

**STATE OF VERMONT
DEPARTMENT OF LABOR**

James Hardy

Opinion No. 12-25WC

v.

By: Stephen W. Brown
Administrative Law Judge

Autumn Harp, Inc.

For: Kendal M. Smith
Interim Commissioner

State File No. BB-1561

OPINION AND ORDER

APPEARANCES:

Heidi S. Groff, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to receive compensation under 21 V.S.A. § 640 for care that his wife Linda Hardy has rendered and continues to render to him as a result of his June 4, 2008 work-related injury?
2. If so, in what amount?

EXHIBITS:

Joint Medical Exhibit (“JME”)

Claimant’s Exhibit 1:	Preservation Deposition of David Rosenfeld, MD
Claimant’s Exhibit 2:	<i>Curriculum vitae</i> of David Rosenfeld, MD
Claimant’s Exhibit 3:	Linda Hardy Journal Entries Reflecting Care for Claimant
Claimant’s Exhibit 4:	<i>Curriculum vitae</i> of April Pettengill, RN
Claimant’s Exhibit 5:	(not admitted)
Claimant’s Exhibit 6:	Report of April Pettengill, RN, dated April 17, 2024
Claimant’s Exhibit 7:	Vermont Board of Nursing, Position Statement Regarding Scope of Practice of Licensed Nursing Assistants
Claimant’s Exhibit 8:	Report of Louise Lynch, PT, dated October 18, 2023
Claimant’s Exhibit 9:	Report of Louise Lynch, PT, dated March 20, 2024
Defendant’s Exhibit A:	Report of Lucy Dupont, RN (undated)
Defendant’s Exhibit B:	Report of Lucy Dupont, RN, dated February 20, 2024

FINDINGS OF FACT:

1. Claimant is a 73-year-old man who resides in Colchester, Vermont, with his wife, Linda Hardy.
2. This claim arises out of an injury that Claimant sustained at work on June 4, 2008. On that date, he went to step out of a building at Defendant's premises, but the stairs had been removed. He fell and severely injured his lower back. Defendant accepted responsibility for this claim and has paid some benefits accordingly.
3. In 2013, the parties agreed to a partial settlement on a modified Form 16, which left medical benefits open. The Department approved this agreement on December 4, 2013. At that time, Claimant had a spinal cord stimulator for his low back injury that the carrier had paid for.
4. Claimant experiences chronic and intense low back pain that significantly affects his mobility. He walks with a cane and requires assistance getting out of bed, walking around the house, traversing stairs, dressing, preparing meals, managing his medications, toileting, showering, and other aspects of daily personal hygiene. Since 2015, Mrs. Hardy has helped Claimant with these and other activities of daily living.
5. Claimant's workplace injury also makes it unsafe for him to drive. Specifically, because of his injury, he experiences paresthesia in his right foot, burning in both feet, and his right leg occasionally gives out. Although he drove for a brief period following his injury, he soon crashed his car into a ditch and determined that it was unsafe to drive anymore. I find this self-assessment well-supported. Due to this limitation, Mrs. Hardy also drives Claimant wherever he needs to go.
6. Claimant's limitations reflect a marked change from his pre-injury capacity. Before his work injury, Claimant regularly rode long distances on his bicycle and golfed every day. He has not engaged in these activities since his injury.
7. Claimant's need for Mrs. Hardy's assistance and care has significantly impacted her life as well. As of 2015, Mrs. Hardy was working as the treasurer for the Town of Westford, Vermont. She transitioned from full-time to part-time in 2014 as Claimant's need for care increased due to his work-related injury. At some point in 2015, Mrs. Hardy determined that she had to retire because it was too much of a hazard to leave Claimant at home when she was working. At the time of her retirement, she had no expectation of compensation for the personal care services that she provided to her husband.
8. Regarding the medical need for Mrs. Hardy's intensive services, Claimant's primary care doctor, Donna Groover, MD, wrote the following note on January 14, 2022:

I've been treating Jim since September of 2018. Because of Jim's disabling work injury, nursing services/personal care attendant services are needed. Linda, his wife, retired from her work in June 2015, so she can assist Jim each day with

dressings, personal hygiene/bathing, travel outside the home, driving to medical appointments, meal preparation, shopping, dispensing, and managing medication. Linda has assisted with Jim's deteriorating condition since her retirement as he cannot attend to these activities of daily living on his own.

(JME 1583).

9. Close in time to the formal hearing in this case, Mrs. Hardy began keeping records of her time caring for Claimant and helping him with his activities of daily living. One sample log presented at the formal hearing showed a day where she spent eight hours and fifty minutes helping Claimant. (Claimant's Exhibit 3). I find this to be a credible and representative sample of the amount of assistance she has provided and will likely continue to provide him.

Expert Testimony

10. Claimant presented expert witnesses David Rosenfeld, MD, and physical therapist Louise Lynch. Both testified at the formal hearing that Claimant needs the near-constant presence of another person due in large part to his risk of falling and his risk of overestimating his own activity capacity. Claimant also presented nurse April Pettengill, who testified about the scope of services that Mrs. Hardy provides to Claimant and the extent to which those services would constitute skilled versus unskilled care under nursing practice guidelines.
11. Defendant presented expert witnesses including occupational and environmental medicine physician Verne Backus, MD, and Lucy Dupont, RN, who both testified that if no one was home with Claimant, he would not be able to take care of himself, and that this is due to his work-related low back injury.

David Rosenfeld, MD

12. David Rosenfeld, MD, is a board-certified physician in the areas of anesthesiology and pain management. He has been Claimant's pain management physician for approximately four years. His treatment of Claimant has included the surgical removal of a spinal cord stimulator, which Defendant paid for. He has examined Claimant many times and has diagnosed persistent lower extremity weakness and neuropathy related to the work injury, resulting in weakness that affects his balance.
13. In his opinion, Claimant needs someone to be nearby for approximately 23 hours per day¹ to assist with using the bathroom and ameliorate the risk of falling, as Claimant

¹ Dr. Rosenfeld clarified on cross-examination, "I'll grant you that he doesn't need somebody watching him, you know starting him down 23 hours a day, but I think there are things that you can't necessarily predict. I mean, meal time is somewhat predictable. Needing to go to the bathroom, not so predictable....Assuming he falls and he's laying on the floor, he could be laying there for days until somebody found him." (Claimant's Exhibit 1, p. 50-51.).

would be unlikely to be able to get back up in the event of a fall.² I find this testimony credible, well-supported, and substantially uncontradicted by other evidence.

Louise Lynch, PT

14. Claimant presented Louise Lynch, PT, as an expert witness. Ms. Lynch has been a physical therapist for 38 years; functional capacity evaluations (“FCEs”) are currently the bulk of her practice.
15. In October of 2023, Ms. Lynch performed an FCE of Claimant. As a part of her evaluation, she interviewed Claimant and Mrs. Hardy and conducted assessments of Claimant’s balance and ability to perform activities of daily living.
16. Ms. Lynch noted that Claimant was able to walk with a cane for short periods of time, could use his cell phone independently, could dress and care for his upper body independently, had the strength to open jars, and could feed himself and use the microwave with one hand so long as he had his cane available.
17. However, she noted that the longest that Claimant could stand during a two-hour examination was 13 minutes, and that to stand for this period, he needed a cane and leaned on the wall. Claimant was only able to walk for approximately five minutes, and he required stand-by supervision due to his fall risk. He had to stop often, and his leg buckled multiple times, requiring Ms. Lynch’s physical support.
18. In Ms. Lynch’s opinion, Claimant cannot dress himself because he cannot reach his lower body, cannot lift his leg over the edge to get into a bathtub, and can only shower with the assistance of his wife. He also requires Mrs. Hardy’s assistance to get on and off the toilet. He also requires assistance with shopping, housekeeping, driving, medication, cooking beyond using the microwave, and housekeeping.

April Pettengill, RN

19. Claimant presented April Pettengill, RN, a registered nurse and certified Life Care Planner, as an expert witness. Nurse Pettengill reviewed all of Ms. Lynch’s testing and interviewed Mrs. Hardy. However, she did not speak with Claimant.
20. The primary subject of Nurse Pettengill’s testimony was the extent to which the services that Mrs. Hardy provides to Claimant constituted “skilled” or “unskilled” care³ under the Vermont State Board of Nursing’s position statement regarding the scope of practice of a licensed nursing assistant (“LNA”). (Claimant’s Exhibit 7).

² Accord JME 1591-1592 (noting that based on Claimant’s need for help with his activities of daily living, it would not be safe for him to live alone).

³ Claimant disclaims any intent to seek compensation for unskilled activities.

21. Nurse Pettengill testified that under those guidelines, “skilled care” involves hands-on care, where the provider might touch the patient, including dressing, bathing, cutting nails, grooming, toileting, mobility assistance, and giving medication. (*Accord generally* Claimant’s Exhibit 7). In her opinion, skilled care can prevent further deterioration in a person’s function, and keeping a person in his own home is generally a better outcome than placement in a residential facility. By contrast, assistance without touching a patient’s body, such as grocery shopping, cleaning, and laundry, generally constitutes unskilled care.
22. That said, Nurse Pettengill acknowledged that several of the tasks which the Vermont State Board of Nursing categorizes as being within the scope of an LNA’s practice might also be performed by a personal care aide, such as unoccupied bedmaking, serving food and beverages, assistance with transfers from a chair to a commode, or assistance with eyeglasses or hearing aids.
23. Nurse Pettengill testified that a family member like Mrs. Hardy can provide “skilled” care without a medical professional’s supervision. However, if another person was hired to perform the care that Mrs. Hardy provides, the hours would almost all be “skilled” versus “unskilled” care.
24. In Nurse Pettengill’s opinion, the care Mrs. Hardy provides to Claimant involves significant amounts of skilled care, in the range of approximately eight hours per day, and this care helps keep Claimant out of a nursing home. She also testified that Mrs. Hardy provides significant amounts of unskilled care, such as shopping, laundry, meal preparation, and emotional support.
25. Nurse Pettengill testified that Mrs. Hardy is aging with her husband and thus finding it increasingly difficult to provide his care as he continues to decline. As such, she would benefit from hiring someone to assist in providing care for Claimant. She opined that three to four hours per day of assistance would allow Claimant to receive the care he needs and not put himself or Mrs. Hardy at risk for injury. As she stated in her report, “[i]f Mrs. Hardy was no longer able to provide care for Mr. Hardy, he would most likely need to be placed in an assisted living type of situation.” (Claimant’s Exhibit 6, page 4).
26. Nurse Pettengill also testified that she contacted professional in-home care providers including Bayada, Home Instead and Visiting Angels in Vermont to get an average that these companies are charging for skilled and non-skilled nursing care. Her work as a Life Care Planner often involves estimating costs of ongoing care, and her inquiries in this case are comparable to the approach she would take in her professional life care planning capacity. She found that the average cost of “skilled” care in Vermont presently is \$35-\$38 per hour and the average cost of “unskilled” care in Vermont presently is \$30-\$35 per hour.
27. In Nurse Pettengill’s opinion, Claimant needs eight hours of care per day as a result of his work injury. As Nurse Pettengill has not spoken directly with Claimant, I do not find that her opinion that he would require institutional care without Mrs. Hardy’s

assistance sufficiently substantiated to support such a finding. For the same reason, I do not find that she is well-situated to assess the number of hours per day Claimant would require care. However, there is no serious dispute that Claimant's limitations from his workplace injury render him unable to live independently without at least some of the assistance that Mrs. Hardy provides.

28. While I have no reason to doubt the accuracy of the cost data points Nurse Pettengill identified in her survey of local in-home care providers, I cannot find that such a limited inquiry provides a meaningful market analysis of the cost of in-home care. I also cannot find that there is sufficient evidence to support a finding that the services Mrs. Hardy provides to Claimant are of comparable monetary value to those of a commercial organization in the business of providing these services. If, for instance, organizations like the ones Nurse Pettengill called provide caregivers who are subject to professional licensing or oversight and backed by liability insurance, that would likely command a different price than an uninsured and unlicensed individual providing exactly the same services, even if there were no objective difference in the quality of services rendered. Without a more economically sensitive analysis, I cannot justify assigning the same prices that a commercial enterprise would charge for the services that Mrs. Hardy provides.
29. As to the classification of the services that Mrs. Hardy provides, I find Nurse Pettengill's testimony to be adequately supported by interviewing Mrs. Hardy, and I find her opinion that most of the activities Mrs. Hardy has recorded in her sample journals would be within the scope of an LNA's permissible practice to be well-supported. That said, her acknowledgement that a personal care attendant might also perform some of the duties that the Vermont Board of Nursing describes as within the scope of an LNA tends to undermine the notion that the scope of practice guidelines above provide a useful dividing line between compensable and non-compensable care for the purpose of Vermont workers' compensation claims.

Lucy Dupont, RN

30. Defendant presented Lucy Dupont, RN, a nurse case manager for VRS Disability Management, as an expert witness. Nurse Dupont performed a care needs assessment for Claimant and determined that most of the care that Mrs. Hardy provides to him is palliative and non-skilled, except for foot care.
31. Nurse Dupont relied extensively upon the Center for Medicare Service guidelines governing the reimbursement of in-home care services under Medicare, codified at 42 CFR §§ 409.32 and 409.33.
32. Section 409.32 provides in relevant part as follows:
- (a) To be considered a skilled service, the service must be so inherently complex that it can be safely and effectively performed only by, or under the supervision of, professional or technical personnel.

- (b) A condition that does not ordinarily require skilled services may require them because of special medical complications. Under those circumstances, a service that is usually nonskilled (such as those listed in § 409.33(d)) may be considered skilled because it must be performed or supervised by skilled nursing or rehabilitation personnel. For example, a plaster cast on a leg does not usually require skilled care. However, if the patient has a preexisting acute skin condition or needs traction, skilled personnel may be needed to adjust traction or watch for complications. In situations of this type, the complications, and the skilled services they require, must be documented by physicians' orders and nursing or therapy notes.
 - (c) The restoration potential of a patient is not the deciding factor in determining whether skilled services are needed. Even if full recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities. For example, a terminal cancer patient may need some of the skilled services described in § 409.33.
33. Section 409.33(d) provides illustrative examples as follows of services that would not constitute skilled care for Medicare reimbursement purposes, but would be classified as "personal care:"

Personal care services. Personal care services which do not require the skills of qualified technical or professional personnel are not skilled services except under the circumstances specified in § 409.32(b). Personal care services include, but are not limited to, the following:

- (1) Administration of routine oral medications, eye drops, and ointments;
...
 - (5) Prophylactic and palliative skin care, including bathing and application of creams, or treatment of minor skin problems;
...
 - (11) Assistance in dressing, eating, and going to the toilet;
...
 - (13) General supervision of exercises which have been taught to the patient; including the actual carrying out of maintenance programs, i.e., the performance of the repetitive exercises required to maintain function do not require the skills of a therapist and would not constitute skilled rehabilitation services (...). Similarly, repetitious exercises to improve gait, maintain strength, or endurance; passive exercises to maintain range of motion in paralyzed extremities, which are not related to a specific loss of function; and assistive walking do not constitute skilled rehabilitation services.
34. In assessing whether the tasks Mrs. Hardy performs constitute skilled or unskilled care, Nurse Dupont assessed each task's complexity and whether it required a professional to prevent deterioration. Relying in significant part on the Medicare guidelines above, she determined that tasks such as medication administration, bathing, meal preparation, assistance with the stairs, dressing his lower extremities,

- assistance with personal hygiene, skin care on legs, driving, hair washing, shopping, and standby presence to mitigate fall risk did not rise to the level of complexity as to necessitate professional supervision, and thus did not constitute skilled care. However, in her opinion, Mrs. Hardy's clipping of Claimant's toenails would need to be done by a skilled nurse if she could no longer perform this service.
35. Nurse Dupont acknowledged, however, that if Mrs. Hardy could no longer care for Claimant, it would be necessary for Claimant to hire someone else to assist him with his activities of daily living, and that the need for this care is due to his work-related back injury.
36. While I find that Nurse Dupont competently analyzed the Medicare reimbursement guidelines, she has not convinced me that these guidelines are the appropriate benchmark by which to assess the compensability of services under Vermont workers' compensation law. This is especially so given Nurse Dupont's credible testimony that Claimant would have to hire someone else to perform such services if Mrs. Hardy were no longer willing or able to perform them.

Verne Backus, MD

37. Defendant presented board-certified occupational and environmental medicine physician Verne Backus, MD, as an expert witness. Dr. Backus has performed three independent medical evaluations ("IMEs") of Claimant, the most recent of which he performed on November 8, 2023. The purpose of his most recent IME was to address whether the assistance Mrs. Hardy was providing to Claimant was reasonably necessary and related to the management of his accepted workplace injury. He reviewed Claimant's medical records, journal entries provided by Mrs. Hardy, depositions of Claimant and Mrs. Hardy, and the reports of Nurse Pettengill and Nurse Dupont.
38. Dr. Backus understood that the scope of Mrs. Hardy's assistance included assistance with showering, bathing, dressing, driving, food preparation, foot care, and "standby" presence to mitigate Claimant's fall risk. Although he expressed some uncertainty about the precise scope of services she provides, Dr. Backus did not dispute that Claimant requires some level of assistance.
39. Importantly, Dr. Backus acknowledged that Claimant's limitations in strength and range of motion made him unable to reach his lower body, and this resulted from his work-related back injury. He also testified that if Mrs. Hardy became unavailable to provide the services that she provides him, Claimant would require help from someone to provide these services that he cannot perform himself.
40. However, in his opinion, most of the care Mrs. Hardy provides is personal care, not skilled care that requiring a professional license. In Dr. Backus's opinion, skilled care generally involves some level of professional supervision, including from a physician. However, in his opinion, the kinds of tasks Mrs. Hardy provides do not require a license or supervision and could be performed by non-licensed home care assistants.

He noted that a skilled medical professional could perform the same tasks that Mrs. Hardy provides, but that does not mean that this level of care requires a skilled medical provider.

41. With respect to the difference between the kinds of care an unlicensed personal care attendant could provide versus an LNA, Dr. Backus agreed with Nurse DuPont's reliance upon the Medicare reimbursement regulation and effectively adopted her analysis as his own. He noted that under the Medicare guidelines, activities such as assistance with dressing, feeding, or using the toilet would constitute unskilled care that an unlicensed personal care attendant could provide.
42. As with Nurse Dupont, I find that Dr. Backus competently analyzed skilled versus unskilled care under the Medicare reimbursement guidelines, but I remain unconvinced that those guidelines should be the dividing line between compensable and non-compensable services under Vermont workers' compensation law, particularly in the case of services that Claimant would undisputedly need *someone* to provide if his wife were unable to, and his need for assistance relates to his accepted workplace injury.

CONCLUSIONS OF LAW:

1. Claimant has the burden of proof to establish all facts essential to the rights he presently asserts. *Goodwin v. Fairbanks Morse & Co.*, 123 Vt. 161, 166 (1962); *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury, *see Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367, 369 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton, supra*, 112 Vt. at 20; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. The Workers' Compensation Act requires an employer to "furnish to an injured employee reasonable surgical, medical, and nursing services and supplies, including prescription drugs and durable medical equipment." 21 V.S.A. § 640(a).
3. It is undisputed that Claimant suffered a compensable workplace injury and suffers significant functional limitations as a result, necessitating assistance with some activities of daily living, which Mrs. Hardy provides.
4. The crux of the dispute is how much, if any, of this assistance constitutes "nursing" services under Section 640(a), such that the employer must "furnish" it to Claimant by paying Mrs. Hardy for these services.
5. It is well-established that "nursing" services need not be provided by a "nurse" to be compensable, so long as they are reasonable and necessary, and that an injured

worker's spouse may provide compensable services. In *Close v. Superior Excavating Co.*, 166 Vt. 318 (1997), the Vermont Supreme Court affirmed the Department's award of compensation to an injured worker's wife following a severe workplace head injury that left him with intermittent seizures, disorientation, and memory loss, requiring supervision twenty-four hours per day. He was unable to take his medication independently, could not prepare his own meals, could not dress himself without assistance, experienced emotional disturbances including uncontrollable bouts of crying and bursts of anger, and would wander at all hours of the day and night. Despite all of this, the injured worker in that case remained at home under his wife's care; following physicians' orders, she administered his medications and monitored his seizures, logged his behaviors, and was effectively on call at all times. Eventually, the injured worker was admitted to an assisted living facility, but the Department awarded his wife over \$200,000.00, based on the minimum wage of \$4.10 per hour in effect at the time, as compensation for services that she rendered over the course of approximately six years.

6. In affirming the Department's decision, the Supreme Court noted that the Department had considered the seriousness of the injured worker's medical condition, his need for continuous care, and the type of care provided by his spouse. The injured worker's treating physician noted that some of the tasks his wife performed could be performed by a licensed practical nurse, though others would require a registered nurse, and still others did not require skilled nursing care at all. However, the physician concluded that if only one person were to be in attendance, that person should be capable of providing skilled nursing care. *Id.*, 166 Vt. at 322. As to the appropriate hourly wage, the Supreme Court rejected the injured worker's argument that the appropriate compensation rate should be based on the prevailing wages of registered nurses or physician assistants, noting that "although some of the work was of a skilled nature, for much of the time claimant's spouse provided what another court has referred to as passive attendance." *Id.* at 325-26.
7. Since *Close*, the Department has clarified that not all care that a family might provide to an injured worker is automatically compensable. 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." *W.P. v. Madonna Corp.*, Opinion No. 18-06WC (June 5, 2006).
8. In applying this principle, the Department has generally found that "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." *C.B. v. Ronald & Tammy Brunet*, Opinion No. 09-07WC (February 23, 2007); accord *Patch v. H.P. Cummings Construction*, Opinion No. 49A-02WC (December 6, 2002) (household cleaning, cooking, laundry and personal errand activities performed by the claimant's mother did not qualify as "nursing services"); *Hansen v. J. Graham Goldsmith*, Opinion No. 11-03WC (February 28, 2003), *affirmed*, 175 Vt. 644 (2003) (housekeeping services only, with no accompanying nursing care, not compensable).

9. In this case, Mrs. Hardy provides a wide variety of services to Claimant, some skilled and some unskilled. Claimant disclaims any intent to seek compensation for unskilled services. However, the testimony concerning the precise line separating skilled and unskilled services is less than crystalline. I am not convinced that either the Vermont Board of Nursing's position statement regarding an LNA's permissible scope of practice (as advocated by Nurse Pettengill) or the Medicare reimbursement guidelines for skilled care (as advocated by Nurse Dupont and Dr. Backus) is dispositive.
8. I find the standard the Department articulated in *W.P., supra*, namely, "what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his functional abilities," to be appropriate in this case. Applying that standard, Dr. Backus's testimony is particularly salient. He credibly acknowledged that Claimant's limitations in strength and range of motion made him unable to reach his lower body because of his work-related back injury, and that if Mrs. Hardy became unavailable to provide the services that she provides to him, Claimant would require help from someone to provide these services that he cannot perform himself. Additionally, Ms. Lynch credibly found in her FCE that Claimant required assistance with dressing below the waist, bathing or showering, using the toilet, and transportation. Even if Claimant can clean and clothe himself above the waist, and even if it is not necessary for someone to have a licensed professional to clean and clothe him below the waist, the evidence is clear that he needs someone—whether his wife or a hired professional—to assist him with these basic activities.
9. Claimant requires assistance using the toilet; this effectively means that someone must always be available. He cannot safely drive, and there is no suggestion that he must remain permanently homebound. Even under Nurse DuPont's more restrictive analysis of skilled care, the foot care that Mrs. Hardy provides would have to be performed by a skilled professional. On the record presented, I conclude that, as in *Close*, if only one person were to provide the care that Claimant needs, it would need to be someone who is at least capable of rendering skilled nursing care, even if much of the care provided is unskilled.
10. This does not mean that Mrs. Hardy should be compensated for twenty-four hours of service per day, as was the case in *Close*, nor is Claimant advocating such a position. Although Claimant does require assistance with toileting, which could happen at any time, he does not require the sort of intense vigilance as someone with unpredictable emotional fluctuations and a tendency to wander. Claimant only seeks compensation for eight hours per day for services rendered, and I find this figure reasonable and substantiated by Mrs. Hardy's journal entries.
11. As to the hourly rate of compensation, I find the approach in *Close* appropriate here, specifically compensating Mrs. Hardy at Vermont's minimum wage in effect during the time periods she provided those services. This aligns with the mix of skilled and unskilled services she provides and reflects the reality that, while a trained and licensed professional would likely be required if she were not providing these services, she is not in fact a trained or licensed professional.

12. Accordingly, Defendant shall pay these benefits retroactive to August 18, 2016, which is six years before Claimant requested compensation for his wife's care. *See* Workers' Compensation Rule 3.1700 (providing that a claim for specific benefits under a previously timely filed workers' compensation claim must be filed within six years of the date on which such benefits accrue).
13. I take judicial notice of the Vermont minimum wage as adjusted for inflation each year between 2016 and the present as follows:

Effective Date	Minimum Wage	Compensation Per Day	Compensable Days in Year	Compensation for Year
January 1, 2016	\$9.60	\$76.80	137 ⁴	\$10,521.60
January 1, 2017	\$10.00	\$80.00	365	\$29,200.00
January 1, 2018	\$10.50	\$84.00	365	\$30,660.00
January 1, 2019	\$10.78	\$86.24	365	\$31,477.60
January 1, 2020	\$10.96	\$87.68	366 ⁵	\$32,090.88
January 1, 2021	\$11.75	\$94.00	365	\$34,310.00
January 1, 2022	\$12.55	\$100.40	365	\$36,646.00
January 1, 2023	\$13.18	\$105.44	365	\$38,485.60
January 1, 2024	\$13.67	\$109.36	366	\$40,025.76
January 1, 2025	\$14.01	\$112.08	TBD	TBD ⁶

Total for Years 2016 through 2024: \$283,417.44

14. Thus, for the period between August 18, 2016 and January 31, 2024, Defendant shall compensate Mrs. Hardy for services rendered pursuant to 21 V.S.A. § 640 in the amount of \$283,417.44.
15. It cannot yet be known whether and to what extent Mrs. Hardy will continue to provide services to Claimant through the remaining days of 2025. Defendant shall calculate and pay a per diem payment consistent with the methodology demonstrated in the foregoing table for so much of 2025 as Mrs. Hardy provides services to Claimant. Defendant shall also pay compensation in the same manner in subsequent years in accordance with Vermont's annually adjusted minimum wage.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant shall pay Claimant's wife Linda Hardy for eight hours per day for services rendered since August 18, 2016, payable at the applicable minimum wage in effect for the time periods during which she rendered services. Through the end of 2024, this amounts to \$283,417.44, with obligations ongoing at a per diem rate of \$112.08 per day in 2025, continuing for so long as Mrs. Hardy continues to provide

⁴ There are 137 days between August 18, 2016 and December 31, 2016.

⁵ I take judicial notice of the fact that 2020 and 2024 were leap years.

⁶ *See* Conclusion of Law No. 15, *infra*.

necessary services to Claimant, with adjustments to the per diem rate in accordance with adjustments to Vermont's minimum wage.

DATED at Montpelier, Vermont this 4th day of September 2025.

Kendal M. Smith
Interim 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.