IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 27

WCC No. 2003-0852

RANDALL SIMMS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 07/12/05

Summary: The claimant demands that the Montana State Fund buy him a handicap accessible van.

Held: The claimant is not entitled to a handicap accessible van. His best justification for a van is for transportation to and from medical appointments but section 39-71-704(1)(d), MCA (1997), expressly provides that an insurer is not liable for transportation except to appointments it requests. Moreover, his request is not justified as medical treatment. He has a car and is able to make standing transfers into and out of the car. While he is unable to drive, a van would not solve his need for a driver. Convenience and getting out of his house to improve his general mental health do not rise to the level of medical necessity.

Topics:

Benefits: Medical Benefits: Handicap Accessible Vans. Under the 1997 version of the Montana Workers' Compensation Act, an insurer is not required to provide a claimant with a handicap accessible van to enable him to go to and from medical appointments. § 39-71-704(1)(d), MCA (1997).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-704(1)(d), MCA (1997). Under the 1997 version of the Montana Workers' compensation Act, an insurer is not required to provide a claimant with a handicap accessible van to enable him to go to and from medical appointments. § 39-71-704(1)(d), MCA (1997).

Benefits: Medical Benefits: Handicap Accessible Vans. An insurer is not required to provide a claimant with a handicap accessible van under the general medical benefits provisions of the Montana Workers' Compensation Act where the claimant failed to show that a van constitutes necessary and reasonable medical treatment for his condition. The fact that a van would make it more convenient for him to go out from his home and that going out would contribute in a general fashion to his mental health does not establish medical necessity for a van, especially where the claimant owns a car, is able to do a standing transfer to and from the car, and uses the car several times a month. Moreover, a request for a van must be considered in the context of other transportation alternatives. An insurer is not required to provide a Rolls Royce where a Chevy is adequate.

¶1 The trial in this matter was held on December 17, 2003, in Helena, Montana. Petitioner, Randall Simms (claimant), was present and represented by Mr. Geoffrey C. Angel. Respondent, Montana State Fund (State Fund), was represented by Mr. Thomas E. Martello.

¶2 Exhibits: Exhibits 1 and 2 were admitted without objection. The respondent objected to Exhibits 3 and 4 on relevancy grounds. Exhibit 4 is a surveillance tape commissioned by the respondent. Exhibit 3 is the investigator's notes of his surveillance. At the beginning of the trial, the Court reserved ruling on the objections and asked Mr. Angel to reoffer the exhibits if he deemed them helpful. He did so at the end of trial but I did not rule on their admissibility at that time. After further considering the matter, I am admitting and considering the exhibits as relevant.

¶3 Witnesses and Deposition: Claimant, Shauna Foley, and Lucinda Dixon testified at trial. In addition, the deposition of Dr. John C. Oakey was submitted to the Court for its consideration.

¶4 Issues Presented: The issues as set forth in the Final Pretrial Order are:

> ¶4a Whether, under the Workers' Compensation Act, Randall Simms is entitled to a handicapped accessible motor vehicle?
>
> ¶4b Whether Randall Simms is entitled to costs, attorney fees and penalty?

(Final Pretrial Order at 2.)

¶5 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 The claimant was injured on May 3, 1999, while working as a glazier for Bozeman Glass. He suffered a laceration to the radial artery of his right forearm. (Uncontested Fact 1.)

¶7 At the time of his injury, Bozeman Glass was insured by the State Fund. The State Fund accepted liability for his industrial injury. (Uncontested Fact 5.)

¶8 The claimant was treated at the Emergency Room of Bozeman Deaconess Hospital immediately following his injury. (Uncontested Fact 2.) While the Court does not have the records of the treatment, apparently the laceration was repaired at that time.

¶9 The next day, May 4, 1999, the claimant developed "volar compartment syndrome which was treated with a fasciotomy, arterial repair and secondary closure." (Uncontested Fact 3.)

¶10 Subsequently the claimant developed Complex Regional Pain Syndrome (CRPS), also known as Reflex Sympathetic Dystrophy (RSD). (Uncontested Fact 4; Oakley Dep. at 5.) The condition involves abnormal pain responses to normal non-painful stimulae. (Oakley Dep. at 9.)

¶11 The claimant's condition initially affected his arms and was treated by the implantation of a spinal cord stimulator in his cervical area. (*Id*. at 7-8; Uncontested Fact 4.) The condition thereafter progressed to his legs and a spinal cord stimulator was implanted in his lumbar spine. (Oakley Dep. at 7-8.)

¶12 As a result of his CRPS, the claimant is now confined to a wheelchair although he is able to stand to move to and from his wheelchair. (Trial Test.; Oakley Dep. at 5.)

¶13 Dr. John C. Oakley, a board certified specialist in neurosurgery and pain management, has been treating the claimant since 1999. (Oakley Dep. at 4, 6.) He implanted both spinal cord stimulators.

¶14 Dr. Oakley testified by deposition. He testified that the claimant reached maximum medical improvement (MMI) in late 2002 or early 2003 and is permanently totally disabled from performing gainful employment. (*Id*. at 17, 21.) Even though the claimant suffered a vertebral compression fracture in the summer of 2003, that fracture did not change his opinion. He testified that the claimant was still at MMI and there is no curative treatment on the horizon. (*Id*. at 22-23.)

¶15 The claimant's 2003 compression fracture is due to bone density loss, which in turn is due to his immobility. Dr. Oakley recommends physical therapy three times a week to minimize bone density loss. (*Id*. at 24.) He testified that in-home therapy is inadequate because of the type of exercise equipment needed. The necessary equipment is not available in Livingston where the claimant resides. The nearest appropriate physical therapy facility is in Bozeman.

¶16 Dr. Oakley also testified as to his need to see the claimant every one to three months to monitor his condition. (*Id*. at 19.)

¶17 Dr. Oakley wrote a prescription for a handicapped accessible van. The prescription is on a prescription pad and is found at Exhibit 1 at page 27. It was written on July 30, 2002, and states, "Rx Handicap accessible van." In his deposition, Dr. Oakley justified his prescription on the claimant's need for physical therapy in Bozeman and for follow-up visits in Billings every one to three months. (Oakley Dep. at 19, 25-26.) Dr. Oakley also testified it would be helpful for the claimant to obtain psychiatric counseling, however, such counseling is not readily available due to a shortage of psychiatrists in Montana. (*Id.* at 15.) Finally, he testified that a van would enable the claimant to get out more and thereby improve his mental health. (*Id.* at 26.)

¶18 The claimant is not able to drive a van or any other vehicle. (Oakley Dep. at 20.)

¶19 Dr. Oakley did not address any alternatives to the purchase of a handicap accessible van.

¶20 The claimant has demanded that the State Fund buy him a handicap accessible van. It has refused and this action ensued.

¶21 The claimant's present transportation outside of his home is by wheelchair and by car. In good weather he drives the wheelchair on and across Livingston streets. A surveillance video (Ex. 4) shows him going to and from a video store and a supermarket.

¶22 The claimant also owns a car and uses it to go out from his home. He has a portable wheelchair he uses when he goes out. Since he cannot drive, his wife loads the wheelchair into the car and drives the car. The claimant testified that he goes out in the car six to seven times a month just for "a drive" or to shop.

¶23 Livingston has a public wheelchair accessible van. The claimant testified that the van has a set schedule, making it inconvenient for him to use it. He also testified that in winter weather, the van will not come up the road to his house. There was no evidence presented as to how often that occurs.

Factual Resolution

¶24 There are significant legal questions concerning the liability of insurers for handicap accessible vans, and I will address those questions in the Conclusions of Law section of this decision. There are also factual questions concerning the claimant's need for a van, and those questions I address here as a part of my findings of fact.

¶25 Initially, the claimant's wheelchair does not provide a satisfactory mode of transportation to medical appointments in Bozeman or Billings. Indeed, it does not provide a satisfactory mode of transportation anywhere in bad weather, and Montana has its share of bad weather.

¶26 However, the claimant has alternative means of transportation. Within Livingston, he can use a public handicap accessible van. While the van may not be able to go up the road to the claimant's house in bad winter weather, the claimant has failed to persuade me that the public van is unavailable during significant periods of time or that its unavailability prevents him from going out in Livingston for any significant periods of time. The fact that he has to adhere to the time schedule of the public van is unfortunate but it is not a compelling argument for my ordering the State Fund to purchase a van. I am unpersuaded that the public handicap accessible van does not provide him with reasonable, accessible transportation within Livingston.

¶27 The claimant also has a car and a portable wheelchair which he uses for transportation. He is able to do standing transfers, which means he is able to stand up and move from his wheelchair to a car seat and vice-versa. He is unable to drive, so his wife must drive: that would not change if he had a handicap accessible van. He has not provided persuasive evidence that a van would make a difference in his going to physical therapy in Bozeman or to Billings for doctors' appointments. Whether by van or by his current car, he would need a driver.

¶28 Dr. Oakley also indicated that a handicap accessible van would allow him to get away from his house and improve his mental health. That opinion is the weakest sort of support for buying a van. Certainly, a handicap accessible van would provide more convenient transportation for the claimant. The question in this case is not what might generally improve the claimant's mental health and happiness, but what is medically necessary.

¶29 As to his need for a van to go to medical appointments, the claimant has not shown that alternative means of transportation to medical appointments are unavailable. Indeed, he gets out several times a month in the car with his wife. Other than to demand the purchase of a van, he has not contacted his claims adjuster to request help with transportation to medical appointments.

¶30 Nor has the claimant provided the Court with any specific van proposal. He simply requests the Court to enter an open-ended order directing the State Fund to buy him a van.

Reasonableness of Insurer's Denial

¶31 Whether or not I am correct in my determination that the claimant is not entitled to a handicap accessible van, the State Fund's denial of the request was reasonable. There are ample legal arguments against the request. Moreover, the claimant never asked the State Fund to provide specific transportation; he simply demanded that it buy him a van. Finally, his own evidence establishes sound factual reasons for denying his request.

CONCLUSIONS OF LAW

¶32 This case is governed by the1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶33 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶34 The claimant is seeking an order directing the State Fund to buy him a handicap accessible van. Before turning to the specific provisions of Montana law which apply in this case, I first note that there are no Montana cases on point and that other jurisdictions have reached different results concerning handicap accessible vans. The cases are summarized in *Annot: Compensability of Specially Equipped Van or Vehicle Under Workers' Compensation Statutes*, 63 A.L.R. 5th 163. While I have not counted decisions, it appears that the number of decisions denying van requests approximately equals the number of decisions granting requests. The decisions typically turn on the particular state statutes and the courts' interpretation of those statutes. Some courts have held that vans are compensable under state statutes which provide for purchase of medical apparatus or medical transportation, while other courts have held "either that a personal vehicle was a personal expense that was not intended to be covered under the compensation statute, or that the language of the statute did not permit reimbursement for equipment that did not contribute to treating an injury or illness." *Id.* at § 4. Other courts have denied payment for vans based on a lack of proof of medical need or upon a finding that alternative transportation is available. *Id*. at § 6[b]. Still other courts have held that the insurer is liable only for the special equipment necessary to convert a van for handicap use and not for the cost of the vehicle itself. *Id*. at § 8.

¶35 Ultimately, as can be seen by reading the summaries of cases in the Annotation, the question of a claimant's entitlement to a handicap accessible van is a matter of interpreting and applying each state's unique law. I therefore address the claimant's request under Montana's laws.

¶36 In examining Montana's workers' compensation laws, I first note that there is no provision authorizing or requiring an insurer to furnish the claimant with a vehicle or even with transportation to and from medical appointments. Indeed, Montana provisions at the time of the claimant's injury specifically provide that insurers are **not** liable for a claimant's transportation to and from medical appointments except for medical appointments requested by the insurer. Section 39-71-704(1)(d), MCA (1997), provides:

> (d) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury **only if the travel is incurred at**

> **the request of the insurer**. Reimbursement must be at the rates allowed for reimbursement of travel by state employees. [Emphasis added.]

No other exceptions are provided in the section and the Court is prohibited from writing additional exceptions into the section. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. Under the section the insurer is not liable for travel expenses except to appointments it requests. Purchase of a van for travel to and from medical appointments stands on no better ground than any other form of travel. Therefore, I conclude that the section affirmatively excludes liability for a van based on the claimant's need to travel to and from medical appointments.

¶37 The only other provisions under which the purchase of a van might be authorized are the general provisions providing for payment of necessary medical treatment. Those provisions, also found in section 39-71-704, MCA (1997), are as follows:

> **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.
>
> (b) The insurer shall furnish secondary medical services only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment.
>
> . . . .

Primary and secondary medical services are defined in section 39-71-116, MCA (1997), as follows:

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

(30)(a)"Secondary medical services" means those medical services or appliances that are considered not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.

(b)(i) As used in this subsection (30), "disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.

(ii) Disability does not mean a purely medical condition.

"Treatment" is not defined in subsection (26) in connection with primary medical services, however, the definition of secondary medical services found in subsection (30), shows that treatment encompasses medically necessary "appliances."

¶38 Assuming that a van constitutes a "medical appliance," the claimant's request in this case faces several, insurmountable obstacles.

¶39 The first obstacle is the clear language of section 39-71-704(1)(d), MCA (1997). As discussed above, that subsection specifically speaks to payment for travel to medical appointments, providing that the insurer is not liable for such travel except where it schedules the appointment. Interpreting either the primary or secondary medical services provision as requiring payment for a van based on the need to travel to and from medical appointments would derogate the plain language of section 39-71-704(1)(d), MCA, and is contrary to two principles of statutory interpretation. The first principle of statutory interpretation which such construction would violate is the "familiar rule of construction . . . that when a general and particular provision of statute are inconsistent, the particular provision will prevail." *State ex rel. Needham v. Justice Court*, 119 Mont. 89, 97, 171 P.2d 351, 355 (1946); *accord, Montana Dept. of Revenue v. Kaiser Cement Corp.,* 245 Mont. 502, 507, 803 P.2d 1061, 1064 (1990). The second rule of statutory interpretation that such interpretation would violate is the "rule of statutory construction that the express mention of one matter excludes other similar matters not mentioned." *Helena Val. Irr. Dist. v. State Highway Commission*, 150 Mont. 192, 198, 433 P.2d 791, 794 (1967). I therefore hold that the purchase of a van cannot be justified as either primary or secondary medical treatment based on the claimant's need to travel to and from medical appointments. There must be some other medical justification.

¶40 A second obstacle is the limitation on secondary medical services. Secondary medical services are those medical services "not medically necessary for medical stability." § 39-

71-116(30)(a), MCA (1997) (quoted in full in ¶ 37). The claimant has reached MMI and is permanently totally disabled, therefore, further medical services come under the secondary medical services provisions in section 39-71-704(1)(b), MCA (1997). Under those provisions, the insurer is required to furnish the requested services "only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." The claimant in this case has been determined to be permanently totally disabled and has presented no evidence which would demonstrate he could return to employment if provided with a handicap accessible van. A van therefore does not meet the requirements for secondary medical services.

¶41 In *Hiett v. Missoula County Public Schools,* 2003 MT 312, 317 Mont. 95, 75 P.3d 341, the Montana Supreme Court construed "primary medical services" as also encompassing medical treatment necessary to "sustain" maximum medical improvement. Thus, if a van were to be shown as necessary to sustain MMI, the claimant would not need to prove that it would enable him to return to work as required in the secondary medical services provisions.

¶42 However, there are obstacles even under the primary medical services rule. First, as already noted, the claimant must prove that a van is necessary for reasons other than transportation to and from medical appointments. Second, he must demonstrate that the van is necessary for him to "sustain" MMI. Third, he must show it is in fact medically necessary. He has satisfied none of these requirements.

¶43 In his testimony, Dr. Oakley did not testify that a van is necessary for the claimant to maintain his MMI status. Indeed, he did not indicate how the lack of a van would cause the claimant's status to deteriorate.

¶44 Other than the claimant's need for transportation to and from medical appointments, the only justification Dr. Oakley provided for a van was for the claimant's convenience and to improve his general mental health by allowing him to leave home more often. The fact that Dr. Oakley wrote a prescription and recommended a van is not conclusive as to medical necessity. If it were then insurers could be required to pay for cruises and a host of other services and activities which a physician "prescribes" to generally improve a claimant's quality of life and general mental health. A prescription is not sufficient. The physician must show that the prescription is for *genuine and necessary medical treatment*.

¶45 Medical necessity also encompasses a requirement that the treatment be reasonable. In the context of transportation, a Chevy may serve the same purpose at a much lower cost than a Rolls Royce. I find nothing in the statutes which require a Rolls Royce where the Chevy[(1)] would be adequate.

¶46 In this case, the claimant already has a means of transportation available to him and is able to use it. He and his wife own a car. He is able to transfer into and out of the car and to

take his portable wheelchair with him. Certainly, a handicap accessible van would make the transfer more convenient, but it would do nothing to alleviate his need for a driver.

¶47 Moreover, the claimant has not shown that alternative transportation is not available. There is a publically operated handicap accessible van available to him. The fact that it is inconvenient because it operates on a schedule is a Rolls Royce argument and is unavailing.

¶48 The claimant also testified that during winter months, the public van will not go up his road. He has provided no further details as to how often that occurs. Anyone living in Montana knows that snow and bad roads are ordinarily a sporadic occurrence. I am unpersuaded that the public van is unavailable during the entire winter, or even for significant periods of time.

¶49 The claimant also has not provided evidence showing that he cannot arrange for other transportation when needed. Indeed, he has never contacted his claims adjuster to request transportation. He chose instead to demand a van.

¶50 Thus, even if the medical benefits statutes would allow the Court to order payment for a handicap accessible van, a handicap accessible van appears to be a Rolls Royce and the Court declines to order the State Fund to pay for one.

¶51 The claimant has asked for penalties and attorney fees. They may be awarded only if the claimant prevails, and he has not. Moreover, they require a finding that the insurer unreasonably denied his request for a van. § 39-71-611, MCA (1987-2003), § 39-71-2907, MCA (1991-2003). Even if I am wrong in denying the claimant a van, I have found that the insurer acted reasonably in denying the request.

¶52 Finally, I note the claimant's motion to reconsider my order quashing his subpoena for records of the Montana Health Systems (MHS). I quashed the subpoena because the sought after documents were not identified in timely fashion and the subpoena was served at the 11th hour. The failure to identify the documents in a timely fashion is conclusive. Moreover, the documents the claimant seeks would not affect my decision in this case. Whether or not the MHS thought the van was medically necessary, that determination would be entitled to no more deference than Dr. Oakley's prescription. Even without the subpoenaed records, the claimant had a full opportunity to provide a factual basis for his request.

JUDGMENT

¶53 Under the facts presented in this case, the claimant is not entitled to have the State Fund furnish him with a handicap accessible van. His petition is therefore **dismissed**. Dismissal is **without prejudice** since future circumstances could conceivably justify a renewed request.

¶54 This JUDGMENT is certified as final for purposes of appeal.

¶55 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 15th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Thomas E. Martello
Submitted: December 17, 2003

1. My apologies to General Motors and its Chevrolet Division.