ANDREA BOUCHER
(Appellee)

v.

JOHN F. MURPHY HOMES, INC.
(Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Argued: November 19, 2014
Decided: March 9, 2015

PANEL MEMBERS: Hearing Officers Greene, Collier, and Elwin
BY: Hearing Officer Greene

[¶1] John F. Murphy Homes, Inc. (Murphy Homes), appeals a decision of a Workers' Compensation Board hearing officer (*Goodnough, HO*) granting Andrea Boucher's Petition for Payment of Medical and Related Services and directing Murphy Homes to pay for massage therapy sessions into the future without time limitation. Murphy Homes argues that (1) there was no competent evidence to support the hearing officer's finding that such treatment was reasonable and necessary, and (2) the authorization of future treatment without a time limit is contrary to law pursuant to *Vaillancourt v. Viner Brothers, Inc.*, Me. W.C.C. 89-136 (Me. App. Div. 1989). We agree with Murphy Homes' second contention, modify the decision accordingly, and affirm the hearing officer's decision as modified.

I. BACKGROUND

[¶2] Andrea Boucher worked for Murphy Homes as a direct support professional for developmentally disabled adults. While at work on January 12, 2012, she suffered a compensable injury to her left shoulder, upper thoracic spine, and lower neck when she slipped on stairs and grabbed a railing with her left hand. She underwent left shoulder surgery on May 24, 2012, but was left with residual myofascial pain in and around the shoulder, the upper back, and lower neck. She was able to return to work for Murphy Homes in a slightly modified position.

[¶3] Ms. Boucher continued to seek medical treatment for shoulder, back and neck pain. She had been prescribed pain medication and underwent physical therapy, osteopathic manipulation therapy, chiropractic treatment, and massage therapy, including neuromuscular therapy.

[¶4] On January 14, 2013, Ms. Boucher's last visit with her surgeon, she reported a recent exacerbation of her chronic pain. She saw Murphy Homes' preferred provider, Dr. Torres of WorkMed, up until February 25, 2013. Dr. Torres recommended "heat, stretch, self massage, theracane, [and her current] gym program." Ms. Boucher treated with her primary care provider, Kristie Knapp, FNP-BC, until April 30, 2013. Ms. Knapp recommended massage therapy twice per month for upper back, shoulder, and neck pain. Ms. Boucher underwent

massage therapy, including neuromuscular therapy, with Bette Swett-Thibeault, LMT.

[¶5] Murphy Homes filed a Notice of Controversy on October 29, 2012, indicating that it would no longer voluntarily pay for massage therapy treatments. Ms. Boucher continued to receive massage therapy from Ms. Swett-Thibeault through July 8, 2013.

[¶6] Ms. Boucher filed her Petition for Payment of Medical and Related Services, seeking payment for ongoing massage therapy treatments. Dr. Esponnette, a physical medicine and rehabilitation specialist, performed an independent medical examination pursuant to 39-A M.R.S.A. § 312 (Supp. 2014). With regard to treatment recommendations, Dr. Esponnette stated as follows:

> Her physical therapy, osteopathic manipulation, chiropractic manipulation, neuromuscular therapy [by Ms. Swett-Thibeault], and other tests have all been reasonable and necessary.
>
> Unfortunately, there is not much more to recommend for future treatment. She is a good candidate to continue with self massage, such as using a tennis ball within a sock and putting pressure on her back, using a Thera-cane, or getting a friend to do sustained pressure over the area. She is a candidate for topical agents, such as BioFreeze, Tiger Balm, Icy Hot, etc. She is a candidate for trigger point injections, especially the upper trapezius and supraspinatus muscles. Ms. Boucher is not a candidate for any further surgery.
> . . . .
>
> The massage treatment has been very appropriate. However, it is strictly palliative at this point. Paradoxically, I have seen individuals in her situation maintain a much higher level of activity capacity with occasional treatments such as once a month. While

> I think these treatments would be a reasonable intervention, I also have to admit that they are purely palliative.
>
> . . . . I do not believe osteopathic manipulation is going to necessarily improve her activity tolerance, whereas I do think that massage therapy likely would improve her activity capacity.

[¶7] With regard to trigger point injections, Dr. Esponnette further explained as follows: "The injection is not a very complex procedure, but the person doing the procedure needs to understand that there is a risk of puncturing the lung, hitting blood vessels, hitting nerves, etc. Furthermore, [Ms. Boucher] has multiple allergies and needs to be especially careful about the treatment."

[¶8] Ms. Boucher testified at a hearing on February 21, 2014, that she was able to obtain significant relief for up to a couple of weeks after each massage therapy session.

[¶9] The hearing officer granted the petition, stating as follows:

> I find and conclude, consistent with Dr. Esponnette's opinion, that ongoing massage therapy treatments would be reasonable, necessary and causally-related to the work injury. The fact that such treatment would be "palliative" does not render it non-compensable. Further, the employee is not currently taking narcotic or other prescription pain medications (all of which, it should be noted, are palliative in nature) and she "has multiple allergies and needs to be especially careful about treatment.". . . A non-pharmacologic pain treatment modality is therefore a good fit for Ms. Boucher at this time.

[¶10] In his original decision, the hearing officer directed that "the employer shall be responsible for the payment of charges associated with massage therapy services for Ms. Boucher in an annual amount not to exceed $1000.00

(from the date of this Decision)." Upon a motion for further findings of fact and conclusions of law filed by Murphy Homes, the hearing officer expressly addressed the "guidelines set forth by the prior Appellate Division in *Vaillancourt* . . ." and modified the directive to require Murphy Homes to pay for "two, one-hour sessions each month, or 24 sessions annually . . . in accordance with Board's fee schedule. . . ." Murphy Homes filed this appeal.

II. DISCUSSION

A. Evidence of Medical Necessity

[¶11] An employee who has suffered a work-related injury "is entitled to *reasonable* and proper medical, surgical and hospital services, nursing, medicines, and mechanical, surgical aids, *as needed*, paid for by the employer." 39-A M.R.S.A. § 206 (2001) (emphasis added). Murphy Homes first contends that the hearing officer erred when ordering payment for future massage therapy treatments because there is no medical evidence to support the hearing officer's finding that such therapy is *needed*, and Dr. Esponnette made no such finding.

[¶12] Dr. Esponnette's medical findings concerning treatment include the following: (1) Ms. Boucher's prior "neuromuscular therapy" was "reasonable and necessary"; and (2) although palliative, such future therapy "would be a reasonable intervention" that "likely would improve her activity capacity." Murphy Homes argues that Dr. Esponnette's failure to specifically state that such future treatment

was *necessary* left the hearing officer with no medical basis for such a finding. We disagree.

[¶13] The hearing officer's award of payment for further massage therapy treatments is supported by Dr. Esponnette's medical findings, as well as other medical evidence and Ms. Boucher's testimony. Ms. Knapp, Ms. Boucher's primary care provider, initially recommended massage therapy, and Ms. Boucher testified that she has benefited from such therapy. Dr. Esponnette pointed out that the other available forms of treatment, such as narcotic pain medications or trigger point injections, carry greater risks of complications, and that future massage therapy would be a reasonable intervention for Ms. Boucher. Moreover, Dr. Esponnette did not state that such treatment was not necessary; rather he emphasized the palliative, non-curative, nature of such care. As the hearing officer reasoned, merely because a treatment is palliative does not make it non-compensable. Finally, because the hearing officer's finding that future massage therapy is reasonable and necessary for Ms. Boucher is not "contrary" to Dr. Esponnette's medical findings, that finding does not need to be supported by clear and convincing evidence. *See* 39-A M.R.S.A. § 312(7). The hearing officer's finding is based on sufficient, competent evidence.

B. *Vaillancourt v. Viner Brothers*

[¶14] Murphy Homes next contends that pre-approval of prospective treatment by the hearing officer without a designated endpoint constitutes legal error, citing *Vaillancourt v. Viner Brothers*, Me. W.C.C. 89-136 (Me. App. Div. 1989). We agree.

[¶15] In *Vaillancourt*, the former Appellate Division recognized that it is within a hearing officer's discretion to order future medical payments, but established guidelines that circumscribe that discretion. The Division stated:

> The concerns that a present award for future medical benefits could lead to unjustified and unnecessary expense can be answered by constructing guidelines for a commissioner to consider: 1) Blanket authorizations should not be ordered. 2) Where authorization for a specific service is requested, there should be competent evidence that the service is necessary and adequate. 3) The cost of the service should be determined and its reasonableness should be decided. 4) When ongoing treatments are ordered, there should be competent evidence concerning the necessary length of time or required number of treatments; and the commissioner should grant benefits for a maximum period and maximum cost.

[¶16] Since the *Vaillancourt* guidelines were articulated in 1989, the Act has been revised in several respects that affect the analysis: the Act now (1) mandates a medical fee schedule, *see* 39-A M.R.S.A. § 209-A (Supp. 2014); (2) provides for a utilization review procedure for an employer to examine whether a "provider has made any excessive charges or required unjustified treatment," 39-A M.R.S.A. § 210(7) (Supp. 2014); and (3) requires the employee or a provider

to challenge such a determination by an "appeal to the board," *id.* § 210(8). We continue to look to *Vaillancourt* alongside these more recent statutory prescriptions for guidance regarding the appropriateness of a future medical benefit award. In so doing, we observe that although questions regarding the reasonableness of cost are generally now governed by the fee schedule, a decision that does not limit "the necessary length of time or required number of [future] treatments" runs afoul of both the *Vaillaincourt* decision and the statutory prescriptions. In particular, the right of the employer to decline to continue to pay for treatment after a utilization review, until after an "appeal to the board" by the employee or the provider, is undermined if a hearing officer orders payment for such treatment at a certain frequency indefinitely.

[¶17] We understand that cases such as this, involving palliative care for a chronic condition (unless done as a trial) do not necessarily have a timetable for expected recovery so that an endpoint can be predicted in advance. Accordingly, (and particularly here, where there does not appear to be any ongoing oversight by a primary care provider), the reasonableness and necessity of such ongoing treatment should be assessed after periodic review, based on the actual results obtained, including the duration of relief and functional improvement.[1]

[1] We also recognize that Murphy Homes is free to petition the Board, pursuant to 39-A M.R.S.A. § 307(1) (2001) for "a determination of rights under this Act" (mistakenly referred to by the hearing officer as a "Petition for Review"), including its right to be relieved from the prospective treatment order. However, without the designation of any time limit as part of the pre-approval, such palliative care could

[¶18] Considering (1) the palliative nature of the treatment, (2) the lack of oversight by a referring provider, and (3) the utilization review process afforded to employers under the Act, we conclude that the circumstances of this case require a reasonable time limit on the effect of the prospective order. Such a determination should be made after considering such factors as (1) the need to avoid interruptions in treatment during the process of reviewing such care, (2) the time needed for such care to demonstrate its effectiveness, and (3) the ability of the employee to continue to receive such treatment during any dispute resolution process generated by the employer controverting such ongoing care.

[¶19] That being said, and considering the time the hearing officer's pre-approval has already been in effect, we exercise our authority to modify the decision to impose a reasonable time limitation, rather than direct a remand. 39-A M.R.S.A. § 321-B(3) (Supp. 2014). Accordingly, the decision is modified to limit the effect of the present pre-approval of massage therapy to eighteen months from the date of the hearing officer's February 26, 2014, decision. Ms. Boucher is free, either before or after the expiration of that period, to petition for payment of massage therapy that continues beyond that date, at which time the hearing officer

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continue even when it is no longer necessary (or not needed as frequently), because the patient and the therapist view it as having some benefit in relieving discomfort, particularly where, as here, there does not appear to be a provider overseeing the care of the work-related condition including the massage therapy referral.

may consider evidence concerning the additional period, if any, the treatment should continue without interruption; and Murphy Homes is not precluded from seeking modification of or relief from the present order, pursuant to 39-A M.R.S.A. § 307(1), prior to the end of the preapproved period based on a showing of changed circumstances.

III. CONCLUSION

The entry is:

> The hearing officer's decision is modified to provide that the pre-approval period for payment for massage therapy treatments shall end eighteen months after February 26, 2014. As modified, the decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2014).

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