THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
South Carolina Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2024-000294

Hector Lopez-Vasquez, …….. Claimant/Appellant,

v.

Ox Paper Tube & Core Carolina LLC, Employer, and Berkshire Hathaway Homestate Insurance, Carrier …… Respondents.

REPLY BRIEF

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REPLY ARGUMENT

1. **Respondents' interpretation of section 42-15-60(A) relies on assumptions and implications, not a fair reading of its text or the case law applying it.**

The parties agree on just one thing. A key issue in this appeal is whether Ox Paper Tube & Core Carolina, LLC's ("Employer") statutory duty to provide Hector Lopez-Vasquez ("Claimant") "medical, surgical, hospital, and other treatment" includes the essential work his partner Julianna Roldan-Dimas performs to keep Claimant clean, fed, and functioning as well as he can given his catastrophic work-related injury. Respondents argue this phrase encompasses only "services provided by a healthcare professional" (Resp'ts Br. at 11), but the methodology used to reach this conclusion is far from sound. Though Respondents couch their argument as a "plain meaning" analysis (Resp'ts Br. at 10-11), what it really provides is just their preferred reading. They offer no authority for their proposed limitations on the meaning of "medical" and "treatment" (Resp'ts Br. at 11), no explanation for effectively reading "other" out of the statute altogether (Resp'ts Br. at 12-13), and no hesitation in asking the court to recognize "implicit" medical credentialing requirements appearing nowhere in the statutory text. (Resp'ts Br. at 17 n. 7).

Respondents start their analysis of section 42-15-60(A) with the premise that the words "medical" and "treatment" cannot reach any actions by an individual without a health care credential. (Resp'ts Br. at 11). No support is offered for this assertion. South Carolina appellate courts look to dictionary definitions to determine a word's common usage, but Respondents do not point to one. S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 509, 757 S.E.2d 388, 394 (2014). They cite no authority to bolster their constrained reading of "medical," arguing only "commonsense" dictates that "medical" limits the statute's reach to healthcare providers. (Resp'ts Br. at 12). But, that is not how "medical" has been construed by South Carolina appellate courts in this context. This court reads section 42-15-60 to cover "reasonably necessary medical costs,"

and has held that phrase covers not just various health care modalities but also many other services that minimize the negative effect of the underlying workplace injury on an employee's day-to-day life. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 619, 632 S.E.2d 874, 881-82 (Ct. App. 1997). In Thompson, that meant payment to contractors for home modifications were compensable expenses. Id. Those expenses were "reasonably necessary ***medical*** costs" for section 42-15-60 purposes just as much as a doctor's bill because they were incurred only because of the underlying workplace injury and were needed to accommodate the employee's related physical limitations. Id.

Respondents' only retort to Thompson is that it was governed by a prior version of section 42-15-60. (Resp'ts Br. at 15). However, that distinction is inconsequential. The prior version of the statute[1] includes the same "medical, surgical, hospital, and other treatment" language the court

[1] The full text of section 42-15-60 in effect when Thompson was decided reads as follows:

Medical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from the date of an injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability and, in addition thereto, such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between employer and employee, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. During the whole or any part of the remainder of disability resulting from the injury the employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept an attending physician, unless otherwise ordered by the Commission and, in addition, such surgical and hospital service and supplies as may be deemed necessary by such attending physician or the Commission. The refusal of an employee to accept any medical, hospital, surgical or other treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Commission the circumstances justified the refusal, in which case the Commission may order a change in the medical or hospital service. If in an emergency on account of the employer's failure to provide the medical care as specified in this section a physician other than provided by the employer is called to treat the injured employee the reasonable cost of such service shall be paid by the employer if so ordered by the Commission.

is called on to interpret here. As such, Thompson holding that home modification expenses were "medical" costs for section 42-15-60 purposes is directly relevant here. If home construction costs incurred to accommodate an injured worker's paraplegia are "medical" expenses, then Ms. Roldan-Dimas' hands-on services to help her brain-injured partner complete activities of daily living are "medical" expenses too. South Carolina is not the only state to interpret "medical" this way in the context of workers' compensation statutes. Alabama courts likewise hold that "medical" attention includes the work of an injured employee's spouse designed to relieve the effects of the employee's injury or to prevent further physical deterioration. Ala. Forest Prods. Indus. Workmen's Comp. Self-Insurer's Fund v. Harris, 194 So.3d 921, 926 (Ala. App. 2014) ("when a non-professional family member watches over and aids the injured employee in performing the ordinary activities of daily living because the employee's injurious condition prevents him or her from performing those essential activities safely and independently, the family member serves as functional aid providing medical attention by relieving the employee from the disability effects of his or her injury").

For similar reasons, Respondents err in asserting without citation that only a medical professional can provide "treatment" as that term is used in section 42-15-60(A). In ordinary usage, "treatment" covers services provided to maintain an injured person's current physical capacities (App.'s Br. at 12) and has been interpreted that way by this court while interpreting the pertinent statute. Id. (citing Hall v. United Rentals, Inc., 371 S.C. 69, 82, 636 S.E.2d 876 (Ct. App. 2006) (interpreting section 42-15-60(A) to require payment for "treatment to at least maintain the

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In cases in which total and permanent disability results, reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit. In cases of partial permanent disability prosthetic devices shall be also furnished during the life of the injured employee or so long as they are necessary.

claimant's degree of physical impairment")). Adopting Respondents' overly constrained view of "treatment" would place South Carolina at odds with the majority of jurisdictions to consider the issue. In a case for which Respondents offer no response, Montana's Supreme Court held not only that attendant care provided by an injured person's family member could constitute "treatment" for purposes of a workers' compensation statute, but also that so finding was the majority rule across the country. (App. Br. at 13) (citing Larson v. Squire Shops, Inc., 742 P.2d 1003, 1005 (Mont. 1987)).

Respondents' errors in reading "medical" and "treatment" are compounded by their unreasonable interpretation of how those two words affect the rest of the key statutory phrase. (Resp'ts Br. at 12-13). Even if Ms. Roldan-Dimas's services did not qualify as "medical treatment," section 42-15-60(A) would still cover them because the statute extends Employer's duty beyond "medical" expenses to include the provision of "other" treatment. The inclusion of "other" means the legislature plainly intended to require Employer provide at least some non-medical services. Black's Law Dictionary (5th ed. 1979) (defining "other" as "different or distinct from that already mentioned"). Covered treatment can extend beyond that which is "medical," "surgical," or "hospital" in nature so long as the service in question "effect[s] a cure," "give[s] relief" or "tend[s] to lessen the period of disability" an injured employee experiences. S.C. Code Ann. § 42-15-60(A). As Dr. Desai testified, the assistance Ms. Roldan-Dimas provides Claimant gives some relief from the physical limitations and disabilities arising from his injury. (Single Commissioner's Order at 16).

Respondents' proposed reading of section 42-15-60(A) renders "other" meaningless. They argue the article "and" in the list of required services "inextricably connects" the words "medical" and "treatment." (Resp'ts Br. at 12). Though unstated, it appears Respondents further conclude

that inextricable connection means "other treatment" is only medical treatment. That reading contradicts the plain meaning of "other" and also renders it wholly superfluous. If "other" treatment simply collapse into the categories of compensable treatment that precede it, the entire phrase "and other treatment" would not have been included when the statute was enacted. The precise error in Respondents' logic was identified by the en banc Arizona Supreme Court in Carbajal v. Industrial Commission of Arizona, 219 P.3d 211 (Ariz. 2009). Carbajal rejected a lower court's holding that, in a statutory list of compensable services referencing "medical, surgical and hospital benefits or other treatment," the phrase "other treatment" is limited to "other medical treatment." Id. at 213. Just as argued above, the plain meaning of "other" means "the listed categories" in the statutory phrase "should be construed as encompassing expenses not generally covered by the others." Id.

In a footnote, Respondents ask the court to ignore Carbajal, noting variations between the Arizona statute and section 42-15-60(A) (Resp'ts Br. at 13 n. 2). But, the precise question Carabajal considered is the one the court faces here—whether a statutory list covering "medical" and "other treatment" is limited to "medical treatment." 219 P.3d at 212-13 (noting issue was whether "statutory phrase 'other treatment' . . . include[d] only skilled attendant care services"). Carbajal answered in the negative for reasons that are equally applicable to section 42-15-60(A). First, such a constrained reading violated a statutory interpretation rule by rendering the word "other" superfluous. Id. at 213 (finding that "other treatment" must include non-medical treatment to "avoid . . . duplication" of the preceding categories). South Carolina applies the same rule. In re Jairus J. V., 425 S.C. 481, 485, 823 S.E.2d 208, 210 (Ct. App. 2019) (rejecting statutory interpretations that render certain text either redundant or superfluous). Second, Carbajal rejected an overly narrow reading of "other treatment" because it would conflict with the state's policy of

broadly construing workers' compensation statutes to benefit injured workers. South Carolina recognizes the same policy. Lewis v. L.B. Dynasty, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015). There is simply no reason to cast aside Carbajal's resolution of the precise question at issue in this case.

Moreover, Respondents' reading of section 42-15-60(A) fails by betraying the very statutory interpretation principles Respondents tout. Respondents repeatedly reference the need to respect a statute's plain language and not go beyond its unambiguous text. (Resp'ts Br. at 10-11). Yet, Respondents do just that to argue for a medical credential requirement section 42-15-60's text plainly does not impose. (Resp'ts Br. at 17 n. 7). Respondents spend multiple paragraphs detailing how Ms. Roldan-Dimas is not a licensed health care professional all for the sake of concluding, absent that credential, nothing she does for Claimant can fall within section 42-15-60(A).[2] Unable to point to any statutory language to support a credential requirement, Respondents summarily ask the court to recognize that requirement as "implicit." (Resp'ts Br. at 17 n. 7). Multiple state supreme courts have rejected similar arguments because statutes like section 42-15-60(A) are not explicitly or implicitly connected to a caregiver's professional status. Carbajal, 219 P.3d at 215 (holding that "[t]he compensability of services inquiry should focus on the nature of the services provided, not on the identity of the service provider"); Kushay v. Sexton Diary Co., 228 N.W.2d 205, 207 (Mich. 1975) (concluding that the statutory phrase "medical, surgical and hospital

[2] Oddly, Respondents suggest Ms. Roldan-Dimas's standing as a layperson rather than a medical professional renders her incapable of meeting statutory "documentation requirements." (Resp'ts Br. at 16) (citing S.C. Code Ann. § 42-15-95). Section 42-15-95(A) simply requires that, if a health care provider has compiled information about a patient, the provider may not withhold it from an employer and may charge for the cost of producing it. This statute cannot be fairly described as a "documentation requirement" as it does not require a provider—let alone an injured person's loved one—to create any documents.

services and medicines or other attendance or treatment" "focuses on the nature of the service provided, not the status or devotion of the provider of that service").

Finally, applying Respondents' flawed qualifications argument here would ignore two key facts. First, since Claimant's treating physician (Dr. Desai) ordered "unskilled" attendant care services (R. p. 24 ¶ 14), Respondents' proposed medical credential requirement is an argument for inefficiency—i.e. requiring a medical provider where one is not needed. That outcome goes against the core objective of the workers' compensation system. Russell v. Wal-Mart Stores, Inc., 826 S.C. 281, 285, 826 S.E.2d 863, 865 (2019) (stating that the "primary goal" of all workers' compensation statutes is to "provide a quick and efficient resolution of work-related injury claims").

Second, the most credible medical evidence in the record shows Ms. Roldan-Dimas is not just qualified for the services Claimant needs, she is the *most* qualified to provide those services to Claimant under these circumstances. (R. p. 18 ¶ 10) (Dr. Desai describing Ms. Roldan-Dimas as "the most appropriate caregiver"); R. p. 27 ¶ 23 (noting Respondents' expert offering contrary opinion was not Claimant's treating physician, has never physically evaluated him, and is less familiar with his condition than Dr. Desai). The only medical evidence on which Respondent relies comes from a provider who specializes in pathology and lipidology with no experience or qualifications in treating patients with brain injuries. (R. p. 19 ¶ 14). Respondents' insistence that Ms. Roldan-Dimas stand down and a stranger with a nursing degree step in is not what is best for Claimant's present needs or future prospects. In sum, Respondents' statutory interpretation argument should be rejected as legally unsound as well as inefficient and impractical when applied to this case.

2. Respondents' policy argument overstates Employer's rights and demeans Claimant's position as a mere "preference."

The last portion of Respondents' brief is a policy argument concluding Employer's statutory right to control Claimant's healthcare must outweigh Claimant's desire to have his partner as his caregiver. (Resp'ts Br. at 17-23). That simplistic construction is not consistent with the law or the record. The law does not permit an employer to use its provider selection right to effectively deny an employee the services he needs, and the record shows that is precisely what will happen should Respondents' position prevail. Respondents offer no substantive challenge to the evidence showing Claimant cannot receive attendant care from a healthcare provider without losing his current housing. Then, in an unfortunate and demeaning final section, Respondents suggest policy favors making Claimant choose between his family home and the attendant care services he needs because Ms. Roldan-Dimas giving up her career to care for him is really just a profit-seeking venture anyway. (Resp'ts Br. at 19, 23). In short, while section 42-15-60(A)'s plain language covering Ms. Roldan-Dimas's services makes a policy analysis unnecessary, Respondents' flawed policy arguments only reinforce why the commission's ruling should be reversed.

Respondents have a substantive but not unlimited right to make certain decisions about the care Claimant receives for his workplace injury. Hall, 371 S.C. at 86, 636 S.E.2d at 885. Respondents exercised that right in the selection of Dr. Desai as Claimant's authorized treating physician. (R. p. 18 ¶ 9). Serving in that role, Dr. Desai has recommended the unskilled attendant care services Ms. Roldan-Dimas provides Claimant (R. p. 24 ¶ 14) and determined Ms. Roldan-Dimas is the most appropriate person to provide those services. Respondents' physician selection right, however, does not allow Respondents to insist on their preferred provider when doing so would require Claimant to "sacrifice much needed treatment." Id. (citing Risinger v. Knight

Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002)). The limited scope of an employer's right to control its employee's medical care is recognized in section 42-15-60(A)'s text. Claimant is permitted to refuse Employer's proposed mode of treatment when "the circumstances justif[y] the refusal." Deviations from an employer's proposed treatment is not, as Respondents suggest (Resp'ts Br. at 18), limited to emergency situations. S.C. Code Ann. § 42-15-60(A) (stating that an employee's duty to accept the employer's proposed treatment does not apply any time there is "good cause" for refusing).

Here, the circumstances present good cause for Claimant's refusal to accept attendant care services through the home health aides Respondents propose. Respondents argue Claimant refused their offer of licensed home health aides simply because he would prefer Ms. Roldan-Dimas and had a higher "comfort level" with her as a caregiver. (Resp'ts Br. at 17, 18). The record tells a very different story. Claimant's refusal was not about preferences, it was about maintaining access to attendant care services without losing his housing and upending his family. On this point, the commission recounted the following unchallenged evidence. Claimant resides with Ms. Roldan-Dimas in a home owned and occupied by Ms. Roldan-Dimas's daughter (Andrea), her husband (Juan), and their young children. As the home's owners, Andrea and Juan have concerns for the safety of their children and have unambiguously stated they will not permit the home health aides Respondents offered to work in their home. (R. p. 108, lines 14-16) (Andrea testifying she will not permit strangers to be in her home around her daughters); (R. p. 109, lines 3-8 (confirming Juan's opposition to home health aides working in his home). Ms. Roldan-Dimas interpreted these statements to mean Respondents' offer was not a viable option for Claimant (R. p. 88). In short, while Respondents offered to bring in outside home health aides for attendant care, the commission recognized this testimony showed Claimant's landlords "would not allow it." (R. p. 13).

This case presents the type of circumstances where there is good cause to refuse Respondents' preferred providers. Consider the logistical nightmare of Claimant acceding to Respondents' preference. He would not be able to continue living in his current home. Laying aside the emotional distress associated with that loss, there are also the financial implications of moving elsewhere. Unable to work because of his traumatic brain injury, Claimant is in no position to search for housing or to pay monthly rent. He has nowhere to go and no way to pay for a move. Respondents not only fail to challenge the evidence described above, they essentially ignore it. In so doing, Respondents' position seems to be that their right to select Claimant's treatment providers allows them to force Claimant to choose between his home and the services needed to cope with his work-related injury. That argument cannot be squared with section 42-15-60(A)'s "good cause" exception or with the objectives of the workers' compensation system. Section 42-15-60, Respondents' provider selection right, and all statutes in this area should be interpreted "to ensure the best interests of the worker are protected," and the commission's order denying compensation for Ms. Roldan-Dimas fails to meet that standard. James v. Anne's Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010).

Claimant's good cause for refusing Respondents' preferred providers is not just about his housing situation. Treatment wise, it would be better for Claimant's long-term status if Ms. Roldan-Dimas was his caregiver. Claimant's condition has required treatment that is intimate, embarrassing, and more easily provided by a loved one. (R. p. 12) (describing Claimant's need for assistance bathing, toileting, and moving around his home). This is not, as Respondents suggest, simply a matter of Claimant's comfort level. Dr. Desai testified to a direct correlation between a loved one providing care for a traumatic brain injury patient and improved medical outcomes for the patient. (R. p. 16) (noting Dr. Desai testifying to "bond" between patient and family member

caregiver that is "a big thing that drives brain injury patients"). This is just as true for Claimant's mental and emotional health. (R. pp. 85-86) (Ms. Roldan-Dimas testifying that having family assist Claimant helped with his post-injury depression). Plus, it is not as if Respondents can point to deficiencies in the way in which Ms. Roldan-Dimas has cared for Claimant. Claimant's caregivers at the hospital trained Ms. Roldan-Dimas on blood sugar monitoring as well as insulin administration, and she has competently applied those lessons to meet Claimant's needs since he returned home. (R. p. 82). Thus, it was a matter of science, not sentiment, that led Dr. Desai to conclude Ms. Roldan-Dimas is the "most appropriate" provider for the services Claimant's condition requires. (R. p. 18 ¶ 10).

Rather than addressing the medical or practical implications of forcing their preferred providers on Claimant, Respondents offer an alternative theory. They suggest Claimant and Ms. Roldan-Dimas may just be in it for the money by funneling payment to Ms. Roldan-Dimas at a greater rate than she earned in her previous employment. (Resp'ts Br. at 23) (decrying the risk of what are euphemistically called "improper secondary gain incentives"). That argument is as nonsensical as it is insulting. Up until Claimant was injured in February 2022, Ms. Roldan-Dimas was dutifully employed in the product assembly business, an industry she has worked in for more than eight years. (R. pp. 80-81, 92). Claimant's injury changed everything. Ms. Roldan-Dimas was forced to take leave from her job and later to resign her employment to provide the treatment Claimant needs and was not getting elsewhere. The workers Respondents sent could not communicate with Claimant (R. p. 89)[3] and there were always painful delays when those workers drove Claimant to medical appointments. (R. p. 95).

[3] Respondents note Respondents offered a Spanish-speaking individual to manage scheduling of Claimant's medical appointments. (Resp'ts Br. at 7). However, ease of communication is most important in the daily hands-on care Claimant needs and, as Ms. Roldan-Dimas testified, none of

Respondents ignore all of this and reduce the matter to a simple financial equation. The modest hourly rate Ms. Roldan-Dimas would receive for her attendant care services exceeds what she previously took home as an assembly line worker. (Resp'ts Br. at 23). Even as a financial calculation, that analysis is flawed. It fails to account for the fringe benefits (e.g. paid time off, retirement savings plans) to which Ms. Roldan-Dimas may have had access as an employee that she cannot use as a caregiver. It also ignores the fact that caregiver is one of the most emotionally, mentally, and psychologically taxing jobs a person can do. All of this just shows Ms. Roldan-Dimas took on the arduous, relentless task of becoming Claimant's caregiver out of love and familial duty, not profit motive. Given the grueling nature of the work, and the modest pay caregivers receive, there is no rational basis for Respondents' bald assertion that reversal here will lead to a flood of spouses angling to become injured employees' caregivers in hopes of some financial windfall. Just like its unsupported statutory interpretation argument, Respondents' policy arguments should be rejected as at odds with the governing law and applicable facts.

CONCLUSION

Based on the arguments above and those in his earlier brief, Claimant respectfully requests the court reverse the commission and appellate panel's decision.

Respectfully submitted,

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the individuals Respondents offered for this work spoke Claimant's native language. (R. p. 89, lines 10-15; R. p. 93, lines 6-7).

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