AFFIRMED by the Court of Appeals, Record No. 0682-20-4 (December 8, 2020)
(Unpublished Opinion)

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Apr. 22, 2020

ANGELA ROSS v. CUMBERLAND HOSPITAL
ACE AMERICAN INSURANCE COMPANY, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00000590379
Claim Administrator File No. B233105063000101331
Date of Injury February 23, 2012

ANGELA ROSS v. CUMBERLAND HOSPITAL
ACE AMERICAN INS CO (TRAV INDEMNITY CO), Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA02000015934
Claim Administrator File No. B533101123000101331
Date of Injury February 16, 2012

Steven T. Harper, Esquire
For the Claimant.

Joseph F. Giordano, Esquire
For the Defendants.

REVIEW before Commissioner Marshall, Commissioner Newman and Commissioner Rapaport at Richmond, Virginia on February 14, 2020.

This case is before the Commission on remand from the Court of Appeals of Virginia. In *Cumberland Hosp. & Ace Am. Ins. Co. v. Ross*, 70 Va. App. 761 (2019), the Court of Appeals of Virginia reversed and remanded for further proceedings in accordance with its opinion. We reconsider the case on remand as directed.

I. Material Proceedings

We incorporate the material proceedings stated in our January 24, 2019 Opinion.

The Court of Appeals summarized the Commission's Opinion:

> In addressing Ross's claim for compensation for care provided by her spouse, the Commission acknowledged employer's argument that the Commission had to apply the holding in Warren Trucking Co. v. Chandler, 221 Va. 1108 (1981), before it could award compensation for spousal care. Although the Commission enumerated the four requirements set out in Chandler, which it referred to as the "Chandler test," it did not address whether those requirements had all been met. The Commission reasoned that the Chandler test was only applicable in determining whether home health care was medically necessary. The Commission found "the evidence and the parties' stipulations showed home health care was reasonable and necessary treatment causally related to the traumatic brain injury and associated conditions" suffered by Ross. It also found the evidence proved Ross's spouse was the best person to care for Ross because she trusts him and he was a familiar and calming influence. Based on these findings, the Commission concluded "an application of the Chandler test was not necessary."

Ross at 766. The Court held "[w]hether disputed medical treatment is compensable as 'other necessary medical attention' within the definition of Code § 65.2-603 was a mixed question of law and fact . . . ." *Id.* (quoting *Haftsavar v. All Am. Carpet & Rugs, Inc.*, 59 Va. App. 593, 599 (2012)).

The Court quoted the test adopted by the Supreme Court in *Chandler*:

> [T]he employer must pay for the care when it is performed by a spouse, if (1) the employer knows of the employee's need for medical attention at home as a result of the industrial accident; (2) the medical attention is performed under the direction and control of a physician, that is, a physician must state home nursing care is necessary as the result of the accident and must describe with a reasonable degree of particularity the nature and extent of duties to be performed by the spouse; (3) the care rendered by the spouse must be of the type usually rendered only by trained attendants and beyond the scope of normal household duties; and (4) there is a means to determine with proper certainty the reasonable value of the services perform by the spouse.

Ross at 767 (quoting *Chandler* at 1116).

The Court held *Chandler* framed "the dispositive question [as] whether, under the circumstances of *this* case, the services performed by *this spouse* in attending to the needs of the disabled claimant qualify as 'other necessary medical attention' within the meaning of Code [§ 65.2-603]." *Ross* at 770 (quoting *Chandler* at 1114 (emphasis added)). It concluded where a claimant seeks compensation for care rendered by his or her spouse, the four *Chandler* requirements must always be considered to determine if the employer must pay for that particular care. *Id*.

On remand, the Court advised that if we determined "the treatment provided by the employer was inadequate treatment for the employee's condition and the unauthorized treatment received by the claimant was medically reasonable and necessary treatment, employer should be responsible for the treatment." *Ross* at 772 n. 3 (quoting *Vital Link v. Hope*, 69 Va. App. 43, 63 (2018) quoting *Shenandoah Prods., Inc. v. Whitlock*, 15 Va. App. 207, 212 (1992)). If we made such a determination and the claimant chose her spouse to provide the treatment, we were required to apply the Chandler test. *Id*.

II. Finding of Fact and Rulings of Law

We have reviewed the record. Our review included the previous Opinion and awards, hearing testimony, the designated medical records, the post-hearing position statements, the exhibits, the August 1, 2018 Opinion, the Request for Review, the parties' Written Statements, the Court of Appeals of Virginia's Opinion, and the oral arguments conducted on February 14, 2020.

A. Inadequate Treatment Provided by Defendants

The employer previously provided home health care to the claimant through a provider, Right at Home. After Right at Home ceased providing services, the employer never offered alternate home health care. The evidence established the treatment offered by the employer through Right at Home aggravated the claimant's anxiety and depression. Whether accurate or not, the claimant believed aides from the agency stole jewelry, attended to personal business and flirted with her husband. Kevin Ross testified the claimant had issues trusting people outside her family since suffering her traumatic brain injury.

We find after October 2017, the defendants did not provide the home health care prescribed by the treating physician, Dr. O'Shanick, and his associate, Madison Moore, PA-C. PA Moore's February 27, 2018 letter stated the claimant's experience with the agency "was detrimental to her health and recovery in that it increased her anxiety and depression." Dr. O'Shanick reviewed and joined this opinion on April 17. 2018. After Right at Home stopped providing home health care, Kevin Ross supervised the claimant's activities of daily living and monitored her safety.

B. Application of Legal Test of *Warren Trucking Co. v. Chandler*

As directed by the Court of Appeals, we analyze the facts on this record in the framework of the four-part *Warren Trucking Co. v. Chandler* test.

1. The defendants knew of the claimant's need for home health care at home as a result of the industrial accident.

The defendants stipulated that the claimant needs home health care services as a result of the accident. The claimant met the first part of the *Chandler* test.

2. The medical attention is performed under the direction and control of a physician, that is, a physician must state home nursing care is necessary as the

> result of the accident and must describe with a reasonable degree of particularity the nature and extent of duties to be performed by the spouse.

Home health care services were performed under the direction and control of the claimant's treating physician. Since 2016, Dr. O'Shanick and PA Moore consistently wrote the claimant needed home health care as a result of her traumatic brain injury and its sequalae. In an August 25, 2017 medical note, PA Moore stated it was medically necessary for the claimant's safety and well-being "that she is provided with a home health aide or family member oversight to help assist her with activities of daily living and to monitor safety concerns 24 hours a day, seven days a week." On October 16, 2017, Dr. O'Shanick indicated the claimant still needed twenty-four hour/seven day a week home healthcare for her safety and well-being. Dr. O'Shanick again affirmed the claimant's need for 24/7 home health care on December 17, 2017. He agreed the claimant's husband Kevin or daughter Mary should be in charge of her home health care for her medical safety and wellbeing 24/7. He opined this care was reasonable and necessary care caused by the claimant's work injuries. PA Moore's February 27, 2018 letter stated the claimant's experience with the agency "was detrimental to her health and recovery in that it increased her anxiety and depression. Having her husband as her primary caregiver would greatly decrease the chance of that occurring in the future." Dr. O'Shanick reviewed and agreed on April 17, 2018.

The claimant carries multiple diagnoses secondary to her traumatic brain injury. As of April 19, 2018, PA Moore listed the following: seizure disorder, disorder of initiating and sustaining sleep, cognitive communication disorder, dysexecutive disorder, depression, vision disorder with insufficient convergence, attention deficit disorder, anxiety, fatigue, apathy and hypopituitarism with growth hormone deficiency. At that time, PA Moore reported the claimant's

eleven prescription medications. These included Topomax, an anti-seizure medication, and several medications addressing anxiety, depression, hypopituitarism, disordered sleep and cognitive disorder. Seven prescriptions were prescribed to be taken once per day, two once per day at bedtime, Topomax twice per day, and a medication to prevent nausea and vomiting was prescribed to be taken as needed. Kevin Ross reminded her to take her medication. When the owner of Right at Home assessed the claimant, she determined the claimant required safety monitoring and medication reminders.

Dr. O'Shanick has stated home health care is necessary for the claimant's medical safety. He is aware that the claimant requires eleven prescription medications. Taking these medications appropriately is part of medical safety. In addition, Kevin Ross testified the claimant has absence seizures, she has burned and cut herself, left the stove or oven on, become unsteady, and fallen. She has memory impairment and is not left at home alone. She does not leave home alone. The claimant's cognitive dysfunction requires monitoring of safety concerns twenty-four hours per day, seven days per week. Her traumatic brain injury resulted in her need for home health care for safety monitoring. The claimant met the second part of the *Chandler* test.

3. The care rendered by the spouse must be of the type usually rendered only by trained attendants and beyond the scope of normal household duties.

The evidence established the care rendered by Kevin Ross was the type usually rendered by trained attendants, namely home health aides. In response to a question sent to him on October 16, 2017, Dr. O'Shanick agreed the claimant needed twenty-four hour, seven days per week home health care for her safety and well-being. He also agreed "the above statement of home health care consists part of monitoring Mrs. Ross for her care and safety is normally performed by

a nurse and or medical attendant." No medical evidence in the record contradicts this medical opinion. Kevin Ross is a registered nurse experienced in working with brain injured patients. He is well qualified and trusted by his wife, despite her suspicion and cognitive impairment. He is performing the same services which were provided through Right at Home by health care professionals – certified nursing assistants and home health aides. We find the home health care, consisting of monitoring for health and safety, is usually rendered only by trained attendants.

In *Low Splint Coal Co. v. Bolling*, 224 Va. 400, 404-405 (1982), the Court held the definition of "attention" included "nursing care at home given a disabled employee by the spouse." *Id*. quoting *Chandler*, 221 Va. at 1116. The Supreme Court noted that term, "attention" might include observant care for the safety and well-being of the patient under a doctor's orders and attention to the needs or necessary personal services of the patient. *Id*. *See Howard v. Howard Bros., Inc*., JCN 239-41-37 (Apr. 30, 2013), *aff'd*, No. 1007-13-2 (Va. Ct. App. Mar. 18, 2014) (affirming Commission's award of home health care to claimant who required twenty-four-hour supervision due to safety concerns and total care for all activities of daily living.)

Here the claimant requires full-time monitoring for her medical safety. This monitoring exceeds normal household duties. A young child requires constant monitoring for safety. It is not normal or usual for adults to require 24/7 monitoring of safety. Because of the claimant's traumatic brain injury and the resulting significant depression, anxiety and cognitive dysfunction, the claimant requires constant monitoring for her safety.

We find this safety monitoring amounts to "other medical attention" that exceeds the scope of normal household duties. The claimant met the third part of the *Chandler* test.

4. There is a means to determine with proper certainty the reasonable value of the services perform by the spouse.

As the Deputy Commissioner found, the home health aides from Right at Home were paid $9.00 per hour at the time they monitored the claimant. This is the amount she assigned as hourly payment to Kevin Ross. The claimant satisfied the fourth part of the *Chandler* test.

IV. Conclusion

We AFFIRM the Deputy Commissioner's August 1, 2018 Opinion.

We AWARD an attorney's fee of $2,000, in addition to the $2,500 the Deputy Commissioner awarded in the August 1, 2018 Opinion, and an additional fee of $1,000 for a total of $5,500, to Stephen T. Harper, Esquire, for legal services rendered the claimant. The claimant shall pay the attorney's fee directly.

JCN VA02000015934 is ORDERED to be returned to the Claims Services Department until such time as either party requests its referral to the hearing docket.

This matter is removed from the review docket.

RAPAPORT, COMMISSIONER, Dissenting:

Respectfully, I dissent.

Contrary to the majority, I disagree that the third element as required by the Supreme Court in *Warren Trucking v. Chandler*, 221 Va. 1108 (1981), has been met.

It is well-established that *Chandler* set the standards of other medical attention. Crucial to our inquiry on remand, *Chandler* instructs that the care provided is to constitute medical treatment "usually rendered only by trained attendants and beyond the scope of normal household

duties." 221 Va. at 1116. Here, the evidence established that the claimant's husband and step-daughter provide medical reminders, monitor for fall protection, and assist with transportation. I find these assistances insufficient to meet the *Chandler* test as directed by the Court. For example, we recently considered a similar situation in *Bartley v. Larry Sheffer*, JCN VA00001273425 (Aug. 16, 2018). In *Bartley,* the claimant's wife "helped with bathing, cutting foods, driving to medical appointments, administering medications, assisting the claimant out of his recliner, and observing the claimant due to his fall risk." (Op. 6.) The Commission found Mrs. Bartley to be ineligible for compensation for her care, emphasizing that these duties were not "the type usually rendered only by trained attendants" as required by *Chandler* at 1118. I do not perceive a distinction in the current case and disagree with the lower decision's depiction of a level of "safety monitoring" to render such as that rendered by trained attendants and exceeding normal household duties.

The care which the claimant's husband renders in this case is almost identical to that rejected by the Supreme Court of Virginia in *Chandler*. Mr. Chandler suffered injuries to his head, neck, and back. Mr. Chandler was unable to drive, was unsteady on his feet, and experienced frequent falls. However, the Court found that the care rendered by Chandler's wife, consisting of "bathing, shaving, feeding, assistance in walking, help with braces, aid upon falling, driving and administering routine medications" was "not beyond the scope of normal household duties." *Chandler* at 1118. The Court reasoned: "None of these duties, when considered in light of the claimant's condition and the extent of his disability, is of the type usually rendered only by trained attendants." *Id.*

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.