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SC Court of Appeals

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.

SUPPLEMENTAL RECORD ON APPEAL

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Other Materials

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Hector Vasquez-Lopez, Claimant, -vs- Ox Paper Tube & Core LLC Employer, and Berkshire Hathaway Homestate Companies, Carrier, Defendants.	)	**LEGAL BRIEF** WCC FILE #: 2202001

Claimant, Hector Vasquez-Lopez, was catastrophically injured at work on February 18, 2022. Mr. Vasquez-Lopez suffered substantial poly-trauma fractures, in addition to a severe brain injury with many resulting complications, including partial right sided facial paralysis, dizziness, unsteadiness, cognitive, vestibular, and short-term memory deficits. Claimant was hospitalized and eventually discharged home on March 03, 2022.

Since discharge, Claimant has required attendant care for assistance with his Activities of Daily Living (ADLs). Claimant initially required care twenty-four hours per day, but now requires assistance during his normal waking hours from 6:00 a.m. to 9:00 p.m., for a total of fifteen hours per day. Claimant's significant other, Julianna Roldan-Dimas, has provided this care since Claimant returned home. At some point, Defendants offered to provide this care through a licensed nurse or nursing aid. However, Claimant declined their offer for numerous reasons outlined below.

Defendants have refused to provide payment to Ms. Roldan-Dimas for this care for various reasons. Claimant addresses each of their arguments below.

The Commission has the authority to Order Attendant Care under 42-15-60(A)

Section 42-15-60A reads in pertinent part:

"The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as may be required... During any period resulting from injury the employer may furnish and the employee shall accept an **attending physician and any medical care or treatment that is considered necessary by the attending physician**, unless otherwise ordered by the Commission for good cause shown." (Emphasis added).

In this case, attendant care is a form of "medical care that has been considered necessary by the attending physician," as contemplated by 42-15-60(A). Dr. Sima Desai is a physiatrist that is board certified in Brain Injury Rehabilitation who practices with Carolinas Rehab – Brain Injury Rehabilitation Group. Dr. Desai is the Defendants' own chosen, authorized treating physician. Dr. Desai opined and ordered that Mr. Vasquez-Lopez has required 24/7 attendant care since he was discharged from the hospital, via a medical questionnaire dated April 06, 2022. (Cl. APA pg. 161).

Dr. Desai thereafter continued to issue medical orders noting the need for attendant care (Cl. APA pg. 200). Furthermore, Dr. Desai testified in her deposition on September 12, 2022, that Mr. Vasquez-Lopez requires attendant care; that Ms. Roldan-Dimas can provide this care; and Ms. Roldan-Dimas is better suited than and preferred to a third-party provider. Dr. Desai's stated reason is that Claimant is familiar and comfortable with Ms. Roldan-Dimas, and brain injury patients perform and recover better when cared for by loved ones rather than strangers. (See Dr. Desai depo pgs. 12-13; 38-39; and pg. 48). In her deposition, Dr. Desai did note that Claimant now requires attendant care for his waking hours (6:00 a.m. to 9:00 p.m.) or 15 hours a day, instead of 24 hours. (Desai depo pg. 55). In short, the attendant care was ordered by the Defendants' chosen physician as medically necessary, thus it is medical care.

Furthermore, it is important for the Commission to recognize that Defendants themselves offered to provide attendant care services to the Claimant, but only via a third-party provider. It is disingenuous for the Defendants to acknowledge their responsibility to provide this care and offer to do so with a third-party but also argue it is not contemplated under 42-15-60(A). Defendants' actions and positions are in direct conflict with each other.

Claimant also commends to the Commission's attention to a recent Court of Appeals case Harrison v. SC, Opinion No. 2021-UP-117. While this case is unpublished and has no binding authority, it reflects how broadly the appellate courts interpret the language in 42-16-60(A).

In Harrison, the Claimant sustained significant injuries and required home modification to include stair lifts or elevators placed in his home, as well as modifications to his bathrooms. Defendants agreed to provide modifications to Claimant's primary home under 42-15-60(A) but refused to provide the modifications to his secondary beach home where Claimant planned to retire. The Commission initially found "modifications to Claimant's second home are not a reasonable and necessary medical cost under Section 42-15-60(A)." The Court of Appeals subsequently reversed noting "Modifications to Claimant's second home are contemplated by the Workers' Compensation Act as reasonable and necessary medical costs" as contemplated under 42-15-60(A).

It is inconceivable to argue that the "reasonable and necessary medical care" language under 42-15-60(A) allows for modifications to an injured claimant's secondary beach home, but it does not cover necessary attendant care services for a catastrophically brain injured claimant that requires assistance and supervision with most of his ADLs.

Claimant finds additional support in Thompson v. S.C. Steel Erectors, 396 SC 606 (1997). In Thompson, the Claimant sustained a spinal cord injury rendering him a paraplegic. The factual recital in the case states "Steel Erectors admitted the accident... began paying [Thompson] weekly benefits of $507.34, as well $1,000.00 per month to Thompson's wife to aid with his care." Thompson later filed a Form 50-request for hearing alleging he was permanently and totally disabled under 42-9-10(c), seeking lifetime benefits and home modifications. Defendants ultimately admitted Thompson was entitled to lifetime benefits, however they disputed the extent of home modifications. Though not directly on point, this case demonstrates attendant care payments being made to a spouse prior to the claimant reaching maximum medical improvement (MMI) and being found permanently and totally disabled.

Claimant further points to 42-15-60(c) which specifically references "Medicines, and necessary nursing services" while 42-15-60(A) does not. To accept Defendants' argument that 42-15-60(A) does not cover non-professional attendant care, since "Other care" is referenced in 42-15-60(C), but not in part 42-15-60(A), the Commission also would have to accept the argument that "necessary nursing services and medicines" are not covered under 42-15-60(A), but only covered under subsection (C) once a person is totally disabled. Such interpretation is in direct contradiction to well established law.

In summary, the attendant care services have been ordered as medically necessary due to Claimant's traumatic brain injury by the authorized treating physician chosen by the Defendants. Any care, to include non-professional attendant care, that has been deemed medically necessary and ordered by the attending physician is considered "medical care" as outlined within 42-15-60(A).

Claimant has shown good cause for refusing Defendants' offer for third party attendant care and requesting that the Commission order care be provided by his significant other.

Claimant and Ms. Roldan-Dimas both live in a home that is owned by Ms. Roldan-Dimas' daughter, Andrea Angeles-Roldan, and her husband. Andrea's two young daughters and adult brother also live there. Therefore, five adults and two minors live in this single-family residence.

Andrea testified that she and her husband did not want a third-party stranger in their home for all waking hours, particularly around her young children. This an understandable and reasonable position for Andrea and her husband to take. Any person would recognize the awkwardness and tension that would accompany having a third-party stranger always hovering around this close-knit family throughout all their waking hours. Furthermore, Claimant cannot have unjustifiably refused in-home care from a third-party because Claimant does not own the home, and the homeowners plainly oppose it. As discussed above, it also is medically preferable for the brain injured patient's recovery to be cared for by a loved one rather than an unknown third-party, per Dr. Desai's testimony. (See Dr. Desai depo pgs. 12-13; 38-39; and pg. 48).

Moreover, Claimant and Ms. Roldan-Dimas only speak Spanish. Upon his initial discharge home, the Defendants sent home health aides to evaluate Mr. Vasquez-Lopez's medical needs (despite their position that it is not covered under 42-15-60(A)). None of these home health aides spoke Spanish, so Andrea had to always make herself available so she could serve as an interpreter. The language barrier is yet another reason for good cause.

Finally, Claimant very much wants his long-time partner to care for him instead of a stranger. Claimant has sustained catastrophic and life altering injuries. Both Claimant's life and the lives of his entire family have been turned upside down and changed forever. It is certainly reasonable for the Commission to take into consideration what the injured party wants, and he wants his long-time partner to be there with him and provide care for him.

Defendants' argument that attendant care services must be provided by licensed professionals is without merit or legal support of any kind.

A plethora of case law from North Carolina and other states around the country holds workers' compensation carriers responsible for payment of attendant care services provided by members of the claimant's family. In addition, Pressley v. REA Construction, 347 SC 283 (2007) supports family-provided attendant care. In that case, it authorized a paralyzed claimant's mother to provide attendant care on her son's behalf.

Claimant is attaching the Circuit Order in the case of McDaniel vs. Hans Lenger, LLC. This Order awards attendant care benefits to the claimant's wife. Interestingly, this Order also reversed the Commission's denial of payment for past rendered attendant care services, noting the claimant's wife was entitled to attendant care payments from the date he was discharged home from the rehab facility. Presumably, the claimant was not yet at MMI upon his initial discharge. Yet, benefits were still owed. This provides further support for payment under 42-16-60(A).

Judge Hayes references an Order from Judge John in the case Howard v. Eagle Electric, C.A. No. 2005-CP-22-1033, which affirmed an award of attendant care benefits to a claimant's spouse and referenced cases from twenty-eight other jurisdictions around the country supporting the same.

South Carolina also gives considerable deference to case law in North Carolina. There is substantial case law in North Carolina providing attendant care payments to family members that are not licensed professional care givers. See e.g., Goodwin v. Swift & Co., 270 N.C. 690 (1967)

Defendants' argument that attendant care services must be provided licensed professionals is supported by exactly zero legal authority, which perhaps explains why none is cited in their brief. Almost all legal authority on this issue supports the opposite position.

Defendants' request that Ms. Rolden-Dimas only be paid in an amount equal to what she was making prior to this injury is not supported by any law or any evidence in this case.

Defendants offensively argue and allude that Ms. Rolden-Dimas is attempting to manipulate Mr. Vasquez-Lopez's tragic situation in effort to obtain financial windfall. For that reason, their argument suggests, she should only be awarded money up to the amount she was earning prior to is injury. Like the other, this argument is wholly unsupported by the law.

Prior to this injury, both Mr. Vasquez-Lopez and Ms. Roldan-Dimas were both hardworking people with demanding full-time jobs. Ms. Roldan-Dimas worked for the last 8 years at Black & Decker for 40 hours each week. After Mr. Vasquez-Lopez's injury, she stood by his side in the hospital, day in and day out. When he came home, she stayed with and watched over while incessantly providing his much-needed care. Eventually, Ms. Roldan-Dimas was let go from her job after her FMLA ran out.

It is undisputed that Defendants' chosen authorized brain injury doctor ordered and opined that Mr. Vasquez-Lopez initially required twenty-four-hour care, seven days a week, and now needs fifteen hours of care, seven days a week. That care is being provided by Ms. Roldan-Dimas, who Dr. Desai opined is more than capable and actually preferrable over an outside third party provider - - regardless of whether they are licensed or not.

It is also undisputed that the appropriate pay amount for a non-professional care giver is $14.41 per hour. This is an hourly amount less than what Ms. Roldan-Dimas was making previously. Essentially, the Defendants want the Commission to ignore the amount of required

care Mr. Vasquez-Lopez needs and instead issue payment for an arbitrary amount. To do so would be to ignore the clear uncontroverted evidence in this case.

It is also important to recognize it is actually the Defendants that will receive a financial windfall by ordering the care with Ms. Rolden-Dimas. Defendants argue that the care must be provided by a licensed and medically trained nurse who would likely cost at least double the amount Ms. Roldan-Dimas is seeking.

Defendants' IME doctor is not qualified to render opinions on needed attendant care from a brain injury perspective.

It is confounding that Defendants can argue with a straight face that Dr. Desai's, their own chosen authorized brain injury doctor, opinions on Claimant's need for attendant care should be disregarded over their medical record review IME expert who has never met Claimant and who is an endocrinologist that treats typically diabetic patients. Such an argument should highlight Defendants willingness to argue anything regardless of how incredulous or inconsistent with the law their position is.

Dr. Desai is the authorized treating physician chosen by Defendants. She is board certified in brain injury rehabilitation, and practices exclusively with brain injured patients. She is Claimant's main treating doctor and works in coordination with all his various cognitive, occupational, vestibular, and physical therapists to determine his level of function and best plan of care.

Dr. Lopes-Varilla is an endocrinologist with MUSC who was hired by Defendants to review his medical records and render an opinion as to whether the accident, and Claimant's subsequent prescription of steroids, aggravated his pre-existing diabetic condition. Claimant later withdrew his request regarding aggravation of his underlying diabetes. Dr. Lopes-Varilla never evaluated Claimant, never performed a physical exam, nor does she have any training, certifications, or experience treating brain injured patients. It is nonsense to argue that Dr. Lopes-

Varilla is qualified, at all, to render opinions on Claimant's need for attendant care, much less that she is more qualified or in a better position than Dr. Desai.

Conclusion

Dr. Desai, the authorized treating brain injury doctor, determined and ordered that it is medically necessary for Claimant to receive attendant care. Any care that is ordered by a doctor as medically necessary is considered "medical care" and is contemplated under 42-15-60(A). Furthermore, Claimant has provided the Commission with good cause for ordering this care be provided by Ms. Rolden-Dimas rather than requiring a stranger to provide the same care in their family's home.

The only credible evidence shows that Claimant requires fifteen hours of care at the rate of $14.41.

Respectfully Submitted,

Andrew W. Creech