

WILLIAM WYTENBACK, Employee, v. LAIDLAW TRANSIT SERVS. and
AIG/CRAWFORD & CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 28, 2001

No. [REDACTED SSN]

HEADNOTES

HOME CARE SERVICES - FAMILY MEMBER - MINN. STAT. § 176.135, SUBD. 1A. Where the employee's friend provided home care services because of the employee's severe disability the friend would only be eligible for payment for the value of her services if they were provided pursuant to a prescription from a physician specifying the nature of the services, pursuant to the requirements of Ross v. Northern States Power Co., 442 N.W.2d 296, 42 W.C.D. 7 (Minn. 1988).

Affirmed in part and reversed in part.

Determined by: Pederson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from an award of reimbursement for nursing services provided by the unmarried employee's live-in partner, Julie Baker. We reverse.

BACKGROUND

The employee, William E. Wyttenback, was born in 1955 and is currently 45 years old. On January 6, 1998 the employee was working for the employer, Laidlaw Transit Services, as a driver of a "metro mobility" van transporting handicapped clients, when he slipped on ice outside the Veteran's Administration Medical Center and sustained an admitted work injury which resulted in comminuted fractures of the vertebrae at C4-C8 and a fracture of the right elbow. The employee subsequently underwent surgery to the cervical spine in March 1998, September 1998 and December 1999. (Exhs. H, I.)

The employee has not returned to work since the injury. He testified that, as a result of his injury, he cannot lift his right arm or leg and has little control on his right side. Use of the left arm is also somewhat limited due to tremors. He can ambulate for short distances, but only with the aid of crutches. The employee has lived with a friend, Julie Baker, since some time in 1997. Ms. Baker has helped him with various activities of daily living since the date of injury. (T. 42-47.)

The employee first began working with a qualified rehabilitation consultant (QRC), Kirsten Peterson, on April 4, 1998, shortly after his first surgery. At that time, the employee was not receiving professional home nursing services. The employee told the QRC that he needed help dressing himself, with food setup for meals, as well as with transportation to and from medical appointments, and that his friend Julie Baker was helping him with these tasks. The need for evaluating home health care services for the employee was not considered at that time. Subsequently, however, the issue was raised with the QRC because Ms. Baker was working and the employee was left at home for extended periods, causing concerns about his safety. (T. 25-30.)

On September 10, 1998, following the employee's second surgery, the employee's treating physician at the Twin Cities Spine Center, Dr. Francis Denis, M.D., issued a prescription for home care, specifically approving a personal care assistant, but limited to two hours per day for two weeks. No further action was taken by Dr. Denis concerning the home health care needs of the employee until March 25, 1999, when he issued a prescription for a home health aide assessment and treatment following the evaluation. (Exh E.)

The first evaluation of the employee's needs was contained in a report dated September 21, 1999 from the employee's occupational therapist at Courage Center, Kathy Wendlandt. The report described the employee's functional abilities in conjunction with an assessment for adaptive equipment. At the time of the assessment in September, the employee had significant weakness of the right upper and lower extremities. Ambulation was limited to 30 feet using two Lofstrand crutches and minimum assistance. There was a limited ability to bear weight on his right lower extremity and the employee reported complete numbness of his right upper and lower extremities. The left upper and lower extremities were both limited by range of motion and strength. There was loss of coordination bilaterally and clonus was present in the right upper extremity. Ms. Wendlandt considered the employee in need of moderate to maximal assistance for all self-cares, including dressing, bathing, grooming, hygiene and other basic activities of daily living, such as cutting food, opening containers, doors and drawers, and meal preparation. (Exh. I.) On December 20, 1999, following the third surgery, Dr. Denis again prescribed home care to include "evaluate & treat (wound check, brace check, aide as needed)." (Exh. E.)

Becklund Home Health Care developed an assignment plan for home health aide service for the employee on December 22, 1999. The plan provided for morning care tasks to include assisting the employee out of bed and into the bathroom, aiding him with showering and drying, and helping him to dress. Noon care included meal preparation and setup. For evening care, the plan called for meal preparation and setup, changing bed linen as needed, assisting the employee with grooming, shaving and taking an evening shower, changing wound dressings, and helping him into his nightclothes. The plan also called for homemaking as directed to include light housework, kitchen cleanup and grocery shopping as needed. The total estimated time for the full services needed was from four to six hours plus help at lunch per day. (Exh. J.)

Becklund Home Health Care, however, was unable to provide these services. The employee's QRC contacted several home health care agencies attempting to secure a home health aide for the employee, but was unable to obtain services. (Exh. A; T. 38.) All this time the employee's friend continued to provide assistance to the employee on a daily basis. On May 22,

2000 Dr. Denis prescribed two to three months treatment through the Courage Center to include physical therapy modalities as needed. (Exh. E.)

An occupational therapy assessment was performed at Courage Center on July 19, 2000. The assessment reported that the employee required assistance with all activities of daily living, including shaving, showering and drying, nail care, and brushing teeth, including placement of toothpaste on the toothbrush. He required assistance in dressing his upper body secondary to significant pain with raising his arms above 90 degrees, and assistance in dressing with respect to the right lower extremity. The employee was unable to hold a pen secondary to fatigue. He was unable to sit beyond about half an hour. The employee reported that he was home alone for two to three hours in the morning and again for two to three hours in the evening. Examination showed left shoulder flexion to 55 degrees and right shoulder flexion to 50 degrees with tremors in the right and complaints of pain. The assessment concluded that occupational therapy was indicated to reexplore adaptive equipment options, assistive devices and environmental controls to maximize the employee's independence in the activities of daily living and to increase his safety in emergency situations. (Exh. H.)

Kathy Wendlandt performed a home care assessment on August 31, 2000. Her recommendations again included that the employee receive assistance with household management including cooking and cleaning, assistance with bathing, dressing and hygiene. (Exh. G.) The employee was discharged from occupational therapy at the Courage Center on September 7, 2000. The discharge summary noted that he had been seen twice weekly for several months for pool, land and home therapeutic exercises focused on improving flexibility, strength, conditioning, ambulation, transfers, self-cares and pain management, and expressed the conclusion that the employee continued to require assistance with basic dressing, bathing, hygiene, housekeeping and meal preparation. It was recommended that the employee be provided with a personal care attendant for approximately 3-6 hours per day to maintain his independence and safety. (Exh. F.)

The employee and Ms. Baker described the specific care for the employee performed by Ms. Baker. Calendars kept by Ms. Baker indicating the specific home nursing and other care she provided to the employee were submitted into evidence (Exhibits B & C). The calendars covered the period from shortly after the employee's injury on January 6, 1998 to the date of hearing in September 2000. (T. 44.) The testimony and the calendars indicated that Ms. Baker typically provided morning care to the employee of preparing and setting up his morning meal, assisting him into the bathroom and helping him with grooming, either by washing his face and hands or helping showering, and then helping him back to his bed. Depending on her own work schedule, she also often prepared a lunch for the employee. The time she attributed to this morning care ranged from one-half hour to as much as three hours, depending on the tasks performed. On most days, Ms. Baker returned home from work over her lunch period and provided from one-half to three-quarters of an hour of additional care, setting up lunch for the employee and helping him eat, and again helping him into and out of the bathroom. In the evenings, the care provided ranged from one and one-half to four hours, with preparation and setup of an evening meal, additional help with the employee's grooming, changing of dressings, and again helping the employee in and out of the bathroom, often including helping him to take an evening shower. In addition to these tasks, the employee's claim for reimbursement asked for payment for Ms. Baker's

time spent in grocery shopping, laundry, housekeeping and changing the employee's bedding. (T. 43-49, 65-70; Exhs. B, C.)

The employee's Medical Request seeking payment for the home care services provided by Ms. Baker was filed on April 17, 2000. The employer and insurer filed a Medical Response on May 3, 2000 which indicated that they did not object to paying Ms. Baker for certain services provided to assist the employee, but that no specific details about the claimed times and amounts had been provided to them. The matter was considered by an arbitrator in the Department of Labor and Industry in an administrative hearing held on June 21, 2000. Following the conference, the arbitrator issued an administrative order denying payment to Ms. Baker. On July 3, 2000, the employee filed a request for formal hearing on the issue. (Judgment Roll.)

The matter came on for hearing before a compensation judge of the Office of Administrative Hearings on September 27, 2000. At the hearing, the parties stipulated that a reasonable rate for services provided by Ms. Baker, should any payment be awarded, was \$10.00 per hour. The employer and insurer disputed payment for any services not meeting the four-part test set forth in Ross v. Northern States Power Co., 442 N.W.2d 296, 42 W.C.D. 7 (Minn. 1988). The parties agreed that the employee had been receiving temporary total disability benefits and no issue of whether the employee was entitled to permanent total disability benefits had been raised for determination. (T. 10-11, 16-24.)

Following the hearing, the compensation judge awarded payment for all home care services set forth in Ms. Baker's calendars through the date of hearing, except for hours claimed for doing laundry and housekeeping. The employer and insurer appeal from that part of the period awarded before March 25, 1999.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, they "are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. *Id.* at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Factfindings may not be disturbed, even though this court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.*

DECISION

The statutory provisions governing this dispute are found in subdivision 1 of Minn. Stat. § 176.135, which provides in pertinent part as follows:

(a) The employer shall furnish any medical . . . treatment, including nursing, . . . as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury. . . .

(b) The employer shall pay for the reasonable value of nursing services by a member of the employee's family in cases of permanent total disability.

In Ross v. Northern States Power Co., 442 N.W.2d 296, 42 W.C.D. 7 (Minn. 1988), our Supreme Court interpreted the scope of the statute with respect to liability for home health care services provided by a family member. In interpreting the statute, the court made a clear distinction between cases where the employee is permanently totally disabled and cases where the employee is otherwise disabled. The court concluded that the provision which allows reimbursement for family-provided nursing care for permanently totally disabled employees, added by the legislature in 1953, "was meant to *expand* the type of nursing care provided in cases of extreme disability." 442 N.W.2d at 299, 42 W.C.D. at 13 [emphasis added]. The court then specifically held that

. . . if the disability is permanent partial, temporary total or temporary partial, only nursing care to cure and relieve the effects of the injury must be furnished; but if the disability is permanent total, a broader type of general nursing care is reimbursable. . . . Clearly, the nursing services provided to a permanently and totally disabled person go well beyond those reimbursable in other circumstances to cure and relieve the effects of the injury.

Id. The Supreme Court held that the cost of care provided to employees who are not permanently totally disabled is payable only under the first sentence of § 176.135, subd. 1(a). For non-permanent total cases, the Supreme Court in Ross held that, in order to qualify for payment, the services must meet a four-part test which requires that:

- (1) the employer knows of the employee's need for nursing services to cure and relieve the effects of the work-related injury,
- (2) the nursing care is specifically prescribed and performed under the direction and control of a physician,
- (3) the care given is beyond the scope of normal household duties and is of the type usually rendered by trained medical personnel, and
- (4) there is a means of determining the reasonable value of the services performed.

Id. at 300, 42 W.C.D. at 15.

The issue of compensation for the home care in the case before us was presented below in a somewhat unusual procedural posture. While the employer and insurer conceded at oral argument before this court that the employee likely has or will become permanently totally disabled, they disputed whether the employee's total disability had become permanent, rather than temporary, prior to March 25, 1999, the date after which they have agreed to provide up to six hours of daily services. When the issue of home care was presented to the compensation judge below, no claim for permanent total disability had been made and that issue was deferred and properly not considered by the compensation judge. See Lundgren v. Paul Schmitt Music Co., 207 N.W.2d 534 (Minn. 1973) (determination of permanent total disability, and related award of nursing services by a family member reversed and remanded where the question of permanent total disability was not put in issue by the employee's petition for reimbursement of such services.)

The compensation judge in the present case found that the evidence indicated that the employee required up to six hours of home care per day, including cooking, grocery shopping, changing bedding, and assistance with toileting, meal preparation, feeding, and preparation of medications for the entire period claimed. She found that such assistance had been provided to the employee by his friend Julie Baker as outlined in Ms. Baker's calendars, and awarded payment by the employer and insurer at the stipulated rate of \$10.00 per hour for all such hours shown, with the exception of time spent in laundry and housekeeping. (Findings 4-6, Order 1.)

The employer and insurer appeal from that part of the payment awarded for the period prior to March 25, 1999. They argue that during that period the employee was categorized as temporarily totally disabled and the compensation judge erred in failing to apply the four Ross factors applicable to non-permanent total cases. They contend that, under these factors, reimbursement should not have been awarded for any of the home care provided by Ms. Baker during periods when no home care had been medically prescribed, specifically, prior to September 10, 1998 when the employee's treating physician first issued a prescription for two weeks of home care, and again from two weeks after that date until March 25, 1999, when Dr. Denis prescribed the home health assessment that resulted in a determination that the employee required from four to six hours of home health care per day. They further argue that reimbursement for the two weeks following September 10, 1998 should have been limited to two hours per day, consistent with the September 10, 1998 prescription. They also contend that some of the types of activities for which reimbursement was awarded, such as grocery shopping, failed to meet the Ross tests. The employer and insurer agree that the Ross standards were met following March 25, 1999 and have paid the employee's friend for up to six hours per day since that date.

The employee argues that the Ross factors are no longer strictly applicable to non-permanent total disability cases, citing various decisions which he contends have broadened the availability of home care by a family member in non-permanent total disability situations. In all of the cases cited by the employee, however, with one exception, the employee had an admitted or adjudicated permanent total disability.¹ In the remaining case, Thomas v. Eveleth Mines,

¹ The other cases cited by the employee are Abraham v. Kottke Bus Service, Inc., 48 W.C.D. 92 (W.C.C.A. 1992), Greenwald v. City of Robbinsdale, 47 W.C.D. 155 (W.C.C.A.

42 W.C.D. 437 (W.C.C.A. 1989), which did deal with a non-permanently totally disabled employee, this court expressly applied the four-part Ross test, as we have consistently done in cases addressing home care by a family member in the non-permanent total disability context².

The employee argues, in the alternative, that language in the Ross decision suggests that the four-part test given in that case should not be applied in “cases of extreme disability”, whether the case is one of permanent total disability or temporary total disability. This was apparently the reasoning adopted by the compensation judge. (See Finding 4, which includes a finding that “[e]mployee has an extreme disability that necessitates a high level of care”.) While a distinction based on the severity of an employee’s disability might be a logical approach to the issue, the statutory language clearly limits payment for nursing services provided by a member of the employee’s family to “cases of permanent total disability.” Minn Stat. § 176.135, subd. 1(b). The Supreme Court’s discussion of “extreme disability” in Ross was only an explanation of that court’s understanding of the legislative rationale for distinguishing between temporary and permanent total disability, and did not constitute an endorsement of a standard based on a sliding scale of the severity of the disability independent of whether it was permanent or temporary in duration. The Ross decision very clearly requires that non-permanent total cases be determined under the four factors quoted above. Where the Supreme Court has unambiguously interpreted a statute, it is not for this court to consider other alternative interpretations.

Applying the Ross factors to the present case, we first note that the parties agree that the only two factors in dispute are factors (2), that the nursing care is specifically prescribed and performed under the direction and control of a physician, and (3), that the care given is beyond the scope of normal household duties and is of the type usually rendered by trained medical personnel.

In the present case, there was no prescription for home nursing services until September 10, 1998, and then only for two hours per day for two weeks. We find that a strict application of the Ross standard requiring that nursing care be “specifically prescribed and performed under the direction and control of a physician” precludes payment for the employee’s friend’s services except for the period specifically directed by his surgeon, Dr. Denis. The only case where a contrary result was allowed was in Williams v. John A. Dalsin & Sons, slip op., (W.C.C.A., May 3, 1993), where we concluded that the compensation judge had not clearly erred in awarding payment for nursing treatment by a family member of an employee with a non-permanent total disability despite the technical absence of a specific prescription, where the services were clearly required and where the evidence supported the judge’s conclusion that the services had been rendered under the general supervision of the employee’s treating physician. In Williams, the family members were supervised by home health professionals who also provided services. Here, however, there is no evidence that the employee’s physicians supervised or

1992), Lundeen v. Horizon Fabricators, Inc., 56 W.C.D. 336 (W.C.C.A. 1997) and Sorcan v. USX Corp., 58 W.C.D. 159 (W.C.C.A. 1997).

² See, e.g., Schmidt v. Ramsey Clinic, slip op, (W.C.C.A. January 26, 1995); Pieper v. Van Den Bergh Foods, slip op. (W.C.C.A., February 24, 1994); Williams v. John A. Dalsin & Sons, slip op. (W.C.C.A., May 3, 1993).

endorsed the provision of services by Ms. Baker prior to the date of the initial prescription, nor were medical records submitted for this period to support a determination of the extent to which the employee's medical disabilities required these services. In addition, no subsequent report from the employee's physician was submitted to support a conclusion that the physician was monitoring the delivery of services by the employee's friend. Under the standards set forth in Ross, there is no evidence to support the finding that any of the services prior to this date are compensable. This case is distinguishable from the Williams case and we do not believe further erosion of the Ross principles would be permitted by the clear directive in Ross. We therefore reverse the award of reimbursement for services prior to September 10, 1998.

Further, the initial prescription was only for two weeks, during a recovery period from a major surgery. Thereafter the record is devoid of any medical evidence regarding the employee's specific need for nursing assistance until the employee's needs were assessed by Courage Center in September 1999. The employee's treating physician did not even make a further recommendation regarding assessment for such care until March 25, 1999. Accordingly, applying the Ross standard, the record here lacks adequate support for the compensation judge's finding that the employee was entitled to home health care assistance between the expiration of the two-week, two hour per day prescription provided by Dr. Denis on September 10, 1998 and March 25, 1999. We therefore reverse the award of reimbursement for home health services provided by Ms. Baker prior to March 25, 1999, with the exception of reimbursement for two hours care per day for two weeks in September 1998 consistent with Dr. Denis' September 10, 1998 prescription.

In light of the procedural posture of this case, we are constrained to note that, should the employee be subsequently determined to have been permanently and totally disabled for any period prior to March 25, 1999, our decision is without prejudice to any claim he may have for payment for the services provided by Ms. Baker after the date of becoming permanently totally disabled and denied here under the Ross standard. This decision does not address the issue of whether the employee, if adjudged to have been permanently and totally disabled, would be permitted to seek reimbursement for the services denied in this claim, as that issue was not presented by the facts of this case.