SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

WILLIAM ROTH,
Claimant,

HF No. 172, 2007/08

v.

DECISION

PENNINGTON COUNTY WEED AND PEST CONTROL,
Employer,

and

SDML WORKERS' COMPENSATION FUND,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL§ 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Rapid City, South Dakota. Claimant, William Roth appeared personally and through his attorney of record, Michael Hickey. Heather Lammers Bogard represented Employer, Pennington County Weed and Pest Control and Insurer SDML Workers' Compensation Fund.

Issues

1. Payment for modifications to Claimant's home
2. Payment for van and handicap accessories
3. Extent of attendant care

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

At the time of hearing, William Roth (Claimant or Roth) was 77 years old. On July 17, 2007, Claimant was spraying weeds for Pennington County Weed and Pest Control (Employer) when he was thrown from the ATV he was driving. Roth sustained a traumatic brain injury that left him without the use of his left arm and leg. Due to his injury, Roth also has developed problems with his right knee and right side from overuse and suffers from incontinence. Roth's injury was reported to Employer and the claim was accepted as compensable.

Dr. Schindler performed a surgery to treat Roth's subdural hematoma, and his follow up care has been with Dr. Craig Mills. Dr. Mills prescribed a number of rehabilitation services for Roth including physical therapy, occupational therapy, and speech therapy. Dr. Mills also wrote a prescription for a wheelchair accessible van, home healthcare assistance, and modifications to Roth's home. Several issues have arisen regarding Insurer's coverage of Roth's medical expenses. Other facts will be developed as necessary.

Analysis

Pursuant to SDCL §62-4-1, the employer must provide reasonable and necessary medical expenses. SDCL §62-4-1 provides in part,

> The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title …The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense.

It is well established by the South Dakota Supreme Court that the Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper.

> It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Construction Co., 425 NW2d 396,399 (SD 1988).

Modifications to Roth's home

At the request of Dr. Mills, John Bosworth from Regional Rehab Institute conducted an Occupational Therapy Home Assessment at Roth's residence. Bosworth made the following recommendations regarding modifications to the house,

> Removal of wall to wall shag carpet throughout the home and replace with Berber carpet or laminate flooring to increase patient's safety and reduce trip hazards…Remove approximately 5 feet of center wall in living room to increase accessibility from bathroom and bedroom.

Mrs. Roth solicited two estimates from local contractors for the work that needed to be done to their home. She contacted Remodel Kings and A-1 Construction. Remodel King's estimate was for $4174.29 which included a new carpeting allowance of

$3,126.00, the carpeting to be chosen by Roth. A-1 Construction's estimate was for $1,143.00. This estimate did not include a flooring allowance; that was to be purchased and installed by the owner. Mrs. Roth chose Remodel Kings because they had the lower bid and because the insurance company had previously hired them to build a ramp to gain wheelchair access to the home, therefore Remodel Kings already had a relationship with the Roth's and the Insurer.

Based on the recommendations of Mr. Bosworth, the Roth's looked at both carpet and laminate flooring samples. The Roth's determined that laminate flooring would be the best option for their home and would be easier for clean-up and for Roth to navigate in a wheelchair. Mrs. Roth was able to find mid-price laminate flooring at a local store that was less expensive than comparable Berber carpet. Mrs. Roth was also able to utilize some left over ceramic tile from another project for the entryway. Remodel Kings completed the modifications to the Roth's home under bid at $3,914.29.

The bill was submitted to Insurer for payment. The Insurer reimbursed Roth's for a portion of the bill in the amount of $2,154.05, but denied $895.45 for work done by Remodel Kings. Insurer stated that the amount of reimbursement was based on its own estimate including installation of standard Berber carpet and cushion at $2.37 per square foot.

Scott Sogge, owner and manager of Remodel Kings did the work for the Roth's and testified live at the hearing. He testified that his estimates were based on industry averages and that he used $2.50 per square foot when providing an estimate to the Roth's. That represented a medium grade floor covering. He testified that the number provided by the insurance company represented a lower grade. Ultimately the laminate flooring chosen by the Roth's was a medium grade product that was within the budget, at a price that was less than the carpet.

Employer/Insurer asserted at hearing that Remodel Kings was a high end company and suggested that they were more expensive that other places in town. This argument is rejected, the Insurer itself, hired Remodel Kings to complete the ramp modifications on the Roth's home, and the bid submitted was less than the other contractor. The price for the work completed was reasonable.

Employer/Insurer also asserted at hearing that the Roth's old carpeting was 13 years old carpeting and that the Roth's received the benefit of new floor coverings at the Insurer's expense. Employer/Insurer further contend that Roth chose to go ahead with the more expensive floor coverings even after receiving the check for a lesser amount from Insurer. Employer/Insurer's assertion that Mr. Roth gained upgraded lifestyle as a result of his injury and need to modify his home is absurd. Employer/Insurer may have

preferred a different floor covering or contractor[1], nonetheless Employer/Insurer failed to satisfy its burden to show that the modifications that were made to the Claimant's home were not necessary or suitable and proper. Laminate flooring was consistent with the recommendations made at the request of Roth's treating physician and the work completed was necessary or suitable and proper.

Van and handicap modifications

Dr. Mills issued a prescription for a "handicap accessible wheelchair van for transportation needs", he clarified that Roth needed a "custom modified vehicle". Mr. Bosworth evaluated the vehicles that were owned by Roth when he conducted the Occupational Therapy Home Assessment. Mr. Bosworth recommended that Roth have a height between 32 and 24 inches from the seat to the ground for transferring into a car secondary to his height and decreased mobility. Roth was able to transfer into a 1990 Pontiac Grand Prix, however he needed moderate assistance, and due to his size he was unable to ride comfortably in the vehicle. Also it is necessary to transport Roth's wheelchair as well. Roth was unable to transfer into his vehicle, a 1970 pick-up truck, because the seat was approximately 45-50 inches in height.

Claimant previously used a wheelchair service when he needed transportation to and from doctor appointment and other outings. That service was discontinued by the insurance company in 2008.

The Roth's were able to obtain a van from Mrs. Roth's brother, owner of a local salvage yard. The vehicle was valued at $4,100. Roth's brother-in law arranged to give them a bill of sale on the vehicle for the purpose of submitting it to the insurance company; however no money was exchanged at the time of transfer because the Roth's did not have the funds available. It was agreed that when Roth had the money, he would pay the brother-in-law $4,100 for the van. Modifications were needed for the van, including a lift to lift the wheelchair, running boards, and a grab bar. The insurance company reimbursed Roth for those expenses to modify the van, however deny that Roth is entitled to reimbursement for the purchase price of the vehicle.

Claimant argues that the van is a reasonable medical expense under the definition of SDCL §62-4-1, and Dr. Mills has prescribed it as a necessary, suitable and proper expense. The South Dakota Supreme Court has previously rejected a claimant's request for a van where a physician has not offered an opinion that a van is a medical necessity. The Court held that, "[e]mployer is only responsible for medical necessities, not convinces, amenities, or aesthetically pleasing accoutrements". *Johnson v. Skelly Oil Co*., 359 NW2d 130, 134 (1985). The case at hand is distinguishable in that Dr.

[1] See *Krier v. John Morrell & Co*., 473 N.W.2d 496 (SD 1991). Claimant's physician recommended a weight loss program due to weight gain brought on by his work related injury. Supreme Court held that although Employer/Insurer presented testimony preferring a different weight loss program, the program chosen by the Claimant remained reasonable and necessary and Claimant was entitled to reimbursement.

Mills, the Claimant's treating physician has written multiple prescriptions for a wheelchair accessible van. In his report he opined to a reasonable degree of medical probability that Claimant's need for a van is a reasonable and necessary medical expense incurred as a result of Claimants work related injury of July 17, 2007.

Employer has not introduced any medical evidence to establish that the need for a wheelchair is not necessary, suitable and proper. Such a showing is required under South Dakota law. *Hanson v. Penrod,* 425 NW2d396, 399 (SD 1988). Employer/Insurer failed to satisfy its burden to show that the wheelchair accessible van as prescribed by Dr. Mills is not necessary or suitable and proper.

Attendant Care

Dr. Mills initially prescribed 24 hour attendant care for Roth following his accident. Visiting Angels provided around the clock care for Roth and assisted him with his therapy, exercise routine and other activities of daily living such as dressing, using the restroom, light housework, helping with meals, and bedtime routine.

On April 8, 2009, Dr. Mills saw Roth for a reevaluation. They discussed Roth's home care needs and Dr. Mills reported, "we discussed his needs for assistance in the home still although not a 24 hours caregiver per se. Evaluation needs to be made likely by therapy and family/staff as to when assistance is needed in the home, for what specific activities and provide this as needed."

On May 21, 2010, Dr. Mills met with Roth, his wife, and his case manager. They again discussed Roth's home care needs, equipment needs and plans to most cost effectively provide these needs. It was noted that Roth would participate in a quality of living evaluation where his abilities and needs would be assessed. Dr. Mills specifically stated that would form the basis for his care program with "appropriate changes and modifications if problems occur."

Roth was sent to Quality Living Inc. (QLI) in Omaha, NE, for the purposes of being evaluated. QUI recommended that Roth's attendant care be reduced to 7-8 hours per day in addition to 3-6 hours of community access time.

On August 2, 2010, Insurer informed Visiting Angels that it had decided to change home health care providers. Effective August 16, 2010, Interim Healthcare would begin to provide home health services for Roth. Interim Healthcare provided care in shifts from 7:00a.m. to 10:00a.m., noon to 1:30 p.m. and 5:00p.m. to 9:00p.m. Roth testified that since Interim had taken over his care, he is not always able to complete all his therapy and if he does, it is rushed and there are also concerns about no longer having assistance to use the restroom in the middle of the night. Roth has requested that his 24 hour care be reinstated.

On November 19, 2010, Roth saw Dr. Mills for his six month reassessment. Dr. Mills noted that his care had been reduced and that "Bill notes that things had not significantly changed in the last 6 months". It was discussed that there were some issues with Mrs. Roth not being able to provide adequate care for her husband during the overnight hours when he was ill or she was unable to provide care due to her own illness. It was also discussed that additional care hours were available if requested, which in this case, Mrs. Roth did not do. Dr. Mills encouraged Mrs. Roth to communicate her need for assistance when she needed it rather than waiting for the six month follow up appointments. Dr. Mills also concluded that several reasonable options were available to Roth to deal with his overnight needs including using a urinal or sleeping with his brace/ shoes to allow him to walk to the restroom unassisted.

It is clear from the medical evidence that Roth does not need 24 hour care. While Mr. Roth may not need continuous round the clock care as his condition improves, that is for his medical providers to evaluate periodically and recommend the appropriate level of care to ensure that all his needs are met and his therapy is completed as prescribed. Employer/Insurer shall continue to work with Claimant's physician and family to provide additional hours of coverage when necessary that are consistent with the most recent prescription issued by Claimant's treating physician. Additionally, it was determined at the hearing that Roth's community access hours were bankable to allow Roth to take some extended outings with his family and friends when he wished.

Conclusion

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 28th day of June, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya M Runyan*

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Taya M. Runyan
Administrative Law Judge