C. B. v. Ronald & Tammy Brunet (February 23, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

C. B.	Opinion No. 09-07WC
	By: Phyllis Severance Phillips, Esq. Hearing Officer
v.	
Ronald & Tammy Brunet	For: Patricia Moulton Powden Commissioner
	State File No. G-02859

Pretrial conference held on November 13, 2006
Submitted on briefs without evidentiary hearing
Record closed on December 22, 2006

APPEARANCES:

Claimant, *pro se*
Keith J. Kasper, Esq., for the Defendant

ISSUE PRESENTED:

Is Claimant entitled to reimbursement under the Workers' Compensation Act for expenses related to personal errands performed on his behalf by his personal care attendants?

FINDINGS OF FACT (based on the parties' stipulated facts):

1. On August 9, 1993 Claimant suffered a compensable work-related injury resulting in quadriplegia. He is confined to a wheelchair and requires 24-hour attendant care. A variety of attendants work consecutive shifts to provide this care.

2. In 1994, Defendant purchased a handicap-accessible van for Claimant's use. Defendant provided a rental van for Claimant's use until the van it had purchased was ready to be delivered.

3. By November 2004 the van had become inoperable. A dispute arose between the parties as to Defendant's responsibility to pay for a replacement van. After a formal hearing, in June 2005 the Commissioner determined that Defendant was obligated to assume a portion of the cost of a replacement van. *Brunet v. Brunet*, Opinion No. 34-05WC (June 17, 2005). Claimant took delivery of the new van in May 2006.

4. While the previous case was being resolved, Claimant did not have access to a handicap-accessible van. As a result, there were various personal errands requiring driving to and from his home that he no longer could perform himself. These errands included shopping for groceries, Christmas presents, medical supplies and other small items, banking (both personal and business) and other "daily stuff." Claimant paid his personal care attendants $15 per hour to perform these personal errands on his behalf.

5. Defendant paid $3,411.14 to Claimant as mileage reimbursement related to these personal errands. In addition, Defendant agreed to provide transportation services to Claimant via Addison County Transit Co., but only for transportation to and from medical appointments.

6. After the new van was delivered, Claimant submitted a bill totaling $11,119.75 to Defendant for the personal errand services performed by his various attendants. The attendants who performed these errands did so outside of and in addition to the 24-hour care they were providing as a group. Therefore, the bill for these services was in addition to the charges for the 24-hour attendant care already paid for by Defendant.

CONCLUSIONS OF LAW:

1. Claimant seeks coverage under 21 V.S.A. §640(a) for the hourly fees he paid his personal care attendants to perform personal errands on his behalf. That section requires an employer to furnish "reasonable surgical, medical and nursing services and supplies to an injured employee." In order to prevail, Claimant must show that it is proper to include within the definition of "nursing services" activities of a type that do not require any nursing skill to perform.

2. The Vermont Supreme Court has considered the appropriate breadth to be given to the concept of "nursing services" under §640(a). In *Close v. Superior Excavating Co.*, 166 Vt. 318 (1997), the court considered whether an injured worker's spouse should be compensated for the full-time "on-call" care she provided, even though part of her time was spent performing household chores rather than administering skilled nursing care. The court affirmed the Commissioner's decision to award compensation for the entire time the spouse was "on call." In doing so, it sanctioned the "flexible case-by-case approach" adopted by the Commissioner in interpreting the parameters of §640(a). *Id.* at 324.

3. Since *Close*, the Commissioner has provided further clarification in three subsequent decisions. In *Patch v. H.P. Cummings Construction*, Opinion No. 49A-02WC (Dec. 6, 2002), the Commissioner concluded that the household cleaning, cooking, laundry and personal errand activities performed by the claimant's mother did not qualify as "nursing services" under §640(a) and thus were not compensable. Significantly, unlike the spouse in *Close*, in *Patch* the claimant's mother was not "on call" and was not also providing skilled nursing care. The Commissioner observed that in *Close* the decision to award compensation to the spouse for providing both skilled nursing care and assistance with household chores 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.* Consistent with that rationale, the Commissioner concluded that household services, standing alone, did not qualify as "nursing services" under §640(a). *Id.*

4. The Commissioner reached a similar result in *Hansen v. J. Graham Goldsmith,* Opinion No. 11-03WC (Feb. 28, 2003), *affirmed,* 175 Vt. 644 (2003). As in *Patch*, the claimant in *Hansen* sought coverage under §640(a) for housekeeping services only, with no accompanying nursing care. The Commissioner noted 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." *Id.* Accordingly, without a statutory provision specifying that housekeeping services were compensable, the Commissioner was constrained from broadening the scope of §640(a) to include them. *Id.*; *see Cote v. Georgia Pacific Corp.,* 596 A.2d 1004 (Me. 1991) (court precluded from expanding the scope of statute providing coverage for "medical services" or "nursing" to include housekeeping services because to do so would be to create statutory rights and liabilities under the guise of construction).

5. Most recently, in *W.P. v. Madonna Corp.,* Opinion No. 18-06WC (June 5, 2006), the Commissioner determined that in developing an appropriate 24-hour care plan for the claimant, the employer would not be required to pay compensation for nurses who performed duties outside of skilled nursing care, such as housekeeping, laundry or secretarial work. Relying on the precedents set by *Close, Patch and Hansen,* the Commissioner stated, "In determining what is reasonable under §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." *Id.*

6. There is now an established line of cases interpreting §640(a), therefore, and holding that such household chores as cooking, laundry and personal errands do not qualify as "nursing services," particularly when they are not provided directly in conjunction with skilled, 24-hour attendant care. Most other jurisdictions have reached the same conclusion. *See Larson's Workers' Compensation Law* §94.03[4] and cases cited therein. While "attendance" in the nursing sense is covered, "a line has been drawn between nursing attendance and services which are in essence housekeeping." *Hansen, supra,* citing *Larson's Workers' Compensation Law, supra* at §94.03[4][d].

7. The services for which Claimant seeks compensation in the current claim involved personal errands of the type previously rejected by the Commissioner in *Patch,* and akin to the household chores rejected in both *Hansen* and *W.P. v. Madonna Corp.* The attendants who performed the errands here, furthermore, did so not in conjunction with the 24-hour skilled care they were providing, but rather outside of and in addition to that time frame. That fact distinguishes the current situation from the one at issue in *Close*, where the household chores were performed within the same time frame and by the same attendant who was providing 24-hour care. Although certainly Claimant may have needed others to perform these services for him, that alone is not enough to make them compensable absent a specific statutory provision providing that they should be. Such personal errands are not "nursing services" and therefore are not covered under §640(a).

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, Claimant's claim for reimbursement for expenses related to personal errands performed on his behalf by his personal care attendants is DENIED.

Dated at Montpelier, Vermont this 23rd day of February 2007.

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Patricia Moulton Powden
Commissioner

Appeal:

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