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RISK ALERT

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CASE LAW UPDATE

Court Addresses Defense Liability for Life Care Plan and Lawn Care Services

Robbie Scarboro was working for Emery Worldwide Freight as a utility driver when he sustained an injury to his upper back and left shoulder in November 1998. Emery accepted liability on a Form 60 and authorized treatment with Dr. Erik Borresen, who diagnosed "left low thoracic neuropathy, left pectoralis transposition, chronic myofascial neck and shoulder pain, chest pain, lumbar disc disease, right knee meniscal tear, depression, and muscle contraction headaches." He ultimately concluded it was highly unlikely that Scarboro would be able to return to gainful employment.

Scarboro later retained Laura Weiss, a registered nurse and certified life care planner, to prepare a life care plan. She recommended that he be provided lawn care services and grab rails and handrails in his home. Dr. Borresen reviewed Weiss' recommendations and agreed they were "reasonable and medically necessary"

Later, Scarboro requested that he be reimbursed the $4,700 he paid for the life care plan. When the defendants refused, he filed a motion asking that they be ordered to do so, but it was denied by a special deputy commissioner. He then requested a hearing, which was held by Deputy Commissioner Ronnie Rowell, who agreed with Scarboro and ordered the defendants to pay for Weiss' life care plan and the lawn care services she recommended.

On appeal, the Full Commission agreed that the defendants were responsible for the cost of the life care plan, but not for lawn care services:

"An ordinary necessity of life is to be paid from the statutory wages provided by the Workers' Compensation Act. Extraordinary and unusual expenses are embraced in the 'other treatment' language of N.C. Gen. Stat. Section 97-25.... In the present case, the lawn care services recommended by the life care plan are ordinary expenses of life for plaintiff and are not extraordinary and unusual expenses … incurred as a result of his work-related injury."

Both parties appealed. The defendants argued that they were not liable for the cost of the life care plan because it was never recommended by an authorized treating physician and not used by claimant's doctors in their medical treatment decisions. But, on September 2, in ***Scarboro v. Emery Worldwide Freight Corp.,*** the Court of Appeals rejected those arguments as "irrelevant" and cited the Supreme Court's decision in ***Timmons v. N.C. Dept. of Transportation*** for the proposition that preparation of a life care plan qualifies as a "rehabilitative service" under N.C.G.S. § 97-25, even if no doctor has recommended it.

Applying the holding in ***Timmons*** to the issues raised in ***Scarboro,*** the Court held that Dr. Borresen's review of Weiss' life care plan and agreement that its accommodations were reasonable and medically necessary supported the Full Commission's conclusion that it was a "reasonable rehabilitative service" and "reasonably necessary for plaintiff to function optimally, avoid potential complications related to his injuries, and lead a productive life."

The Court turned next to claimant's appeal from the Commission's refusal to order the defendants to pay for lawn care services and agreed that "just because the life care plan was determined to be a reasonable medical expense, defendants are not necessarily required to pay for each item mentioned in the plan." Although claimant argued that his chronic pain made lawn cares services medically necessary and testified that he had hired a lawn care service because he was concerned that his homeowners' association would levy penalties against him if he did not keep his yard in compliance with the neighborhood's restrictive covenants, and notwithstanding testimony from two doctors that he should avoid performing yard work because of his back and shoulder problems, the Court held that "providing plaintiff with the resources to comply with this restrictive covenant does not rise to the level of 'other treatment' [within the meaning of N.C.G.S. § 97-25]."

Risk Handling Hint: While ***Timmons*** involved an employee rendered paraplegic by his work-related injury, the Court's decision in ***Scarboro*** makes it clear that the employee need not suffer from paraplegia, and the treating doctor need not recommend that a life care plan be prepared,

for the Commission to have the authority to order the defendants to pay for either its preparation or implementation of its recommendations. However, it is also clear from ***Scarboro*** that the defendants are not automatically liable for all of the recommendations made in a life care plan. In addition to the lawn care services that were rejected in ***Scarboro***, the Court of Appeals refused to find the defendants liable for an injured worker's consumer debts in ***Grantham v. Cherry Hospital*** and held in ***McDonald v. Brunswick Electric Membership Corp.*** that neither the statute's "other treatment or care" nor "rehabilitative services" language obligates an employer to provide a specially equipped van to a wheelchair-using plaintiff.

Court Breathes New Life into Presumption of Continuing Disability

Robert Alphin sustained an admittedly compensable injury to his low back in March 1990, after which his employer, Tart L.P. Gas, agreed to pay TTD for "necessary weeks" pursuant to a Form 21 agreement. He returned to work on at least two occasions, but went back out and was paid further TTD pursuant to a Form 26 agreement. Later, his weekly checks stopped when the Commission approved a Form 24, but the parties subsequently entered into a second Form 26 agreement to pay him for a 10 PPD rating to his back.

When Alphin went out of work again, TTD was reinstated pursuant to a third Form 26. Then, he reached MMI, which led to a fourth Form 26, pursuant to which he was paid for an additional five percent PPD rating.

In March 1993, a fifth Form 26 was executed and TTD benefits resumed. But, in November of that year, after Alphin's neurosurgeon increased his PPD rating to 25% and released him to return to work with restrictions, the Commission ordered him to cooperate with vocational rehabilitation and awarded additional compensation for a 10% increase in his rating.

In April 1996, Alphin filed a Form 33, alleging permanent and total disability. He also moved for reinstatement of weekly benefits, contending that he had fully complied with vocational rehabilitation. But, the Full Commission entered an Opinion and Award finding that the defendants were entitled to terminate Alphin's benefits due to his failure to cooperate with vocational rehabilitation and because he had been capable of sedentary work since November 11, 1993.

Alphin appealed to the Court of Appeals, which affirmed the Commission's determination that he had not complied with vocational rehabilitation. But, it also held that the Commission was only authorized to *suspend* Alphin's benefits until his unjustifiable refusal to cooperate ceased, not terminate them. The case was remanded to the Commission with a directive to decide whether Alphin was entitled to TTD by showing that he was now willing to cooperate with vocational rehabilitation.

On remand, in an order dated December 8, 2000, the Full Commission denied Alphin's motion to resume benefits, as he had not proven that he was willing to cooperate in the rehabilitative process. It also amended its prior decision to make clear that benefits were being suspended, not terminated, and it repeated its earlier holding that Alphin was capable of sedentary work and, therefore, only entitled to compensation for that part of his 25% rating that had not already been paid. Alphin appealed to the Court of Appeals, but then failed to perfect the appeal and it was dismissed.

In April 2001, Alphin filed another motion to resume payment of TTD, alleging that the defendants had refused to provide vocational rehabilitation services despite his willingness to cooperate with them, but that motion was denied by the Commission's Executive Secretary. He then filed a Form 33, but the deputy commissioner who heard the case found that Alphin's assurances of cooperation lacked credibility.

On appeal, the Full Commission ordered Alphin to submit to an IME "to determine the extent of plaintiff's continuing disability, if any, and whether he would benefit from a resumption of vocational rehabilitation." Then, in March 2007, after that IME was completed and the doctor deposed, the Full Commission filed another Opinion and Award, in which it concluded that Alphin had failed to establish that his unjustified refusal to cooperate with vocational rehabilitation had ceased. Therefore, it found that he was not entitled to have his weekly compensation checks reinstated.

The Full Commission also held that the presumption of total disability that resulted from the parties' last Form 26 in 1993 ended when it ruled in December 2000 that Alphin had reached MMI, was capable of sedentary work and was only entitled to compensation for PPD, a decision that became final when claimant withdrew his appeal from it. The Commission also determined that he had failed to prove he was totally disabled or that he suffered from a diminished wage earning capacity after he refused to cooperate with the vocational services offered by the defendants in 1995.

Alphin appealed one more time to the Court of Appeals, which on September 16, in ***Alphin v. Tart L.P. Gas Company,*** affirmed the Commission's determination that he failed to prove that his unjustifiable refusal to cooperate with vocational rehabilitation had come to an end. However, the Court also found that the Commission erred when it concluded that claimant's presumption of disability ended with its Opinion and Award of December 8, 2000. The Court held that the burden of rebutting the presumption of continuing disability which arose from the parties' last Form 26 in 1993 remained on the defendants and it was error for the Commission to put the burden on Alphin to prove he was disabled: "plaintiff was not required to produce any evidence of disability, and, instead, the burden rested with defendants to prove plaintiff's employability." As a result, the Court has remanded the case back to the Commission for a determination as to whether the defendants rebutted claimant's presumption of continuing total disability.

In the course of reaching that remarkable decision, Judge Martha Geer, the author of the Court's opinion, cited ***Kisiah v. W.R. Kisiah Plumbing, Inc.,*** in which the Court of Appeals ruled in 1997 that "absent a settlement with the employee, an award of temporary total disability cannot be undone without resort to a lawful determination by the Commission that the employee's disability no longer exists." In citing ***Kisiah*** as authority, Judge Geer ignored the fact that the Commission made precisely such a determination in its December 8, 2000 Opinion and Award, when it found Alphin capable of sedentary employment, cut off his weekly total disability checks, and limited his future compensation to additional PPD benefits. To rule as the Court did, Judge Geer had to dismiss as "beside the point" defendants' argument that, as Alphin had withdrawn his appeal, *res judicata* and collateral estoppel precluded him from challenging the Commission's findings regarding the extent of his alleged disability.

In effect, the Court's holding allowed claimant to breathe life back into the "presumption of disability" that arose when the defendants admitted on the parties' March 1993 Form 26 that claimant was *temporarily* totally disabled from gainful employment, but which ended when the Commision determined that claimant was able to return to sedentary work and was no longer totally disabled from gainful employment. While claimant initially contested that holding, he eventually allowed it to become the law of the case by withdrawing his appeal from the Commission's Opinion and Award.

Risk Handling Hint: Because the decision in ***Alphin*** was unanimous, the defendants in it do not have an automatic right of appeal to the Supreme Court. That being so, whether they will be accorded an opportunity to contest Judge Geer's analysis of the legal issues raised in this case will be left to the discretion of the Supreme Court. As a result, risk managers and the parties whose interests they seek to protect may have to deal with the repercussions of this troublesome decision for some time to come.

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