

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 11

WCC No. 2000-0201

ANN BUSTELL

Petitioner

vs.

AIG CLAIMS SERVICE, INCORPORATED/

THE INSURANCE COMPANY OF PENNSYLVANIA

Respondents/Insurers.

DECISION AND ORDER REGARDING DOMICILIARY CARE
AND OTHER BENEFITS

Summary: Dispute over amount of reimbursement for twenty-four hour domiciliary care furnished a quadriplegic petitioner. Insurer contends that reimbursement is limited to the daily medicaid rate for nursing homes. The petitioner also seeks reimbursement for home improvements, a handicap van, and a voice-activated computer.

Held: The limitation in section 39-71-1107(3), MCA (1999), for reimbursement of domiciliary care on its face applies only to domiciliary care provided by family members. Petitioner's request for reimbursement for home improvements, a handicap van, and a computer, does not fall under the primary medical services provision she cites. § 39-71-704(a), MCA (1999).

Topics:

Benefits: Domiciliary Care. The rate of reimbursement for domiciliary care furnished by a non-family member is not limited to the rate paid by medicaid for care in a nursing home. § 39-71-1107(3), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-1107(3), MCA (1999). The rate of reimbursement for domiciliary care furnished by a non-family member is not limited to the rate paid by medicaid for care in a nursing home. § 39-71-1107(3), MCA (1999).

Benefits: Medical Benefits: Primary Medical Services. Under section 39-71-704(a), MCA (1999), the petitioner is not entitled to reimbursement for home improvements, a handicap van, or a computer.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-704(a), MCA (1999). Under section 39-71-704(a), MCA (1999), the petitioner is not entitled to reimbursement for home improvements, a handicap van, or a computer.

¶1 Petitioner (claimant) is a quadriplegic as a result of a motor vehicle accident she suffered while driving for J-TABS. The Court has previously resolved liability issues but retained jurisdiction to address disputes that may arise concerning what benefits she is due. *Bustell v. AIG Claims Service, Inc.*, 2002 MTWCC 26, ¶ 79. Since the issuance of the Court's decision, a dispute has arisen concerning claimant's entitlement to domiciliary care benefits and for payment of house improvements, a van, and other equipment needed in light of her quadriplegia. Respondent does not contest claimant's entitlement to domiciliary benefits, rather it disputes the rate payable for domiciliary care. It disputes claimant's request for payment for house improvements, the van, and the computer.

I. Domiciliary Care

¶2 Respondent agrees that claimant needs around-the-clock, twenty-four hour domiciliary care. However, it is paying for that care at the medicaid reimbursement rate for nursing home care, which is apparently \$103 per day. (Brief in Support of Motion for Reasonable Domiciliary Care Benefits and Other Items at 1.) Claimant alleges that her actual costs are "about \$300 per day." (*Id.*)

¶3 Reimbursement for domiciliary care is governed by statute. Since claimant was injured on December 2, 1999, the 1999 version of the domiciliary care statute applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382(1986).

¶4 Section 39-71-1107, MCA (1999), is the statute at issue. It provides:

39-71-1107. Domiciliary care -- requirements -- evaluation. (1) Reasonable domiciliary care must be provided by the insurer:

(a) from the date the insurer knows of the employee's need for home medical services that results from an industrial injury;

(b) when the preponderance of credible medical evidence demonstrates that nursing care is necessary as a result of the accident and describes with a reasonable degree of particularity the nature and extent of duties to be performed;

(c) when the services are performed under the direction of the treating physician who, following a nursing analysis, prescribes the care on a form provided by the department;

(d) when the services rendered are of the type beyond the scope of normal household duties; and

(e) when subject to subsections (3) and (4), there is a means to determine with reasonable certainty the value of the services performed.

(2) When a worker suffers from a condition that requires domiciliary care, which results from the accident, and requires nursing care as provided for in Title 37, chapter 8, a licensed nurse shall provide the services.

(3) When a worker suffers from a condition that requires 24-hour care and that results from the accident but that requires domiciliary care other than as provided in Title 37, chapter 8, the care may be provided by a family member. The insurer's responsibility for reimbursement for the care is limited to no more than the daily statewide average medicaid reimbursement rate for the current fiscal year for care in a nursing home. The insurer is not responsible for respite care.

(4) Domiciliary care by a family member that is necessary for a period of less than 24 hours a day may not exceed the prevailing hourly wage, and the insurer is not liable for more than 8 hours of care per day.

Initially, the briefs do not specifically inform the Court whether the care being provided to claimant is or is not "nursing care as provided for in Title 37, chapter 8," however, claimant's brief in support of her motion indicates it is not. She refers to "personal care attendants." (Brief in Support of Motion for Reasonable Domiciliary Care Benefits and Other Items at 3.) For present purposes, I assume that her care is not provided by licensed nurses.

¶15 Respondent contends that subsection (3) limits reimbursement for domiciliary care to the "statewide average medicaid reimbursement rate for the current fiscal year for care in a nursing home." Claimant argues that the limitation applies only if the care is provided by a family member. The disagreement is a matter of statutory interpretation.

¶16 Section 39-71-1107, MCA, initially provides that the insurer is responsible for providing reasonable domiciliary care. That requirement is clear and unequivocal; unless the limitations of subsection (3) or (4) apply, there is no dollar limitation on that responsibility.

¶17 In interpreting subparagraph (3), the Court is guided by the general principal that if a statute is plain and clear on its face it needs no interpretation and must be applied as written. *In re Marriage of Christian*, 295 Mont. 352, 356, 983 P.2d 966, 968 (1999). Having examined the two sentences of subsection (3), I conclude that they are plain and clear. The first sentence allows for domiciliary care to be provided by a family member. The second sentence provides that "reimbursement for **the** care" is limited to the medicaid rate for daily care in a nursing home. In referring to "**the** care," the sentence refers back to the first sentence allowing for care by family members. Thus, it is clear that the limitation of the

second sentence applies only to care by family members. I therefore conclude, as a matter of law, that the medicaid rate of reimbursement does not apply to any domiciliary care being provided to claimant by non-family members. That conclusion is consistent with *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 23, 302 Mont. 518, 15 P.3d 877, which said: "As the Workers' Compensation Court pointed out, there are two classes created by § 39-71-1107, MCA; family member caregivers who are subject to the limitation on compensation and non-family member caregivers who are not subject to the limitation on compensation."

¶18 If the respondent disputes the reasonableness of the domiciliary care rate claimed by claimant, then a hearing into the rate is required. Respondent shall notify the Court whether a hearing is necessary and whether discovery regarding the rate is necessary. A scheduling order will then issue.

II. House Improvements, Van, and Computer

¶19 Claimant is also seeking payment for home improvements needed to accommodate her handicap. She seeks home improvements, a handicapped equipped van for transportation, and a voice activated computer system. Given her disability, none of these items is facially unreasonable. The question confronting the Court, however, is whether the Workers' Compensation Act requires the insurer to pay for them.

¶110 The claimant seeks payment for these items as necessary medical expenses. She argues that these items come under the umbrella of "primary medical services" for which the insurer is responsible. (Brief in Support of Motion for Domiciliary Care Benefits and Other Items at 5.)

¶111 Section 39-71-704(a), MCA, governs primary medical services:

39-71-704. Payment of medical, hospital, and related services -- fee schedules and hospital rates -- fee limitation. (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

"Primary medical services" is defined in section 39-71-116(26), MCA (1999), as follows:

(26) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

"Medical stability" in turn is defined in subsection (18) of Section 39-71-116, MCA, as follows:

(18) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

¶12 Home improvements, a special van, and voice activated computer do not constitute "primary medical services" if they are required to accommodate claimant's handicap but do not to further her healing process. Unless claimant can demonstrate as a matter of fact that the items are reasonably necessary to claimant's reaching MMI, she is not entitled under 39-71-704(a), MCA (1999), to reimbursement for these items.

ORDER

¶14 The medicaid rate of reimbursement for domiciliary care, § 39-71-1107(3), MCA, applies only to domiciliary care provided by family members. The limitation does not apply to domiciliary care provided to claimant by non-family members.

¶15 If respondent contends that amounts paid by claimant for domiciliary care furnished by non-family members are unreasonable, it shall inform the Court and the claimant of its contention no later than March 10, 2003, in which event the Court will schedule an evidentiary hearing regarding domiciliary care rates.

¶16 Under section 39-71-704(a), MCA (1999), the claimant is entitled to reimbursement for home improvements, a handicap van, or a computer only if she can prove as a matter of fact that the items are reasonably necessary to help claimant achieve maximum medical improvement. If claimant contends that they are, then it shall notify the Court and the respondent of its contention no later than March 10, 2003, in which event the Court will schedule an evidentiary hearing.

DATED in Helena, Montana, this 26th day of February, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis
Ms. Melanie S. Pfeifer
Submitted: January 24, 2003