under round-the-clock skilled care is viewed by many in both the legal and health services communities as unreasonable; thus, compelling public policy arguments have been made against this practice. Sabatino & Litvak, *Liability Issues Affecting Consumer Directed Personal Assistance Services—Report and Recommendations*, 4 Elder L.J. 247, 254 (1996); *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999). *Hartford Underwriters Ins. Co. v. State of Kansas, Dep't of Human Res.,* 272 Kan. 265 (2001). Specifically, the ability and benefits of a health services consumer such as Claimant to direct and control the health services he needs is recognized in literature on the subject and sometimes referred to as "consumer-directed personal assistance services." Sabatino, 4 Elder L.J. at 255. This independent-living movement began in the 1970's demanding that health services consumers have greater control over the management of their in-home health care due to the inherent intimate nature of the situation. *Hartford,* 272 Kan. at 1152. The goals were to prevent the unjust practice of institutionalizing people with disabilities for cost effectiveness and convenience reasons. The Department is not prepared to raze the efforts of this movement by limiting Claimant's available compensation to that of institutionalized care.

10. The medical expert opinions on this issue are analogous to this policy and the Department's position on this unique case. The expert opinions are consistent in that Claimant ought to remain in his home with round-the-clock care to reasonably relieve Claimant's symptoms and maintain his functional abilities. The Department does not have the authority to limit reasonable home nursing care compensation to the cost of institutionalized care in Claimant's geographical area. *Gintof,* Opinion No. 21-04WC.

Does Claimant Require Round-The-Clock Skilled Care?

11. All of the medical experts agree that Claimant requires round-the-clock care. The experts disagree as to the best way to meet Claimant's care needs. The Defendant's expert nurse advocates a plan whereby a live-in Nursing Aide provides the bulk of Claimant's care, an LPN would be scheduled for three, four hour shifts to coincide with Claimant's bowel and bladder program, and an RN would consult with Claimant in his home every 30-60 days to oversee the total plan and reorder medications. The Claimant asserts he requires round-the-clock skilled care that does not include a provider actually residing in his home.

12. When choosing between conflicting medical experts the Department has traditionally considered several factors: (1) whether the expert has a treating relationship with the claimant; (2) the professional's qualifications, including the education and experience of the expert; (3) the comprehensiveness of the evaluation performed, including whether the expert had all medical records in making the assessment; and (4) the objective support underlying the opinion. *Yee v. International Business Machines,* Opinion No. 39-00WC (2000).

13. Dr. Martynec has been Claimant's primary care provider since he was a child. He is an internist with a qualification in geriatric medicine. His experience with Claimant's condition from decades of treatment qualifies him to opine on Claimant's care plan. Dr. Martynec is regularly in contact with Claimant's care agencies regarding his care plan and has approved many of these plans over the years. As Claimant's internist and primary care provider, Dr. Martynec has reviewed Claimant's extensive medical file and regularly performs personal evaluations of Claimant. Based on the extent of time Dr. Martynec has treated Claimant, his opinion concerning Claimant's care has the requisite objective foundation. Despite previously approved care plans, Dr. Martynec opined that since March of 2005 Claimant has required round-the-clock LPN or RN care to respond to and care for the autonomic dysreflexia and other conditions.

14. Despite the lack of treating relationship with Claimant, Lorraine Buchanan has extensive training and experience in rehabilitation nursing; she is a registered nurse with a Masters Degree in rehabilitation nursing. In her experience as a life care planner, Ms. Buchanan has prepared life care plans for 200-250 spinal cord injury patients; including assessment and recommendations for long-term nursing care. Ms. Buchanan is highly qualified to opine on Claimant's nursing care needs. Her evaluation of Claimant involved a complete review of his medical records and a home visit to assess current status and need; thus, was most thorough and based on objective knowledge. Ms. Buchanan concluded that Claimant ought to remain in his home under round-the-clock skilled care, provided this care can be safely managed.

15. Tracy Lombardi, RN, has obtained a series of certifications in nursing. However, she has little experience with spinal cord injuries and has considerably less experience in the general field of nursing than Lorraine Buchanan. Ms. Lombardi has never had a treating relationship with Claimant, nor did she complete a home visit as part of her report evaluation. At the time she completed her report, Ms. Lombardi had not reviewed the complete medical file that Ms. Buchanan had reviewed in her evaluation. Based on this narrow file review and telephone conversations with Claimant's case manager, Ms. Lombardi concluded that a reasonable nursing care plan would consist of a live-in Nursing Aide, an LPN for three, four hour shifts per week to assist with bowel and bladder programs and a monthly RN visit to generally oversee the plan and reorder medications. Although Ms. Lombardi's opinion is inherently objective, she admittedly did not review the necessary medical records or complete a site visit; thus, her objectivity was compromised by her lack of diligence in completing a thorough evaluation.

16. Dr. Kraus is a medical doctor specializing in rehabilitation medicine. Though he did not have a treating relationship with the Claimant aside from the IME, he does have extensive experience treating patients with spinal cord injuries. Dr. Kraus performed a thorough evaluation of the Claimant and the medical records prior to compiling his report. However, Dr. Kraus noted that the skills of medical doctors and nurses are distinct and he was unfamiliar with the standards of care in the nursing profession. Therefore, his opinion on the reasonable nursing care needs of the Claimant is given its appropriate weight. Dr. Kraus concluded that Claimant would be most reasonably cared for in his home under round-the-clock care that required at least part-time LPN or RN supervision; he suggested that a Nursing Aide or "nice person" could be trained to complete the daily tasks of the LPN or RN. Dr. Kraus' recommendation to train a Nursing Aide or "nice person" to complete tasks regulated only to LPN and RN care is wholly inappropriate to Claimant's unique situation. While it may be legal in Pennsylvania to privately hire Nursing Aides to complete these tasks, this allowance does not apply to the circumstances of this case. Such an allowance may apply to a tetrapalegic who did not have an injury in the course of employment and is financially unable to manage assistance from anyone else. The Pennsylvania law humanly allows for such situations; however, the Defendant will not be allowed to benefit from this provision to secure its own cost effectiveness.

17. Robin Siedman's, RN, vast expertise lies primarily in the field of regulatory compliance for various types of nursing and home health and hospice operations. To the extent this issue deals with these areas of expertise, her opinion is given the appropriate weight. Ms. Seidman did not establish a sufficient foundation with respect to nursing care standards for spinal cord injury patients to prove a specific expertise in that field. Nevertheless, she did complete two medical records and care plan reviews for Defendant in 2005. The conclusion offered by Ms. Seidman included round-the-clock skilled care in either an institutional setting or in Claimant's home under one agency or private hire. Specifically, she cites Claimant's need for skilled nursing intervention throughout the day as the basis for her conclusion. This conclusion was founded without the complete medical record, including the most recent IME, or a site visit. Therefore, as far as Ms. Seidman's opinion on nursing care is consistent with Dr. Martynec and Ms. Buchanan's opinions, it will be given the appropriate weight, but where it is inconsistent with their opinions it is not viewed as persuasive.

18. The medical expert opinions of Dr. Martynec and Ms. Buchanan on the issue of what degree of care the Claimant requires outweigh the opinions of the other experts offered. Dr. Martynec has been the primary care physician for decades and is the only treating expert opinion provided on the record. His evaluations were consistent, thorough and included all pertinent medical records. Ms. Buchanan's expertise on the issue far surpasses the other expert opinions offered. Her objective evaluation was also very thorough; it included all pertinent medical records and a site visit prior to compiling a report. Dr. Martynec and Ms. Buchanan opined that Claimant ought to remain in his home with skilled round-the-clock care, provided this care can be safely managed.

19. Despite the challenges of arranging for round-the-clock skilled care Claimant has demonstrated this feat to be not only reasonable but also achievable as of the close of this record. Since April of 2005, Claimant has safely managed his own care. He has presented creditable evidence of a schedule that was wholly filled by LPN and RN care. Due to Claimant's recent ability to schedule his own round-the-clock skilled care without the management or financial assistance of the Defendant, the Department is confident that he is able to safely manage his own home nursing care.

Is Claimant's Care Plan Is Reasonable?

20. The standard for determining whether Claimant's care plan under 21 V.S.A. § 640(a) is reasonable has been established to be not what the claimant desires or what he believes to be most helpful, but rather what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his functional abilities. *Quinn*, Opinion No. 29-00WC. The competent expert opinions agree that Claimant requires round-the-clock care; specifically, the more persuasive opinions concluded that Claimant requires round-the-clock skilled care. Consistent with the more persuasive medical experts, Claimant can be reasonably cared for with round-the-clock LPN care provided there is RN oversight on a weekly basis to assess the Claimant's status and reorder medications.

21. The Claimant failed to prove that strictly RN care is reasonable and necessary. However, due to Claimant's rural location it has been adequately demonstrated that LPN care may be difficult to acquire on a round-the-clock basis. Therefore, based on Claimant's ability to demonstrate that he is able to almost completely fill his weekly schedule with LPN and RN care, it is appropriate under the workers' compensation statute and rules to require Claimant to seek out LPN care prior to hiring RN care during his prospective recruiting process. 21 V.S.A. § 640(d); Rule 40.011; 40.080. The Department recognizes that "In fashioning a workers' compensation system in which a Claimant need not prove fault and the employer has limited liability, the Legislature necessarily chose to cover some, but not all, potential services for an injured worker." *Hanson v. Goldstein*, Opinion No. 11-03WC (2003); *affirmed* 175 Vt. 644 (2003). The LPN and RN care will be paid a competitive wage dictated by the market in Claimant's area that is adequate to attract and retain nurses of this skill level. The Department will refrain from setting a specific rate in this unique case, based on the medical experts who opined that nursing rates fluctuate with the market on a yearly and geographical basis.

22. In light of the consistent medical opinions regarding Claimant's need for round-the-clock care and the grave consequences of even the smallest error, the care plan shall avoid scheduling nursing shifts in excess of 40 hours per week for each nurse; taking into account jobs nurses may have outside of Claimant's home. The Department is confident that given the lack of restrictions on reimbursement rates for care providers, this safety provision will not equate to further hiring obstacles for the Claimant. *Quinn*, Opinion No. 29-00WC. Further, the nurses hired to care for Claimant shall not be required to perform duties outside of skilled nursing care (e.g., housekeeping, laundry, secretarial work) as defined under 21 V.S.A. § 640(a); the Defendant is not required to compensate for these services. *Patch,* Opinion No. 49A-02WC. "While attendance in the nursing sense is covered, a line has been drawn between nursing attendance and services which are in essence housekeeping." Larson's Workers' Compensation Law, § 94.03(4)(d); *Hanson,* 175 Vt. at 644. More specifically, the medical evidence as to how well Claimant is able to consistently feed himself is unclear; however, the nursing staff hired to care for him are not required to prepare his meals outside of heating, plating the food, and feeding the Claimant when necessary.

23. Due to the exceptional circumstances of this case, a fiscal intermediary hired by the Defendant to assist in furnishing nursing care to the Claimant as recommended by the nursing compliance and operations expert, Robin Seidman, RN, is appropriate and necessary. The duties of the intermediary will include, but may not be limited to, paying for advertising needed to fill available positions, handling the necessary bookkeeping required to furnish Claimant with the reasonable nursing services, and making compensation payments to Claimant and nursing staff as is required under the Act. It is also appropriate and necessary for the Defendant to offer 96 hours of overlapping care for training and paid vacations. The Defendant shall also pay the necessary payroll expenses (e.g., taxes and workers' compensation insurance) through the fiscal intermediary. Rule 40.080. Considering the sophistication of the Defendant in this case, the Department is confident that Defendant and the fiscal intermediary are capable of abiding by the well-established rules and regulations set forth to properly administer the Act. As a reminder, this protocol requires the Defendant to pay properly submitted medical bills within 30 days, or provide Claimant with proper notice as to why the medical bills will not be paid. Should either party neglect to follow the established protocol while furnishing Claimant with reasonable nursing services, the appropriate sanctions may be brought against them.

24. Whether Defendant is required to pay for past advertising expenses that Claimant accrued during the recruitment process since spring of 2005 is less clear. The standard for 21 V.S.A. § 640(a) requires the Defendant to furnish nursing services deemed reasonable and necessary; a requirement abided by Defendant for many years. The record is not entirely clear on why three different agencies have retracted their care services. The Defendant asserts that Claimant and his home environment present unreasonable circumstances for their care providers, while Claimant identifies the agencies lack of professionalism and refusal to provide the reasonable and necessary care ordered as the primary reasons for the questionable environment. However, the Department has never considered advertising fees accrued by the Claimant during a recruitment process to be included in this provision; in fact, there is very little guidance from any other court on this issue. Advertising fees are typically negotiated between the parties. Since the parties have unsuccessfully negotiated this issue and Claimant has failed to establish all the facts essential to justify compensation for services that traditionally fall outside the provision, no compensation for past advertising fees will be granted. *Goodwin*, 123 Vt. at 161.

How Much, If Any, Does Defendant Owe To Claimant For Reasonable Medical (Nursing Care) Expenses Paid To Nurses Other Than Jan Allen And Meg Perry, Or, In The Alternative, How Much, If Any, Has The Defendant Overpaid Claimant For Medical (Nursing Care) Expenses For Nurses Other Than Jan Allen And Meg Perry?

25. The standard for determining whether Defendant owes Claimant for out-of-pocket nursing services expended since April 4, 2005 pursuant to 21 V.S.A. § 640(a) has been established to be not what the claimant desires or what he believes to be most helpful, but rather what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his functional abilities. *Quinn*, Opinion No. 29-00WC. The expert medical opinions are consistent in that Claimant has required for years round-the-clock nursing care. The more persuasive expert opinions concluded that Claimant has required round-the-clock skilled care since at least March of 2005. Claimant was forced to expend out-of-pocket to provide for these services to ensure his health and safety after three agencies hired by the Defendant had decided to no longer provide care.

26. The skilled nursing services were deemed reasonable and necessary by the more persuasive expert opinions of Dr. Martynec and Ms. Buchanan and were appropriately documented and submitted; the Defendant's experts conceded this level of care was necessary, but disagreed as to who should provide this care. Therefore, the Defendant shall reimburse the balance of Claimant's 2005 and any 2006 out-of-pocket expenses for the nursing services deemed reasonable and necessary by the more persuasive expert opinions.

How Much, If Any, Does Defendant Owe Jan Allen, RN, For Reasonable Medical (Nursing Care) Expenses On Account Of Claimant, Or In The Alternative, How Much, If Any, Has Defendant Overpaid Jan Allen, RN, For Medical (Nursing Care) Expenses On Account Of Claimant?

27. The persuasive medical experts also opined the RN services provided by Ms. Allen to Claimant to be reasonable and necessary; thus, satisfying the standard required by 21 V.S.A. § 640(a). Ms. Allen appropriately documented and submitted her time slips for 2005. She agreed with Defendant to a rate of $34/hour as of 2005. Defendant has failed to pay Ms. Allen for many hours of nursing services provided in 2005. Because Claimant has satisfied his burden to show that the services rendered were reasonable and necessary and abided by the appropriate rules for reimbursement, Defendant shall reimburse Ms. Allen for all arrearages stemming from services provided in 2005 at the agreed upon rate of $34/hour including any overtime pay, time and a half at $34/hour, that was not received.

How Much, If Any, Does Defendant Owe Meg Perry, RN, For Reasonable Medical (Nursing Care) Expenses On Account Of Claimant, Or, In The Alternative, How Much, If Any Has Defendant Overpaid Meg Perry, RN For Medical (Nursing Care) Expenses On Account Of Claimant?

28. Once again, the persuasive medical experts opined the RN services provided by Ms. Perry to be reasonable and necessary; thus, satisfying the standard required by 21 V.S.A. § 640(a). Ms. Perry appropriately documented and submitted her time slips for 2005. She agreed with Defendant to a rate of $34/hour as of 2005. Defendant has failed to pay Ms. Perry for many hours of nursing services provided in 2005. Because Claimant has satisfied his burden to show that the services rendered were reasonable and necessary and abided by the appropriate rules for reimbursement, Defendant shall reimburse Ms. Perry for all arrearages stemming from services provided in 2005 at the agreed upon rate of $34/hour including any overtime pay, time and a half at $34/hour, that was not received.

Is Claimant Entitled To A Reinstatement Of Weekly Permanent Total Disability Benefits?

29. The Claimant asserts that Defendant ceased paying indemnity benefits over 20 years ago with no legal authority. The Defendant argues it was not obligated to continue paying these benefits under the applicable statutes and Claimant is barred from challenging the discontinuance by the statute of limitations. In 1971, 21 V.S.A. § 642(a) was amended to state "If the total disability continues after the third day for a period of seven consecutive calendar days or more, compensation shall be paid for the whole period of the total disability." At the time of Claimant's injury, § 643 provided "Payments shall not continue after such disability ends, nor longer than three hundred and thirty weeks."

30. The Supreme Court of Vermont addressed this conflict in *Montgomery,* 142 Vt. at 461 by recognizing that § 642(a), as amended in 1971, conflicted with the 330-week limit on the duration of benefits in § 643. While noting that the workers' compensation statutes are remedial in nature and ought to be liberally interpreted and citing *State v. Lynch,* 137 Vt. 607, 610 (1979) for the requirement that later statutory enactments take precedent over earlier ones, the Court decided that § 643 retained no force. Once it became apparent to the Defendant within the 330 weeks that Claimant's broken neck was going to result in paralysis of both legs, thereby qualifying him for permanent total disability benefits pursuant to 21 V.S.A. § 644, Defendant was required to discontinue the temporary benefits and issue permanent total benefits. The Department does not have the authority to reward the Defendant for failing to abide by its statutory obligations therefore Claimant is entitled to a reinstatement of his indemnity benefits.

31. The Defendant unsuccessfully argues that Claimant is barred by the statute of limitations. There are two stages of limitations that may have barred Claimant's assertions. First, the employee must file a claim for compensation within six months of the date the injury becomes reasonably discoverable and apparent, unless the employer already knows of the injury. 21 V.S.A. § 656. Second, if the claim is denied or contested by the employer, the employee may then bring an action within six years from the date the injury was "reasonably discoverable and apparent." *Hartman v. Ouellette Plumbing & Heating Corp.,* 146 Vt. 443 (1985). Evidence of Defendant's knowledge of injury is founded in their immediate payment of benefits in 1973. Claimant satisfied both of these potential limitations.

32. Therefore, Claimant is entitled to reinstatement of his total disability benefits because he made a timely claim for these benefits directly following his injury.

Is Claimant Entitled To Interest On Any Of The Above Arrearages, If Any?

33. Pursuant to 21 V.S.A. § 664, Claimant is entitled to interest on all of the above arrearages from the date each payment became due. This includes any expenses paid to nurses other than Jan Allen and Meg Perry, expenses by Jan Allen on account of Claimant, expenses by Meg Perry on account of Claimant, and unpaid total disability benefits to date.

Is Claimant Entitled To Attorney's Fees And Costs In Connection With This Claim?

34. The Workers' Compensation Act provides for a discretionary award of reasonable attorney fees and mandatory award of necessary costs for prevailing claimants. 21 V.S.A. § 678(a). Factors considered in fashioning an award include the necessity of representation, difficulty of issues presented, time and effort expended, clarity of time reports, agreement with the claimant, skill of counsel and whether fees are proportional to the efforts of counsel. *Hojohn v. Howard Johnson's, Inc.*, Opinion No. 43A-04WC (2004); *Estate of Lyons v. American Flatbread*, Opinion No. 36A-03 (2003).

35. Considering the unique complexity of this case, the time and skilled effort expended by the attorney to establish the Claimant's right to compensation, clarity of time reports and proportionality of the fees to the efforts of the attorney, the Department is confident that Claimant's attorney has met the established criteria for determining the reasonableness of the fees and costs. Accordingly, Defendant is ordered to pay Claimant $18,499.50 in attorney's fees and $14,850.70 in costs.

**ORDER:**

Based on the Foregoing Findings of Fact and Conclusions of Law,

Madonna Corporation is ORDERED to pay the Claimant:

1. All medical benefits as outlined above pursuant to 21 V.S.A. § 640.
2. Permanent total disability benefits to Claimant calculated to include all past due benefits pursuant to 21 V.S.A. §§ 642, 644.
3. Interest on all arrearages.
4. Claimant's attorney's fees of $18,499.50 and costs of $14,850.70 pursuant to 21 V.S.A. § 678(a).

Dated at Montpelier, Vermont this ___ day of April 2006.

__________________________
Patricia A. McDonald
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 Supreme Court of Vermont. 21 V.S.A. §§ 670, 672.

W. P. v. Madonna Corporation (June 5, 2006)

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| W. P. | Opinion No. 18A-06WC |
| v. | By: Margaret A. Mangan<br>Hearing Officer |
| Madonna Corporation | For: Thomas W. Douse<br>Acting Commissioner |
| | State File No. J-07632 |

**RULINGS ON DEFENSE MOTIONS TO AMEND AND FOR STAY**
**AND**
**CLAIMANT'S MOTION TO CLARIFY**

Motion to Amend

After a multiple day hearing and opinion in favor of Claimant, Defendant filed a motion to amend to "correct any inference that Defendant carrier was acting in anything less than the Claimant's best interest for the past thirty-two (32) years and, secondly, to obtain clarification of several points that Defendant does not understand in the Order." Motion at Amend April 25, 2006 at 1. Claimant opposes the motion.

This Department never intended to create an inference that Defendant lacked concern for Claimant's best interests. For 32 years since his accident, Claimant's family, friends, and the Defendant carrier provided care to him that can only be described as remarkable. No inference to the contrary was intended. Unfortunately, extreme differences as to how to continue that care caused the disputes that led to the hearing.

Next, Defendant argues that the Department's order is ambiguous in describing Claimant's right to hire nurses. Simply, Claimant has the right to hire the nurses to care for him with funds from the carrier. A fiscal intermediary is to assure that billing is accurate and payment is timely made. Claimant must focus on hiring and retaining LPNs at a competitive wage. If LPNs are not available, RNs may be hired. Claimant has the burden of demonstrating the reasonableness of the hiring decisions, if those decisions are challenged.

Request to Reconsider Past Due Temporary Total Disability Benefits

Defendant argues that Claimant was limited to 330 weeks of permanent total disability benefits, despite 1972 statutory amendments to 21 V.S.A. § 643 that abrogated the time limit. Defendant relies primarily on *Montgomery v. Brinver Corp.,* 142 Vt. 461 (1983). In *Montgomery*, the Vermont Supreme Court held that 330 week limit of § 643 was abolished for temporary benefits, but did not address whether it was abolished for permanent total benefits. Defendant asserts that the Department should not extend the nullification of the durational limit to permanent total benefits.

The Workers' Compensation Act (the Act), having benevolent objectives is remedial in nature and must be given liberal construction; no injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits. *Id.* Claimant in this case would receive no indemnity benefits beyond 330 weeks if Defendant's argument were accepted, a conclusion at odds with the Act and the liberal construction to be given to it. *Id.* It is a reasonable inference that the court in *Montgomery,* 142 Vt. at 461, would have concluded, if met with this specific issue, that the nullification of the 330 weeks was extended to permanent total disability. The evidentiary basis to support Defendant's assertion simply does not exist. Thus, the Department accepts as logical and persuasive, Claimant's argument that the legislature never intended for claimants with permanent total disabilities to receive fewer benefits than claimants with temporary total disabilities.

Statute of Limitations

Next, Defendant argues that Claimant is barred from further benefits since he did not reassert his permanent total disability claim after the initial payments had ceased. However, Defendant was on notice of Claimant's tetraplegia from the outset. The permanent character of Claimant's injury was not newly founded, but had existed since the time of the injury.

Defendant asserts that the initial notice of his injury was not sufficient to inform Defendant of the subsequent claims. *Longe v Boise Cascade Corp*., 171 Vt. 215 (2000). *Longe* dealt with permanent partial disability, a separate benefit from the temporary total disability he had been receiving. In contrast, this unusual claim was a permanent total disability claim from the outset, regardless of how the carrier chose to characterize the claim. At the time of Claimant's injury, as it is today, an employee is entitled to permanent total disability if his work related injury falls within an enumerated list of injuries under 21 V.S.A § 644(a). Claimant's injury fell within these enumerated injuries at the time of his injury in 1973. V.S. 1947, § 8098. (subsection v: "an injury to the spine resulting in permanent and complete paralysis of both legs"). A separate claim on Claimant's behalf never should have been required. Claimant has been entitled to permanent total disability since his accident in 1973.

Motion for Stay

Defendant has requested a motion for stay pursuant to V.R.C.P 74(c). To prevail on a motion for stay, Defendant must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public. *In re Insurance Servs. Office, Inc*., 148 Vt. 634, 635, (1987). The Department has the discretionary power to grant a full or partial stay of judgment. 21 V.S.A. §675(b); *Austin v Vermont Dowel and Square Co*., Op. No. 05S-97WC (1997).

Defendant fails to meet any of the four prongs required to justify a stay for benefits and attorney fees. Defendant does not demonstrate the likelihood of success on the merits on its appeal being that Defendant had notice of the severity of the injury from the beginning. As this department implied in *Dubuque v. Grand Union Company,* Op. No. 34S-02WC (2002), the most important of the four criteria in the workers' compensation context is the second, whether Claimant would suffer irreparable harm if the stay were granted. *Kraby v Vermont Telephone Company*, Op. No. 06S-04WC (2004). In this case, there will be irreparable injury to Claimant if the stay for benefits and attorney fees is granted. Claimant has a permanent disability and has gone far too long without benefits. The stay of attorney fees and costs would cause substantial harm to Claimant given the complexity of these issues, the attorney's time accorded to this case, and the monies expended to protect Claimant's benefits. Finally, it would be outside the best interests of the public if the Department further delayed benefits that Claimant is legally entitled to receive.

However, Defendant did meet the criteria to justify a motion for stay on the interest of all arrearages for permanent total disability benefits. There will not be irreparable injury to Claimant if the stay for the interest is granted. Given the considerable amount of time to be covered, Defendant would be harmed if ordered to pay the interest on Claimant's reimbursement of benefits.

Motion to Enforce

Claimant has requested more specificity in the order to support a Motion to Enforce in superior court under 21. V.S.A. § 675(a). A separate order will follow on this question.

Accordingly,

1. Defendant's Motion to Amend is hereby GRANTED to the extent described above.

2. Defendant's Motion for Stay is hereby DENIED for payment of permanent total disability benefits to Claimant and payment of Claimant's attorney fees.

3. Defendant's Motion for Stay is hereby GRANTED for payment of interest on all permanent total disability arrearages.

Dated at Montpelier, Vermont this 5th day of June 2006.

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Thomas W. Douse
Acting Commissioner

**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| William Perry | Opinion No. 18S-06WC |
| v. | By: Margaret A. Mangan<br>Hearing Officer |
| Madonna Corporation | For: Thomas W. Douse<br>Acting Commissioner |
| | State File No. J-07632 |

**ORDER SUPPORTING CLAIMANT'S MOTION TO ENFORCE**

Captioned a Motion to Enforce, Claimant's motion is one for more specificity in the order of Opinion. No. 18-06WC (date) to facilitate enforcement in superior court. The specificity sought is the amount due for nursing services rendered but not yet paid. Not all claims are in dispute.

William Perry

For out of pocket expenses paid by Mr. Perry for nursing services through 1/1/06: $3,538.80. This amount is not in dispute.

The interest due is $1,206.38, as calculated on 5/19/06 for the amount due through 1/1/06, and the interest on the unpaid arrearage from 5/19/06 until paid. This amount is not in dispute.

The carrier issued seven checks to Mr. Perry on 5/22/06 to reimburse him for unpaid weeks of nursing expenses. This series of checks omitted to pay for the weeks of 2/20-2/26/06 for $54, 3/13-3/19 for $3,577, and 4/24-4/30 for $1,909. The carrier issued a check on 5/26/06 for $1,429, underpaying Mr. Perry for nursing services rendered from 4/24-4/30/06. The total non-payment and underpayment owed is $4,471.

The total owed Mr. Perry for out of pocket expenses for nursing services from 1/2/06 through 4/30/06 is 43,271.25. AIG issued five checks on 3/20/06 that totaled $17,140.75, resulting in a new total due of $26,130.50. Defendant contends the sum owed Mr. Perry for out of pocket expenses for nursing services from 1/2/06 through 4/30/06 is $5,256.10 remaining from $26,130.50. This amount is in dispute. Defendant's 5/24/06 correspondence asserted the seven checks issued on 5/22/06 resulted in the total amount paid as $20,874.40, thus leaving a balance of $5,256.10 plus interest for the period from 1/2/06 through 4/30/06. However, Defendant's calculations incorrectly included $1,703 as payment for the week from 5/1/06 through 5/7/06, which falls outside the time period from 1/2/06 through 4/30/06. The total amount paid by AIG on 5/22/06 and on 5/26/06 for the time period from 1/2/06 through 4/30/06 is $20,600.40, when added to the previous total for payments made by AIG on 3/20/06 of $17,140.75 (which is an underpayment of $1,419) equals $37,741.15, leaving a balance of $5,530.10 owed Mr. Perry for nursing services from 1/2/06 through 4/30/06.

Interest on the underpayments and arrearage from 1/2/06 through 4/30/06 is $507.03, and the interest on the unpaid arrearage from 5/19/06 until paid.

**The sum certain owed William Perry as of 5/19/06 is $10,782.31 plus interest not specified above and due from 5/19/06 until paid.**

The following nursing services for Meg Perry and Jan Allen are based on the hourly rate of $34.00 and overtime after 40 hours of work performed at time and a half. This rate reflects an agreement and order stated in paragraph 27, Opinion No. 18-06WC and by oral order of the Hearing Officer on June 12, 2006.

Meg Perry

For Ms. Perry's expenses through 1/1/06, the amount owed for nursing services is $31,326.75. This amount is not in dispute.

Interest due on Ms. Perry's unpaid expense through 1/1/06 as calculated through 5/19/06 is $4,055.38, and interest on the unpaid balance from 5/19/06 until paid. This amount is not in dispute.

Ms. Perry's expenses from 1/2/06 through 4/30/06 total $25,716.75. She received $19,822 from AIG, leaving a balance of $5,894.75. This amount is in dispute because Defendant's 5/24/06 correspondence indicates accounting of arrearages for a period from 1/2/06 until "the present" which total $20,523.25 owed Ms. Perry. According to Ms. Perry's affidavit, which states the amount owed after receiving five checks issued by AIG on 3/21/06 is $20,523.25, and the correlating balance sheet provided by Claimant's attorney, the amount owed Ms. Perry for nursing services from 1/2/06 through 4/30/06 is $25,716.75. Defendant's total of payments made by AIG is $16,082. According to the balance sheet provided by both Defendant and Claimant, total payments made to Ms. Perry for the time period from 1/2/06 through 4/30/06 is $19,822. The amount owed Meg Perry for the time period from 1/2/06 through 4/30/06 is $5,894.75.

Interest due on Ms. Perry's unpaid services from 1/2/06 through 4/30/06 as calculated through 5/19/06 is $514.59, and interest on the unpaid balance from 5/19/06 until paid.

**The sum certain owed Meg Perry as of 5/19/06 is $41,791.47, plus interest from 5/19/06 until it is paid.**

Jan Allen

For Ms. Allen's expenses through 1/1/06, the amount owed for nursing services is $42,922.50. This amount is not in dispute.

Interest due on Ms. Allen's unpaid expenses through 1/1/06 is $5,464.77 as calculated on 5/19/06, and interest on the unpaid balance from 5/19/06 until paid.
For Ms. Allen's expenses from 1/2/06 through 4/30/06, the amount outstanding is $3,718.75; this amount is disputed because Defendant's calculations incorrectly included $2,397 as payment for the week from 5/1/06 through 5/7/06, which falls outside the time period from 1/2/06 through 4/30/06.

Interest due on Ms. Allen's unpaid expenses through 4/30/06 as calculated on 5/19/06 is $434.49, and interest on the unpaid balance from 5/19/06 until paid.

**The sum certain owed Jan Allen as of 5/19/06 is $52,540.51, plus interest from 5/19/06 until paid.**

Attorney Fees

Claimant’s outstanding attorney fees as of 6/2/06 are $1,260, and fees for additional time spent on these matters after 6/2/06, not presently included in this amount, will also be due at time of payment.

**The sum certain owed Claimant’s attorney as of 6/2/06 is $1,260.**

This Order clarifies with specificity the sums certain owed Claimant for nursing services and, in the interest of justice and efficient use of judicial resources, urges prompt resolution of this claim.

SO ORDERED

Dated at Montpelier, Vermont this 23rd day of June 2006.

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Thomas W. Douse
Acting Commissioner