THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

DOCKET NO. 2019-0464

Appeal of Laura LeBorgne

APPEAL FROM DECISION OF THE
WORKERS' COMPENSATION APPEALS BOARD

BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

Cases

QUESTIONS PRESENTED

1. Whether the CAB erred by concluding that Ms. LeBorgne failed to demonstrate that her medical bills were reasonable, necessary and causally related to her work injury?

   See Motion for Rehearing at 2-3, App. at 5-6; see also Transcript of May 8, 2019 CAB Hearing ("Transcript") at 55-57, App. at 51-53.

2. Whether the CAB erred in considering whether the providers' failure to provide timely Workers' Compensation Medical Forms is a factor in determining whether the medical bills were reasonable, necessary and causally related to her work injury?

   See Motion for Rehearing at 2 at ¶ 4, App. at 2.

3. Whether the provisions of RSA 281-A:23 V (c) are applicable where the provider is paid directly by the Claimant?

   See id.

4. Whether the CAB erred by determining that the medical evidence Ms. LeBorgne provided, in lieu of the New Hampshire Workers' Compensation Form was, "insufficient" to meet her burden of proving that the medical bills were reasonable, necessary and work-related?

   See id. at 3-4, ¶ 9, App. at 6-7.

5. Whether the CAB erred when it determined that a "good cause" argument was not made, pursuant to RSA 281-A:23 V (c), for the providers' failure to provide timely Workers' Compensation Medical Forms, where evidence was presented that: a) the providers were out

of state and; b) the providers produced medical records which provided the Carrier with sufficient information to determine whether the treatment was reasonable, necessary and related to the work injury?

See id. at 3, ¶7, App. at 6; see also Transcript at 60:14-61:1-16, App. at 54-55.

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

Other Authorities

TEXT OF STATUTES INVOLVED IN THE CASE

RSA 281-A:23 Medical, Hospital, and Remedial Care. –
I. An employer subject to this chapter, or the employer's insurance carrier, shall furnish or cause to be furnished to an injured employee reasonable medical, surgical, and hospital services, remedial care, nursing, medicines, and mechanical and surgical aids for such period as the nature of the injury may require. The injured employee shall have the right to select his or her own physician.

V. (b) The commissioner shall develop a form on which health care providers and health care facilities shall report medical, surgical or other remedial treatment. The report shall include, but is not limited to, information relative to the up-to-date medical status of the employee, any medical information relating to the employee's ability to return to work, whether or not there are physical restrictions, what those restrictions are, the date of maximum medical improvement, and, where applicable, the percentage of permanent impairment in accordance with the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association and as set forth in RSA 281-A:32, and any other information to enable the employer or insurance carrier to determine the benefits, if any, that are due and payable. In addition to the report required under this section, the health care provider shall furnish a statement confirming that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained. The statement shall read as follows: "I certify that the narrative descriptions of the principal and secondary diagnosis and the major procedures performed are accurate and complete to the best of my knowledge." The health care provider shall date and sign the statement.

V. (c) The commissioner may assess a civil penalty of up to $2,500 on any health care provider who without sufficient cause, as determined by the commissioner, bills an injured employee or his or her employer for services covered by insurers or self-insurers under this chapter. There shall be no reimbursement for services rendered, unless the health care provider or health care facility giving medical, surgical, or other remedial treatment furnishes the report required in subparagraph (b) to the employer, insurance company, or claims adjusting company within 10 days of the first

treatment. First aid treatment is excluded from the 10-day reporting requirement. Additionally, for good cause, a hearing officer may waive the 10-day reporting requirement and order remuneration paid. The employer, claims adjustment company, self-insurer or insurer shall pay the health care provider or health care facility within 30 days of receipt of a bill for services.

STATEMENT OF THE FACTS AND OF THE CASE

On May 19, 2011 Laura LeBorgne sustained a work-related injury at the Elliot Hospital in Manchester, New Hampshire. At that time, Ms. LeBorgne was employed as a nurse in the Cardiac Step-Down Unit. She was injured while attempting to transition a patient from a chair to the patient's bed. There is no dispute that this injury was causally related to her employment and the claim was accepted by the workers' compensation carrier ("the Carrier.") The parties reached a Lump Sum Settlement ("the Settlement"), which was approved by the Department of Labor in 2014. The Carrier was thereafter obligated to pay all future medical treatment arising out of the work-related injury, so long as the treatment was reasonable, necessary and related to Ms. LeBorgne's May 19, 2011 work injury.

After her injury on May 19, 2011 Ms. LeBorgne continued to experience pain and symptoms in her neck, back and right side. Ms. LeBorgne sought remedial and palliative treatment in New Hampshire from 2011 through 2016. Throughout this time she engaged in a variety of treatments to relieve her pain including, physical therapy, medications, acupuncture, trigger point injections and occipital nerve blocks. See Records at 847 (Elliot Occupational Health Services), App. at 28; see also Records at 839-840 (Elliot Occupational Health Services), App. at 26-27; Records at 638 (Elliot Orthopaedic Surgery), App. at 25; Records at 708 (Elliot Pain Management Center), App. at 24. Shortly thereafter, Ms. LeBorgne began seeing Dr. Powen Hsu at New Era Medicine. In a report summarizing Dr. Hsu's treatment of Ms. LeBorgne, he discussed her ongoing chronic pain symptoms noting:

> "Through my treatment from 2012 to present, I have clinically concluded that there is neuropathic component of this recurrent soft tissue pain which is not detectable by current testing capability. Neuropathic cause of recurrent myofascial pain is likely cause of her current recurring symptoms. Ms. LeBorgne is therefore have (sic) a diagnosis of chronic recurrent right cervical and shoulder girdle myofascial pain. She has been able to adhere current regiment of medication and treatment with chiropractic and massage therapy regimen which is necessary to maintain her daily function." See Records at 80-81, App. at 21-22.

Dr. Hsu also concluded that "the ongoing treatment of massage therapy, chiropractic care and medications are to maintain her functional level and allow for her to continue to pursue her activities of daily living." Id. He indicated that the prognosis for Ms. LeBorgne was "good for adequate pain control *with the regimen currently prescribed"* (emphasis supplied), but that it was unlikely that she would achieve a "pain free" full recovery. Id. During Ms. LeBorgne's time treating with Dr. Hsu, he recommended massage therapy with Ann Maloney. There is no evidence in the record that Ann Maloney prepared New Hampshire Workers' Compensation Medical Forms during her treatment of Ms. LeBorgne or any treatment notes. Rather, as is customary, Ms. LeBorgne's treating provider, Dr. Hsu, and his office, prepared the Workers' Compensation Medical Forms ("the Forms/the Form") associated with his coordination of her treatments, as her medical doctor. See e.g., Records at 78, App. at 23. The Carrier did not raise any concerns about the fact that the massage therapist did not submit the Forms or records at that time.

In 2015, Ms. LeBorgne relocated to New Jersey. See Transcript at 15:19-21, App. at 40. Ms. LeBorgne subsequently moved to Manhattan,

New York. Id. at 16:25, App. at 41. In New York, she treated with Dr. Charles Kim, an orthopedic pain specialist. See Records at 14-17, App. at 16-19.[1] Dr. Kim's office notes indicate that the patient was assisted in the past by massage therapy. Id. at 14, App. at 16 (noting "past pain treatment history: Helped by: Heat, Ice, Massage, Chiropractic treatments, Osteopathic treatments and Bed rest.") It is true that Dr. Kim did not specifically indicate in some of the early office notes that Ms. LeBorgne should continue massage therapy treatments but he did reference these treatments in others. See Records at 2, App. at 10 (office visit from 7/18/2018 noting "continue mindfulness/massage") see also Records at 14, App. at 16 (office visit 10/31/2016 noting "heat, Ice, Massage.") Ms. LeBorgne testified at the CAB hearing that Dr. Kim verbally told her to continue these massage therapy treatments. See Transcript at 39:10-25, App. at 47. At a later date, Dr. Kim opined that massage therapy improves Ms. LeBorgne's mobility, circulation and helps reduce her pain. See Records at 1, App. at 9. Dr. Kim described Ms. LeBorgne's treatment as follows in a letter dated June 14, 2018:

> "Due to her injury, patient has been experiencing chronic pain to right shoulder and has been completing a combination of weekly deep tissue massage, meditation, stretching, Tizanidine and psychological treatment, which has allowed her to experience a significant decrease in pain and improve her quality of life/mental health. It is medically necessary that patient continue weekly deep tissue massages with licensed massage therapist as this has been an intricate part of her rehabilitation and management of pain since 2012." See Records at 6, App. at 14.

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[1] Ms. LeBorgne now sees Dr. Kim every six months. He was described during the CAB hearing as the "quarterback" of her treatment given that he has the most current experience with her treatment. See Transcript at 31:13-20; 46:3-7, App. at 44; 50.

During this time Ms. LeBorgne treated with licensed massage therapist Megan Doolen, who she located on the New Jersey Massage Association website. See Transcript at 23:4-8, App. at 43. Ms. Doolen worked at Devotion Yoga in New Jersey, at the time, and specialized in deep tissue massage therapy and myofascial release therapy. Id. Ms. Doolen is a licensed massage therapist in the State of New York. She provided a letter to the Carrier on December 21, 2018 outlining her credentials noting her ten years of experience in massage therapy and her specialty working with patients with work-related injuries. See Records at 906, App. at 38. When Ms. Doolen was a therapist employed at Devotion Yoga in 2016, the Carrier paid for her treatment of Ms. LeBorgne. See Transcript at 32:18-25; 33:1-7; 46:10-19. App. at 45-46; 50.[2] At some point Ms. Doolen began working in New York.

Ms. LeBorgne then engaged in weekly deep tissue massage therapy with licensed massage therapist Amanda Brewster, in New York, at the end of 2017 when Ms. Doolen was on maternity leave. Ms. LeBorgne still treats with Ms. Brewster as her primary massage therapist. She testified that Ms. Brewster's skilled myofascial therapy assists in reducing Ms. LeBorgne's pain and helps her maintain her baseline pain level. As a result, in part, of her ongoing massage therapy treatments, Ms. LeBorgne was able to remove pain medication from her treatment regimen in May of 2017. See Records at 11, App. at 15; see also Transcript at 18:17-25, App. at 42. In the CAB

[2] Ms. Doolen worked at Devotion Yoga in 2016 when the Carrier paid for her massage therapy services. After that date Ms. LeBorgne treated with Ms. Doolen at Ettia Day Spa in Manhattan, New York, and the Carrier denied payment for these treatments.

hearing Ms. LeBorgne testified that her baseline pain due to her injury is a four on a scale of ten. See CAB Transcript at 18:5-17, App. at 42. She testified that with Dr. Kim's recommendation of a muscle relaxant, massage therapy and meditation, she has been able to conclude use of narcotics to control her pain. Id. at 17-24, App. at 42. Ms. LeBorgne testified that the treatments, including massage therapy have "given [her] a life again." Id.

Ms. LeBorgne paid for the massage therapy treatments in New York out-of-pocket since the treatments were working. Because the treatments were weekly, she knew she could not wait for pre-approval each time she engaged in treatment. Ms. LeBorgne also reasonably presumed the treatments would be reimbursed, as the Carrier had paid for this same massage therapy treatment up until 2017. See Transcript at 42:1-23, App. at 48. However, the Carrier subsequently issued denials for the massage therapy treatments with the licensed therapists in New York. See Records at Page 34-38, App. at 62-66 and 887-892, App. at 56-61.[3] The denials indicated that "the documentation received with this billing does not support your treatment was causally related to the original date of your workplace injury and/or is not reasonable and medically necessary. No medical records on file for the enclosed dates of service." See Records at 887, App. at 56. Ms. LeBorgne appealed this denial to the Department of Labor.

[3] The Carrier accepted and paid some of Ms. LeBorgne's massage therapy treatments in New Jersey, but not the treatment with the New York providers. See Records at 901-902 (summary of denied massage therapy bills), App. at 67-68.

Prior to the hearing before the CAB, but after the first level hearing at the Department of Labor, Ms. LeBorgne was able to obtain treatment notes from her massage therapists in New York, relative to the denied massage therapy treatment. See Transcript at 43:14-25, App. at 49. She testified that she asked her massage therapy treatment providers for these notes, because the Carrier indicated at the first level hearing that no treatment notes were ever provided and that appeared to be a basis for denying her treatment. Id.

On May 8, 2019 the parties appeared at a hearing before the Compensation Appeals Board ("CAB") on the issue of RSA 281-A:23, reimbursement of out-of-pocket expenses associated with some of Ms. LeBorgne's massage therapy treatment. Prior to the CAB hearing, the Carrier hired Dr. Andrew Farber who performed an Independent Medical Evaluation ("IME"). In his IME, Dr. Farber concluded that Ms. LeBorgne suffered from a cervical sprain, right shoulder sprain and labral tear. See Records at 29, App. at 36. He indicated that there is "no need for further physical therapy or surgical treatment," but also indicated that Ms. LeBorgne has not yet reached a maximum medical endpoint. Id. Despite the medical evidence of Ms. LeBorgne's ongoing symptoms, Dr. Farber indicated that her prognosis was "good," she had no further need for physical therapy, and her massage therapy was not medically necessary. Id.

Dr. Farber then prepared an addendum to his IME, after he was asked by the Carrier to expand on his opinion relative to Ms. LeBorgne's prior massage therapy treatment. See Records at 22, App. at 29. Dr. Farber opined that the length of the massage therapy treatment was "excessive" and the treatment she already had was therefore not reasonable, or related to

her work injury in May of 2011. Id. At the time this report was written, the Carrier had already accepted and paid for massage therapy treatment that its own expert now claimed was unnecessary. Dr. Farber did not address in his addendum to his report that Ms. LeBorgne's two providers, Dr. Kim and Hsu, had concluded that this massage therapy was necessary and actually had led to maintaining the patient's baseline pain level and daily function, while also contributing to her ability to cease use of narcotic pain medication.

On June 3, 2019, the CAB issued its Decision, concluding that Ms. LeBorgne had failed to demonstrate that the medical treatments she received with two massage therapy providers, from May 30, 2017 through January 11, 2018 were "reasonable, medically necessary, and causally related to her workplace injury." See CAB Decision at 5, Addendum at 36. The CAB's rationale in making this conclusion was not based on any discussion of dueling expert testimony of Drs. Kim, Hsu and Farber. While the CAB did indicate that it found the lack of documentation of Ms. LeBorgne's massage therapy treatment in Dr. Kim's earlier medical notes "disturbing," it did not reject Dr. Kim's opinion. Instead, the CAB noted "Dr. Kim does explain the treatment plan more clearly in two letters that were written at the request of the claimant." See June 3, 2019 Order at 4, Addendum at 35. The CAB further found that Dr. Kim's opinions were "slightly more reasonable and sounder than those of Dr. Farber." Id.

The sole basis for the CAB's conclusion to find in favor of the Carrier was that the New York massage therapy providers had failed to complete the Forms and that, according to the CAB, the information the treating providers produced in lieu of the forms to the Carrier was

"insufficient to fulfill the requirements of RSA 281-A:23." See id at 4-5, Addendum at 35-36.

On June 27, 2019 Ms. LeBorgne requested a rehearing on the grounds that the fact that the New York massage therapists did not complete the Forms was not relevant to the threshold issue of whether the massage therapy recommended by Dr. Kim was reasonable, necessary and related to Ms. LeBorgne's work injury. See Motion for Rehearing at 2, App. at 5. The Motion also argued that the statute, RSA 281-A:23 V (c), relates to billing and payment arrangements between the provider and carrier. Id. To the extent that the statute even applies to the case, the Motion argued that Ms. LeBorgne established good cause to obviate the need for the Form, in that her out-of-state providers were not comfortable filling out a form required under another state's laws and the medical records confirming the treatment is reasonable, necessary and work-related were provided to the Carrier. Id. The CAB denied this request on July 15, 2019. See CAB July 15 Decision, App. at 3. This appeal follows.

SUMMARY OF THE ARGUMENT

Applying RSA 281-A:23 V (c), a provision of the statute that governs payments between insurance and medical providers, the CAB concluded that Ms. LeBorgne had failed to meet her burden, on the basis that the New York massage therapy providers failed to complete the Forms, and the information provided in lieu of the Forms was insufficient. The CAB erred with respect to both of these conclusions. The threshold issue in this case is whether the massage therapy treatments in New York that were recommended by Ms. LeBorgne's treating providers are reasonable, necessary and related to her injury of May 19, 2011. Whether or not a massage therapist completed the Form discussed in RSA 281-A:23 V (c) has no bearing on that question, and the CAB's reliance on that provision in reaching its conclusion was misplaced.

The evidence that Ms. LeBorgne provided was sufficient to establish that the massage therapy treatment in New York was still reasonable, necessary and related to Ms. LeBorgne's work-related injury. The evidence was that Dr. Powen Hsu concluded that massage therapy was necessary and recommended ongoing treatment. Dr. Charles Kim concluded that the massage therapy treatment was necessary and maintains Ms. LeBorgne's baseline functionality. The massage therapists provided treatment records with weekly logs of treatment and notations regarding the specific massage therapy provided during the sessions. The CAB accepted the opinion of Dr. Kim over that of the Carrier's hired expert, and thereby presumably accepted the conclusions that the massage therapy was reasonable, necessary and related to her work injury. Ms. LeBorgne satisfied her burden of proof on the threshold issue of the compensability of her

treatments. Accordingly, the CAB erred in determining nonetheless that the absence of the Workers' Compensation Medical Form somehow bears on the compensability of the medical treatment.

Neither the plain language of the statute, nor the Form, supports the CAB's erroneous conclusion that palliative treatment providers are required to execute the Form. The language of the statute and the Form clearly relate to obligations of providers of remedial care, rather than care issued on behalf of providers of palliative care, such as massage therapy treatment providers. The statute and the Form do specifically reference remedial care. The Form itself states "[t]his form must be completed at each health professional visit (MD, DO, DC or DDS)." A massage therapist is neither an MD, DO, DC, nor a DDS. Furthermore, the provisions of RSA 281-A:23 V (c) apply to billing and payment between providers of remedial care and insurance carriers. Here, Ms. LeBorgne paid out-of-pocket for her treatment. As such, RSA 281-A:23 V (c) is inapplicable to the facts in this case and the CAB erroneously relied on that provision of the statute in reaching its Decision.

The statute also provides that, for good cause, the provisions of RSA 281-A:23 V (c) can be waived. Here, the CAB erred in finding that Ms. LeBorgne failed to establish good cause as to why the New York providers were not required to complete the Form. The CAB erred in reaching this conclusion. Ms. LeBorgne's New York massage therapy providers were not comfortable executing a Form from another State and instead opted to provide narrative responses relative to their credentials and their contemporaneous treatment notes. This is a reasonable position to take. The massage therapists provided detailed notes, which, combined with Ms.

LeBorgne's previous records, established that the treatment was reasonable, necessary and related to Ms. LeBorgne's work-related injury. Furthermore, given that the Form specifically indicates that it is to be completed by an MD, DS, DO or DDS, it was reasonable for the massage therapy providers to object to filling out forms that are clearly meant for doctors, and other remedial care providers. Accordingly, the CAB erred by concluding that she failed to establish good cause to waive the requirements of RSA 281-A:23 V (c).

ARGUMENT

I. LEGAL STANDARD

The findings and rulings of the CAB must be upheld, unless they lack evidentiary support or are tainted by legal error. Appeal of Gamas, 138 N.H. 487,491 (1994). "An employer has a continuing obligation to provide or pay for medical, hospital, and remedial care for as long as it is required by an injured employee's condition." Appeal of Wingate, 149 N.H. 12, 15 (2002) citing Appeal of Bergeron, 144 N.H. 681, 684 (2000); see also RSA 281-A:23, I. The claimant bears the burden of proving the causal relationship between her continuing medical treatment and her work-related injury by a preponderance of the evidence. Wingate, 149 N.H. at 15.

Acknowledging that there are certain treatments that assist chronic pain patients, but may not cure or remediate their ailment, the New Hampshire Supreme Court has concluded that "a treatment may be reasonable and required by the nature of an injury even though the treatment does not improve the patient's medical condition." Appeal of Levesque, 136 N.H. 211, 214 (1992) ("[f]or example, administration of pain-killing drugs to a terminally ill cancer patient may be reasonable even though the drugs will not reverse the cancer.") Treatment that is remedial aims to cure the ailment. See *The Compact Oxford English Dictionary* (2nd ed. 2004) (defining remedy as "to heal, cure, make whole again.") However, when a patient reaches a medical endpoint for purposes of a workers' compensation claim and they may never be "cured" through remedial treatment, palliative treatment can still be compensable. Appeal of Lalime, 141 N.H. 534, 538 (1996). Palliative treatment is that which is

useful to relieve or prevent pain and discomfort even though the treatment cannot effect a greater cure. Castle v. City of Stillwater, 51 N.W.2d 370, 373 (1952); see also *The Compact Oxford English Dictionary* (2nd ed. 2004) (defining palliative as "serving to relieve (disease) superficially or temporarily, or to mitigate or alleviate (pain or other evil.")) "In any case involving a question of whether the treatment is reasonable and necessary, the analysis is whether the employee presented objective evidence that it was reasonable to seek further treatment, including treatment that is palliative." Appeal of Silk, No. 2006-0461, 2007 WL 9619477, at *1 (N.H. May 23, 2007) citing Appeal of Levesque, 136 N.H. at 214.

RSA 281-A:23 V (b) (c) sets out guidelines by which a health provider can seek reimbursement from the Carrier and does not relate to the threshold question of whether the treatment itself is related to the work injury. The execution of the Form is simply required, unless good cause exists, prior to the insurance company remitting payment for medical, surgical, or other *remedial* treatment.

RSA 281-A:23 V (b) states:

> "The commissioner shall develop a form on which health care providers and health care facilities shall report *medical, surgical or other remedial treatment*. The report shall include, but is not limited to, information relative to the up-to-date medical status of the employee, any medical information relating to the employee's ability to return to work, whether or not there are physical restrictions, what those restrictions are, the date of maximum medical improvement, and, where applicable, the percentage of permanent impairment in accordance with the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association and as set forth in RSA 281-A:32, and any other information to enable the employer or insurance carrier to determine the benefits, if any, that are due and payable. In addition to the report required under this

> section, the health care provider shall furnish a statement confirming that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained. The statement shall read as follows: 'I certify that the narrative descriptions of the principal and secondary diagnosis and the major procedures performed are accurate and complete to the best of my knowledge.' The health care provider shall date and sign the statement" (internal quotations omitted and emphasis supplied).

As RSA 281-A:23 (b) implicitly requires knowledge of maximum medical improvement and permanent impairment guidelines which are set forth in the American Medical Association Permanent Impairment guidelines published for doctors, it is understandable why providers of palliative care, such as massage therapists, may choose not to complete the Form. Section (c) of the same statute further emphasizes the intent of the statute to relate to medical, surgical or remedial care providers and states:

> "The commissioner may assess a civil penalty of up to $2,500 on any health care provider who without sufficient cause, as determined by the commissioner, bills an injured employee or his or her employer for services covered by insurers or self-insurers under this chapter. There shall be no reimbursement for services rendered, unless the health care provider or health care facility giving *medical, surgical, or other remedial treatment* furnishes the report required in subparagraph (b) to the employer, insurance company, or claims adjusting company within 10 days of the first treatment. First aid treatment is excluded from the 10-day reporting requirement." (emphasis supplied) See RSA 281-A:23 V (c).

The Form itself reads:

> "This form must be completed at each health professional visit (MD, DO, DC, or DDS) and must be filed with the worker's compensation insurance carrier within 10 days of the treatment (first aid excluded). Failure to comply and complete this form shall result in the provider not being reimbursed for services rendered and may result in civil

penalty of up to $2,500." See e.g. Workers' Compensation Medical Form dated 5/9/2016, Records at 78, App. at 23.

In the event that a health professional cannot or does not provide the Carrier with an executed Form within 10 days of the treatment, the law recognizes a "good cause" provision obviating the requirements of production of the workers' compensation form at the discretion of the Department of Labor. The statute reads:

> "for good cause, a hearing officer may waive the 10-day reporting requirement and order remuneration paid. The employer, claims adjustment company, self-insurer or insurer shall pay the health care provider or health care facility within 30 days of receipt of a bill for services."

II. NEITHER THE PLAIN LANGUAGE OF THE STATUTE NOR THE FORM SUPPORT THE CAB'S APPLICATION OF RSA 281-A:23 V (C) TO THE QUESTION OF WHETHER MS. LEBORGNE MET HER THRESHOLD BURDEN OF PROOF

i. The medical records support that the massage therapy treatments were reasonable, necessary and related to the May 11, 2019 work injury.

The threshold determination that the CAB was required to make in this case was whether the continued massage therapy treatments recommended by Dr. Charles Kim in New York were reasonable, necessary, and related to Ms. LeBorgne's May 19, 2011 work injury. See RSA 281-A:23. The CAB erred by disregarding the overwhelming evidence that the massage therapy treatment was reasonable, necessary and related to Ms. LeBorgne's work injury. Dr. Hsu concluded that Ms. LeBorgne's massage therapy was reasonable, necessary and related to her

work-injury. He indicated that Ms. LeBorgne had persistent pain in her neck and shoulder that was currently being managed with medication, chiropractic treatment, and massage therapy. See Records at 80, App. at 21. In Dr. Hsu's opinion, chiropractic and massage therapy are necessary to maintain Ms. LeBorgne's daily function. See Records at 81, App. at 22. Ms. LeBorgne testified that she had engaged in this massage therapy since 2012. When she moved to New Jersey, Ms. LeBorgne continued this treatment. Specifically, she treated at Devotion Yoga, with Megan Doolen. The Carrier apparently concluded that this treatment was reasonable, necessary and related to her work injury as the Carrier did not deny payment of this massage therapy treatment for years, while Ms. LeBorgne engaged in massage therapy in New Hampshire.

When Ms. LeBorgne moved to New York, she treated with Dr. Kim, who also recommended that she continue massage therapy to manage her right shoulder and upper back pain. See Records at 1, App. at 9. Dr. Kim prepared an opinion that the weekly massage therapy is reasonable and necessary in managing her chronic shoulder pain and assists Ms. LeBorgne with "mobility, circulation and helps decrease her pain." Id. Importantly, Dr. Kim concluded that this treatment helps improve Ms. LeBorgne's quality of life, mental health and "enables her to manage pain without the use of narcotics." Id. Ms. LeBorgne reported that she felt she could live and maintain her baseline pain level with her massage therapy. See CAB Transcript at 18:5-17, App. at 42. The CAB ultimately credited Dr. Kim's analysis over that of Dr. Farber, thereby presumably adopting his opinion regarding the necessity and reasonableness of her treatment.

Ms. LeBorgne presented sufficient evidence to sustain her burden to demonstrate that her massage therapy treatment in New York, with Megan Doolen and Amanda Brewster, was reasonable, necessary and related to her injury in May of 2011. Yet the CAB's Decision ignored its own conclusion regarding the medical evidence and instead relied on the fact that the New York providers did not complete the Form as somehow dispositive or even relevant to the question of the reasonableness, necessity and causal connection of Ms. LeBorgne's massage therapy treatment to her work-related injury. It is not dispositive or relevant and the CAB's reliance on RSA 281-A:23 V (c) in determining that Ms. LeBorgne failed to meet her burden is contrary to the evidence in the record and constitutes legal error.

ii. The plain language of the statute applies to reimbursement for treatment between health care providers and insurance carriers.

The CAB found that Ms. LeBorgne did not meet her burden of proof regarding the necessity and reasonableness of her massage therapy treatments on the basis that RSA 281-A:23 V (c) states that there shall be "no reimbursement for services rendered" unless the provider submits a Workers' Compensation Medical Form to the employer or Carrier "within ten (10) days of the first treatment." The CAB erred in applying RSA 281-A:23 V (c) in this case, as that provision only applies to billing and payment arrangements between the providers of remedial care and a carrier. RSA 281-A:23 V (c) applies to "health care providers" furnishing a report to the carrier or employer. Ms. LeBorgne is neither a health care provider nor is she seeking reimbursement for a health care provider. Ms. LeBorgne was paying for her massage therapy treatments out-of-pocket. The plain

language of the statute applies only to situations where the health care provider seeks reimbursement for medical treatment from the workers' compensation provider. That factual scenario is not present in this case. Thus, the CAB erred when it found that the provisions of RSA 281-A:23 V (c) even applied to this case, as Ms. LeBorgne paid for these treatments on her own and was not a health care provider seeking reimbursement from a Carrier.

III. TO THE EXTENT THAT RSA 281-A:23 V (C) EVEN APPLIES TO PALLIATIVE CARE, THE CAB ERRED BY CONCLUDING THAT MS. LEBORGNE FAILED TO MEET THE GOOD CAUSE PROVISIONS OF NH RSA 281-A:23 V (C)

The CAB also erred in concluding that Ms. LeBorgne failed to provide good cause for the New York massage therapists' declining to prepare a Workers' Compensation Medical Form, pursuant to RSA 281-A:23 V (c). RSA 281-A:23 V (c) states "additionally, for good cause, a hearing officer may waive the 10-day reporting requirement and order remuneration paid." In its Decision, the CAB concluded "although the panel could find that the claimant had good cause, we decline to do so in this case, because the information that was provided late was insufficient to fulfill the requirements of RSA 281-A:23. See June 3 CAB Order at 5, Addendum at 36.

i. The information provided was sufficient to establish good cause to waive the 10-day reporting requirement under RSA 281-A:23 V (c)

Ms. LeBorgne testified during the CAB hearing that at some point after she received denials from the Carrier, relative to her treatment in New

York with massage therapists Megan Doolen and Amanda Brewster, she approached her massage therapists and asked them if they would complete the Forms. Both providers indicated that they did not feel comfortable completing a New Hampshire-specific form. This was a reasonable position to take given the language of the statute.

The plain language RSA 281-A:23 V (c) reads to apply to remedial care treatment providers. The statute reads: "[t]he Commissioner shall develop a form on which health care providers and health care facilities shall report medical, surgical or other remedial treatment" (emphasis supplied). See RSA 281-A:23 V (c). The statute provides a list of health care practitioners who must execute the Form prior to reimbursement; specifically, providers of medical, surgical or other remedial treatment. The language of the statute specifically qualifies the word "treatment" with the word remedial and gives two examples prior to the word remedial. Had the legislature intended the provisions of RSA 281-A:23 V (c) to apply to palliative care, it would have indicated so. The use of the word remedial is not a mistake.

The plain language of the Form also supports that the requirements of RSA 281-A:23 V (c) did not apply to the massage therapists in this case. The Form "must be completed at each health professional visit (MD, DO, DC, or DDS). See e.g., Workers' Compensation Medical Form dated 5/9/2016, Records at 78, App. at 23. The examples of "health professional" listed in the parenthetical immediately following the term do not include LMT (massage therapists). It was certainly reasonable of the legislature to ask only qualified treating physicians to complete the Form, as the Form requires the provider to issue a conclusion regarding maximum medical

improvement and permanent impairment. A palliative care provider would not ordinarily offer an opinion on the employee's status regarding these issues and likely could not without significant challenge from a Carrier. Both the plain language of the statute and Form appear to support the decision of Ms. LeBorgne's massage therapists in declining to execute the Forms in this case.

Given that neither of the New York massage therapists qualify under any of the statutorily mandated categories enumerated on the Form, as neither provider is an MD, DO, DC, or DDS, this was a reasonable explanation for the providers' hesitation in filling out the Form. Furthermore, both massage therapists prepared letters and treatment notes to provide to the Carrier, in lieu of filling out the Form. The CAB also had the records, the Forms and opinions of Drs. Hsu and Kim, who both concluded the treatment was reasonable, necessary and related to Ms. LeBorgne's work injury. The CAB accepted Dr. Kim's conclusions over those of the Carrier's selected IME doctor. Thus, the CAB erred in determining that a good cause argument was not made and that the information provided in lieu of the Forms was insufficient under RSA 281-A:23 V (c).

CONCLUSION

For the reasons stated above, Laura LeBorgne respectfully requests that this Honorable Court: (a) reverse the CAB's Decisions of June 3, 2019 and July 15, 2019, (b) find that Ms. LeBorgne met her burden to establish that her massage therapy treatments were reasonable, necessary and causally related to her workplace injury; and (c) grant such other and further relief as is just, equitable, and appropriate.

ORAL ARGUMENT

Mark D. Wiseman will argue the case for the appellant, and 15 minutes are requested for this purpose.

CERTIFICATION PURSUANT TO RULE 26(7)

Pursuant to Supreme Court Rule 26(7), I hereby certify that every issue specifically raised herein (a) has been presented in the proceedings below and (b) has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. I further hereby certify the within brief complies with the word limitation in Supreme Court Rule 16(11) of 9,500 words. This brief contains 6,737 words.

CERTIFICATION PURSUANT TO RULE 16(3)(i)

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that the decision being appealed was in writing, and that a true and accurate copy of the same is appended to this brief.

Respectfully submitted,
LAURA LEBORGNE

By and through her Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: January 21, 2020

By: /s/Mark D. Wiseman
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being served electronically upon Eric G. Falkenham, Esquire and Gordon J. MacDonald, Esquire, NH Attorney General, through the Court's electronic filing system, and two copies have been mailed to Kenneth Merrifield, Commissioner, New Hampshire Department of Labor, State Office Park South, 95 Pleasant Street, Concord, NH 03301, in compliance with Supreme Court Rule 16(3).

/s/Mark D. Wiseman
Mark D. Wiseman

ADDENDUM

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State of New Hampshire

COMPENSATION APPEALS BOARD

June 3, 2019

DECISION OF THE COMPENSATION APPEALS BOARD

LAURA LEBORGNE

v.

DOCKETED

ELLIOT HOSPITAL

DOCKET#: 2019-L-0140

APPEARANCES: Mark Wiseman, Esq. represented the interests of the claimant. Charles Giacopelli represented the interest of the employer and carrier, CCMSI, TPA for the self-insured.

ISSUES: RSA 281-A:23 Medical, Hospital, and Remedial Care.

WITNESSES: Laura LeBorgne, claimant

DATE OF INJURY: May 19, 2011

HEARING: A hearing was held at the New Hampshire Department of Labor, Concord, New Hampshire on May 8, 2019.

PANEL: The panel was comprised of Joseph Dickinson, Esq. Panel Chair, and Panelists Harry G. Ntapalis and Marc G. Beaudoin, Esq.

BACKGROUIND

Ms. LeBorgne was employed with Elliot Hospital back in 2010 and 2011 when she sustained two separate injuries in the course of her employment. The second claim was settled via a Lump Sum Settlement Agreement that was approved by the Department of Labor on June 3, 2014. Pursuant to that settlement, the medical payment provision was left open. Recent medical bills related to massage therapy have been denied by the carrier, and the claimant has requested a review of those denials. The claimant filed a hearing request with the Department of Labor on June 26, 2018, and a hearing was held on October 10, 2018. The Compensation Appeals Board (CAB) held a hearing on May 8, 2019.

FINDINGS OF FACT

Ms. LeBorgne currently resides in New York City, New York, and she traveled with her husband to the NH Department of Labor to attend the hearing. She sustained her first work related injury while employed with the Elliot Hospital back on April 21, 2010. She was working in a geriatric-psychiatric unit during that shift, and she was kicked in the face twice by a patient that she was trying to assist, who was seated in a chair. She claims that she sustained a whiplash type of injury, and she experienced pain in her neck, jaw, and shoulder. She reported that she missed a couple of weeks of work while she was recovering, but that the pain went away and she returned to work full-time.

Ms. LeBorgne sustained her second work related injury while she was still employed with the Elliot Hospital back on May 19, 2011. She reported that she was working in the Cardiac Step Down Unit, and that she was injured when she was transitioning a patient from a chair back to the patient's bed. She reported that she experienced sudden and severe pain in her jaw, neck, shoulder, and upper right side of her body. It was this second injury that the claim was settled via a Lump Sum Settlement Agreement where the medical provision was left open.

The claimant met with Jessica Lovely, APRN at Elliot Occupational Services on July 6, 2011 and was diagnosed with a Trapezus Strain with a treatment plan of trigger point injections, continued physical therapy, and ice (Tab 33, Page 846-847). Claimant said that she tried to control the pain with medication and physical therapy, but that she "hit a wall and was not improving." At this point, she claims that she felt that she needed to see a specialist. During this time, she reported that she was prescribed several types of medications to include muscle relaxers and opioids (Tab 33, Page 836). She further reported that there was some relief with the medications, but that it was not significant enough to "resume life."

On May 16, 2012 the claimant met with Dr. Mark Piscopo, who wanted the claimant to continue with trigger point injections to the upper right side of her body to include her neck and back. Claimant also reported that she was continuing with physical therapy, acupuncture treatments, and medication, specifically Vicodin and muscle relaxers. However, she reported to Dr. Piscopo that she was having a lot of difficulty sleeping, which would make things worse the following day. (Tab 22, Page 638).

On November 1, 2012, the claimant met with Dr. Eduardo Quesada, who provided the claimant with an occipital nerve block on the right side with trigger point injection therapy. He reduced her Cymbalta medication, continued to prescribe Baclofen, and limited use of short acting opiate analgesic (Tab 26, Page 708). Ms. LeBorgne reported that the treatment did not help. She further reported that she tried to go back to work in 2012 to do computer related work, but that she could not continue that type of work due to the pain. She reports that she has not worked since.

From 2012 through 2016, the claimant reported that she was consistently treated with prescriptions of opioids for pain control. She was a patient of Dr. Powen Hsu, who prescribed opioids for pain, chiropractic treatments, and massage therapy. However, sometime in 2016, Dr. Hsu stated that he was weening the claimant off opioids due to the current medical trends in the prescription of opioids for pain (Tab 7, Page 80-81).

The claimant reported that she met with Dr. Charles Kim, an Orthopedic Pain Specialist, in New York City. She said that Dr. Kim took her off the opioid medications and prescribed a new muscle relaxer. He also ordered the continuance of massage therapy. The claimant said that she was eventually taken off all opioids. The claimant further reported that she still experiences pain "24/7" since the second work injury back in 2011. She said that her baseline for pain is a 4 out of 10, but that she does have flare ups where the pain will jump to a 6/7 out of 10. She said that the new muscle relaxer that Dr. Kim prescribed combined with massage therapy has led to a better quality of life. She said that she can sleep now, and that she is no longer in a "fog" due to the opioids. However, the claimant reported that she still cannot sit at a desk to work at a computer.

Dr. Kim reports that the claimant, "has been experiencing chronic pain to right shoulder and has been completing a combination of weekly deep tissue massage, meditation, stretching, Tizanidine and psychological treatment, which has allowed her to experience a significant decrease in pain and improve her quality of life/mental health (Tab 1, Page 6 and Page 1).

The claimant did submit into evidence the massage therapy bills that were denied (Tab 3, Page 34-38 and Tab 36, Page 901-902).

The claimant reports that she has attended Devotion Yoga with Megan Doolen, LMT, and that she received deep tissue massage with myofascial release in 2017. She then went to see massage therapist, Amanda Brewster, from the end of 2017 until the present. She reports that Ms. Brewster can maintain the claimant's baseline pain level at 4 out of 10 through massage therapy. She further states that she attends 60-minute treatments once a week with the focus of the massage on her right shoulder, and that she tries not to miss a treatment.

The claimant did not submit the massage therapy notes to the carrier right away, because she claims that she did not know that they existed. However, she did provide those notes to the carrier prior to today's hearing (Tab 37, Page 903-905 and Tab 38, Page 906-908). Ms. LeBorgne said that she has been paying out of pocket, because the treatments have been working. She reports that she purchases them in blocks of ten, because it is cheaper. She also said that the unpaid bills do include the customary tip.

The claimant did report that she has asked both massage therapists to fill out the workers compensation form for the State of New Hampshire, but that they did not want to complete the form since they are licensed in the State of New York. The claimant also pointed out that she

only spent five minutes with the Independent Medical Examination provided by Dr. Andrew Farber, and that she is still being treated by Dr. Kim (Tab 2, Page 22-30).

During cross examination, the carrier's counsel noted that he never received any massage therapy notes until after the hearing on October 10, 2018. He also inquired about the two letters written by Dr. Kim months after the treatment was declined, but that Dr. Kim's notes did not mention massage therapy as part of the treatment (Tab 1, Page 11, 13, and 17). Opposing counsel also questioned the claimant that the carrier paid for massage therapy treatments in New Hampshire, and only denied the treatments sought in New York when the workers compensation form for the State of New Hampshire were not completed and submitted.

DISCUSSION

The claimant has the burden to prove by preponderance of the evidence that the massage therapy treatments were reasonable and necessary, and that they were a result that was caused in whole, or in part, by the May 19, 2011 work injury. The panel finds that Ms. LeBorgne was a credible witness. It also gives Dr. Kim's medical opinions and recommendations substantial weight as a treating physician, but found the fact that massage therapy was missing from several of his notes disturbing. Dr. Kim does explain the treatment plan more clearly in two letters that were written at the request of the claimant (Tab 1, Page 1 and 6). We also find that Dr. Kim's medical opinions to be slightly more reasonable and sounder than those of Dr. Farber, who is an independent medical examiner that only spent five minutes with the claimant and conducted a review of her medical records.

However, the carrier argued that the claimant did not meet her burden of proof, and that the treatment was not reasonable. It further argued that it did cover massage therapy when the claimant sought treatment in New Hampshire, because those Licensed Massage Therapists (LMT) did complete the required workers compensation form for the State of New Hampshire. However, the carrier argues that the claim should be denied, because the New York LMTs did not complete or submit the workers compensation form for the State of New Hampshire as required by NH RSA 281-A:23 and LAB 508-13. NH RSA 281-A:23, subsection 5(c) states in part, "There shall be no reimbursement for services rendered, unless the health care provider or health care facility giving medical, surgical, or other remedial treatment furnishes the report required in subparagraph (b) to the employer, insurance company, or claims adjusting company within 10 days of the first treatment." Subsection 5(c) further states, "Additionally, for good cause, a hearing officer may waive the 10-day reporting requirement and order remuneration paid."

The carrier argues that a good cause argument was not made, and that the treatment providers simply did not want to comply with New Hampshire law. The panel agrees with the carrier that a good cause argument was not made, nor could it be made since the healthcare provider never furnished the required report to the carrier. The carrier did receive some handwritten notes from both LMT providers along with a letter describing their respective education, training, and experience. However, that information the carrier did receive was

insufficient to fulfil the requirements of NH RSA 281-A:23. The purpose of the form in question is to provide information with regards to an injured worker's treatment, physical restrictions, return to work status, and whether or not the treatment provided is casually related to the alleged work injury. Although the Panel could find that the claimant had good cause, we decline to do so in this case, because the information that was provided late was insufficient to fulfill the requirements of RSA 281-A:23.

DECISION

On the issue of RSA 281-A:23, the panel finds that the claimant has not met her burden of proof to show by a preponderance of the evidence that the medical treatments with Megan Doolin, LMT and Amanda Brewster, LMT with a date range of May 30, 2017 through January 11, 2018 are reasonable, medically necessary, and casually related to her workplace injury on May 19, 2011.

This was a unanimous decision of the panel.

Respectfully submitted,

Marc G. Beaudoin, Esq., Panel Member
Compensation Appeals Board