A Call for Clarity

The "Big Ticket" Medical Benefits Lottery

By H. George Kagan

Proposed methods of visualizing recurring problems, and tools for dealing with them in the here and now, while waiting for clarity to arrive.

Most state workers' compensation acts outline limitations on "everyday" benefits in great detail. Not much statutory guidance is provided, however, for medical "prescriptions" that stand out from the norm beyond the broad grant of benefits that are "medically necessary." Many jurisdictions' administrative agencies promulgate highly specific medical benefits regulations, rules and reimbursement schedules, but these too often fall short when it comes to "prescriptions" of extraordinary services, devices, vehicles and structures usually seen in large exposure or catastrophic injury cases. As a result, defense counsel must often "think outside of the box."

It is first the claims professional who must determine, on an ad hoc basis, what is appropriate and what is not. Substantial legal exposure hangs in the balance. In many cases, an employer or carrier can draw on intermediary vendors' relevant experience with intensive and extraordinary medical workers' compensation benefits requests. When issues emerge within the "grey area" of extraordinary medical prescriptions and recommendations, the contentiousness that often follows can "foster an atmosphere of distrust and lack of cooperation," which can mar the recovery process and relationship between injured worker, employer or carrier, and vendors striving to meet the worker's needs. *Temps & Co. Cremeens*, 597 So. 2d 394 (Fla. Dist. Ct. App. 1992). Litigation, prolonged and difficult precisely because of ambiguous authority, often ensues.

Where litigation occurs, an employer or carrier must first construe given statutory authority, then determine "genuine medical necessity," and finally muster expert evidence in support of the defense which is almost but *not quite* always necessary. (Where an injured worker seems incapable of carrying a state-specific burden of proof—summary judgment or its equivalent may be invoked. This can backfire, however, via enlistment of the defense's own expert to help "make" the injured worker's case.)

In otherwise compensable cases, U.S. jurisdictions adopt essentially one of three approaches to extraordinary medical ben-

■ H. George Kagan, a partner with Miller Kagan Rodriguez & Silver PL, is based in West Palm Beach, Florida, and was named one of the Top 100 Florida Super Lawyers in 2007. He was chair of the Workers' Compensation Section and also the Rules Committee for the Florida Bar and vice chair of its inaugural Workers' Compensation Board Certification Committee. Mr. Kagan is a past president of the Palm Beach chapter of the American Inns of Court. He has been cited in Best Lawyers in America since 1995 and is the current chair of DRI's Workers' Compensation Committee.

efits. This article will (1) explain the different approaches and examine illustrative cases; (2) identify representative jurisdictions that follow each approach; (3) discuss a proposed (by the author) four-part test that may better inform the defense of extraordinary medical benefits cases; and finally, (4) discuss the *nuts and bolts* of defending these kinds of cases.

Is It Covered and If So, to What Extent?

If "it" is not "covered," it is not awardable. Workers' compensation measures are "creatures of statute" and courts *generally* have little leeway to read absent terms *into* statutes. Yet, the benefits described here are often the *least* specific among those in the respective statutes.

If "it" *is* covered in either statutory or, as is more often the case, case law authority, the equally important companion question is: what is the extent of responsibility? Before describing these three paths, or identifying which states follow a particular path, it is important to note that even a given jurisdiction's characterization of its own approach is sometimes misleading. When a jurisdiction is unsure how to handle a question, it sometimes relies on another state, but in the process, mischaracterize that state's approach. Many of these states first list how other jurisdictions rule, often uncritically adopting lists from other cases, but on careful inspection, the characterizations are not always apt! Furthermore, a given state's approach can differ depending on the date of an accident and applicable version of a state statute. A few such anomalies, which further hinder understanding, will be pointed out where applicable.

First Prong and Illustrative Cases: *Deny Responsibility*!

Many states deny any responsibility on the part of an employer or carrier to provide special housing, personal transportation, swimming pools or other extraordinary benefits to injured workers.

Alabama

Alabama was squarely in the "denial" camp in its supreme court's ruling in *Ex parte City of Guntersville*, 728 So. 2d 611 (Ala. 1998), however, the same court recently relaxed its grip somewhat in *Ex parte Mitchell*, 989 So. 2d 1083 (Ala. 2008), but the extent is not entirely clear. The court allowed a motorized scooter award under its new standard as an allowable "other apparatus," but denied the accompanying award of a "lift," which was deemed

> [S]olely to facilitate access to transportation in connection with a motor vehicle.***… [A] lift can serve no function other than as an attachment to a mode of transportation to facilitate the injured employees' transportation. The lift itself cannot improve Mitchell's condition, prevent the further deterioration of his condition, or relieve him from the effect of his condition by restoring him to a basic level of appearance or functioning.

Mitchell, 989 So. 2d at 1092.

The author believes, employing the ratio decindendi of *Mitchell*, given that Alabama denied a van lift award, it is unlikely to consider a van an appropriate medical apparatus, but it is possible.

Colorado

Colorado remains fairly strict. In *Bogue vs. SDI Corp.*, 931 P.2d 477 (Colo. App. 1996), the court also affirmed denial of a van. Although the court commiserated with the difficulties engendered by the state's policies, it reaffirmed the viability of earlier cases, *e.g.*, an older case in which a special stair glide to allow a claimant to seek cover in a basement during a tornado alert—and similar devices—were determined to be non-covered medical benefits. The court reasoned that to recognize coverage of such devices would leave "no meaningful limitation on an insurer's liability." *Id.* at 479 (internal citations omitted). The court did, however, cite an appropriate award of a hot tub, which did fit the state's definition of a required medical benefit.

Maryland

In *R & T Constr. Co. v. Judge*, 594 A.2d 99 (Md. 1991), the Court of Appeals of Maryland denied award of a vehicle as not within the insurer's responsibilities, whereas it awarded basic modifications to a home to create access for necessities. However, more extensive modifications to improve the claimant's quality of life were denied as "not strictly necessary," because such an award would lead to "no statutory standard to guide the commission in determining the extent of an insurer's obligation to make alterations to a Claimant's residence." *Id.* at 531. The court did, however, permit the enhanced cost of electricity required by the claimant's medical apparatus and batteries required by his equipment.

Former DRI Workers' Compensation Committee Chair Bob Erlandson noted a late-breaking Maryland Court of Special Appeals result on March 31, 2009, which permitted the award of a home alarm system, following a brutal beating, as necessary to the employee's well-being, under a rationale first articulated in a Florida case awarding child care, discussed below. *See Simmons v. Comfort Suites Hotel*, ___ A.2d ___, 2009 WL 886930 (Md. App. March 31, 2009).

An employer or carrier must first construe given statutory authority, then determine "genuine medical necessity," and finally muster expert evidence.

New York

In *Nallan v. Motion Picture Studio Mechanics Union, Local No. 52*, the court ruled a van was not a medical apparatus under New York's statute, briefly articulating that it was not embraced by New York law. This compact holding has served as a template for all subsequent New York decisions. 49 A.D.2d 365, 375 N.Y.S.2d (N.Y. App. Div. 1975), *rev'd on other grounds*, 40 N.Y.2d 1042, 360 N.E.2d 353, 391 N.Y.S.2d 853 (N.Y. 1976); *see also Langford v. William Rogers, Inc.*, 144 A.D. 2d 785; 534 N.Y.S.2d 7621 (N.Y. App. Div. 1988); *Kranis v. Trunz, Inc.*, 91 A.D.2d 765; 458 N.Y.S. 2d 10 (N.Y. App. Div. 1982).

New Mexico

New Mexico's decisions are often characterized as the "middle" prong approach.

Its multiple decisions purport to analyze the approaches among the states. One leading New Mexico case even allowed an initial purchase of a van coupled with denial of the replacement van. *Fogleman v. Duke City Automotive Services*, 999 P.2d 1072 (N.M. 2000). However, a careful reading of the decision reveals that the first van was *voluntarily provided* by the employer, and

To understand the seemingly simple concept—medically necessary—its evolution in "generous" Florida is illuminating.

the court made no allowance for any costs under the theory proposed by the worker. The worker argued that the van was not a "medical" expense but an "artificial member" under the New Mexico statute. The court rejected the distinction. In short, New Mexico seems to be a "denial" state.

The Middle Path and Illustrative Cases: Modification Cost Only

Some jurisdictions take a middle path, restricting extraordinary benefits to modification of existing vehicles or residences and basing employer liability on the "difference" in cost or value between an "accessible" vehicle or home and a hypothetical "base" or original "non-accessible" device, home or vehicle.

Maine

In *Brawn v. Gloria's Country Inn*, 698 A.2d 1067 (Me. 1997), the Supreme Judicial Court of Maine ruled that an employer should receive the trade-in value of a previously owned van toward the purchase of a new one, But careful reading of the decision shows that the first van was voluntarily purchased by the employer, putting the case squarely in the "middle" camp.

Michigan

Michigan is often cited as permitting total van awards, with credit given to *Wilmers v. Gateway Transp. Co.*, 575 N.W.2d 796 (Mich. 1998). However, that case has been overruled in *Weakland v. Toledo Eng. Co. Inc.*, 656 N.W.2d 175 (Mich. 2003), in which, with strong dissent, the Michigan Supreme Court overruled *Wilmers*, clearly holding that only modifications to an existing van would be permitted. (The *Weakland* decision, however, begged the question: what happens when there is no suitable van *to* modify?)

Missouri

In *Mickey v. City Wide Maint.*, 996 S.W.2d 144 (Mo. Ct. App. 1999), an intermediate appellate court permitted an award based on the difference between a conventional, "average," mid-priced automobile of the same year as the claimant-purchased van, "to be deducted from the cost of the converted van."

North Carolina

Also following the middle path is *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (N.C. 1986), and a follow-up case, *Grantham v. Cherry Hosp.*, 389 S.E.2d 822 (N.C. 1990), which precluded a rehabilitation specialist's recommendation that a claimant's *overwhelming consumer debt* be absorbed as part of his rehabilitation plan.

The Third Path and Illustrative Cases: A Mix of Total Awards, Denials and "Differences"

States following the third path offer an amalgam, creating uncertainty. Some cases from some states can be read to allow an unrestricted award of an apparatus such as a car or a van, if appropriate, without seriously discussing alternatives. *See Terry Grantham Co. v. Indust. Commis. of Arizona*, 741 P.2d 313 (Ariz. Ct. App. 1987); and *Okla. Gas & Elect. Co. v. Chronister*, 114 P.3d 455 (Okla. Civ. App. 2004). Florida, *sometimes* described as perhaps the most generous jurisdiction, takes the "all three paths" route. *See* Lex K. Larson, *Larson's Workers' Compensation Law*, §93.03[1], at 43.

Florida

Florida's fabled generosity may be cooling. Previously, when a benefit was established as "medically necessary," there was "no apportioning" the cost of medical benefits, which meant that the employer was 100 percent responsible, subject only to certain case law distinctions that emerged. But after Florida's 1994 amendments, and particularly after those of 2003, *any* medical benefit is now subject to *both* a "major contributing cause" test for a threshold determination of compensability—requiring 51 percent—and *also* an "apportionment" analysis, whereby the remaining "percent" not caused by an accident may be carved out, which is controversial and vulnerable to appellate attack as of this writing. *See also Aino's Custom Slip Covers v. DeLucia*, 533 So. 2d 862 (Fla. Dist. Ct. App. 1988) (no award permitted on the facts); *Brown v. Steego Auto Parts*, 585 So. 2d 401 (Fla. Dist. Ct. App. 1991) (weight loss program awarded); and *Temps & Co. Cremeens*, 597 So. 2d 394 (Fla. Dist. Ct. App. 1992) ("differential in cost" case award).

Mississippi

In *Miss. Trans. Com. v. Dewease*, 691 So. 2d 1007 (Miss. 1997), the court permitted a van award in principle but denied on the facts presented, following *Georgia-Pacific Corp v. James*, 733 So. 2d 875 (Miss. 1999), in which a van was awarded, but dicta cautioned that it may sometimes be appropriate to simply modify existing vehicles.

Iowa

Stone Container Corp. v. Castel, 675 N.W.2d 485 (Iowa 2003), is a case referencing prior approval of a van under extraordinary facts presented, and also adding *award of a computer.*

Arkansas

In *Liberty Mutual Ins. Co. v. Chambers*, 64 S.W.3d 775 (Ark. 2002), a divided court permitted award of a wheelchair-accessible hand-controlled van, to be operated by the claimant, and went a step further, reversing the "credit" allowed the employer for a failed modification of the claimant's original vehicle based on the rational that the carrier knew or should have known those efforts would prove inadequate. Paradoxically, a subsequent Arkansas case disallowed a van under the constraints of a pre-1993 law accident claim. *Public Empl. Claimant Division v. Keys*, 99 Ark. App. 77 (2007 Ark. Ct. App.).

Pennsylvania

A decision recently handed down by the Supreme Court of Pennsylvania illuminates the arguable flaw in strictly adhering to

precedent in awarding modification costs only. In *Griffith v. Workers' Compensation Appeal Board*, 943 A.2d 242 (Pa. 2008), the court described precisely the enigma facing a claimant who did not have and could not afford a basic van, and ruled that in such cases, an entire van could be awarded when modification is appropriate.

Nuts and Bolts of an Extraordinary Benefits and Services Defense

A four part standard, culled from many cases, to help visualize and discipline the defense or award of extraordinary medical benefits in jurisdictions where they are permitted, and where permitted, also the *extent* of employer responsibility, is proposed by the author.

> Extraordinary medical benefits, services and devices (or modification of existing facilities and vehicles) must be demonstrated as (1) genuinely medically necessary, (2) uniquely attributable to injury or sequelae, (3) based on genuinely expert opinion that (4) conforms to the governing legal standard.

Application of the test in a defense must be tailored to a jurisdiction and case facts.

Medically Necessary

To understand the seemingly simple concept—medically necessary—its evolution in "generous" Florida is illuminating. In the late 1960s, extremely sympathetic cases began to yield remarkable benefit awards. *E.g.*, *Oolite Rock Co. v. Deese*, 134 So. 2d 241 (Fla. 1961) (horrific injuries prompted the first payment of attendant care to family members); *Haga v. Clay Hyder Trucking Lines*, 397 So. 2d 428 (Fla. Dist. Ct. App.), *review denied*, 402 So. 2d 609 (Fla. 1981) (grievous leg injury resulted in award of a swimming pool); *Edgewood Boy's Ranch Found. v. Robinson*, 451 So. 2d 532 (Fla. Dist. Ct. App. 1984) (handicapped van awarded); and *Peace River Elec. Corp. v. Choate*, 417 So. 2d 831 (Fla. Dist. Ct. App. 1982) (worker awarded a complete modular home where the combination of extreme injury and dilapidated status of claimant's existing home precluded modification). Starting in the late 1980s, a campaign was launched—by the author and others—to bring some order to a process rapidly losing any recognizable contours. The campaign met with some success via a series of cases, but an important, unwritten "wild card" rule also emerged, which continues to inform the result in most jurisdictions: *the party that controls the rhetoric often prevails.*

A more critical embrace of the concept of "medically necessary" is the first key to unraveling experts' personal proclivities merely posing as expert testimony establishing medical necessity. The first "campaign" case, *Aino's Custom Slip Covers v. DeLucia*, 533 So. 2d 862 (Fla. Dist. Ct. App. 1988), involved an initial award of a van to a wheelchair-bound, frail elderly claimant largely because it would be more "convenient,… safer and easier…, beneficial in the course of his treatment," and would allow him to "stretch out," and make transfers easier. At the appellate level, SUCH benefits conferred by a van were deemed legally insufficient support for award of an "*unusual 'other apparatus' item which was not been shown to be "medical necessary…*"" *Aino's* at 865.

The van in *Aino's* was also part of a "life-care plan" developed by a life-care vendor that the trial judge had adopted. A life-care planner was placed in charge of "overseeing and supervising" claimant's rehabilitation; home modifications, vehicle purchase, further nursing care needs, and to manage medical care. The appellate court ruled the planner's testimony was not evidence of medical necessity.

Relying on *Aino's*, the same court later reversed an award based on a similar "comprehensive life care plan" in *Diamond R. Fertilizer v. Davis*, 567 So. 2d 451 (Fla. Dist. Ct. App. 1990), which included a "$650 television set, $350 video cassette recorder, a specially equipped $28,000.00 van, a special $3,000.00 bed, a $2,000.00 whirlpool, a $960.00 hydraulic lift and a $3,000.00 environmental control unit." The bottom line was that there was no proof the claimant needed these items or services *due to medical necessity.*

Separating "Necessary" from "Nice"

In Florida, the claimant's bar explored the medical necessity stumbling block and, with the help of sympathetic or opportunistic experts, found it easy to move to the next level, so to speak, in trial courts: all previously denied types of awards could be had simply if the right expert waved the "medical necessity wand" over identical items. This resulted in *Timothy Bowser Construction v. Kowalski*, 605 So. 2d 885 (Fla. Dist. Ct. App. 1992).

In *Kowalski*, the treating physician saw "need" for a van. The physician further testified it was "medically necessary" that the claimant have transportation for various purposes—such as "quality of life activities," including trips to the grocery store, the mall, the beach, homes of other family members and the movies. These activities would provide the injured worker with socialization and community reintegration activities, according to the physician's testimony. *Kowalski* at 886. The trial judge also supplemented the employer's acknowledged responsibility for an "accessible living environment" with the requirement that "said housing shall provide a minimum 2 bedrooms and 2 bathrooms and shall be of sufficient size to accommodate the claimant's parents (providing 24 hour a day attendant care)," based on the physician's belief that the "very positive and caring supportive relationship between the claimant and the parents render it medically necessary for the parents to live with him." *Id.* at 888.

The appellate court reversed the awards in *Kowlalski* and remanded. The *Kowalski* holding's significance to the advocate is that the magic words "medically necessary" chanted by the experts this time did not foreclose appellate scrutiny based on the competent substantial evidence rule. Rather, the *Kowalski* court determined that it occupied "the same vantage point" as other courts in evaluating whether the expert's testimony met a legal standard. Evaluating testimony in this case resulted in reversal. Actual analysis, as opposed to a court's uncritical acquiescence, revealed that the so-called "medical necessity" prescription by the treating physician was simply the "personal preference of the medical witness." *Kowalski* at 889. Whereas a van might be necessary for transport, the court reasoned, it was only necessary for trips that were the employer's responsibility, which was only to and from *genuinely* medically necessary appointments.

Takeaway Tools: Ways to Crack the Medically Necessary *Code*

The award of the van was actually reversed in *Kowalski* in stronger language than had

been anticipated, which gives employers useful leverage in negotiating these kinds of prescriptions, vis-à-vis the court's very clear statement that although a van was necessary for transport of this large, totally incapacitated claimant, transport was *only required to facilitate medical treatment*. By *strong* implication, it was not required for "quality of life" trips. However, this implication continues to stir controversy and create confusion.

The stream of raw medical testimony purporting to adhere to rigorous methodology establishing facial necessity should pass through a purely legal filter.

For the "medically necessary" component of our entitlement test, first, physicians, and second, when necessary, the courts, must be challenged to differentiate genuine medical necessity from personal proclivities.

In certain cases these issues *also* implicate the test for scientific validity, invoking the applicable *Frye* or *Daubert* standard, but, especially in appellate challenges, we must exhort our judiciary to enforce legal standards in this area, in order to ascertain whether there is *genuinely* substantial evidence in a record to support an award—rather than mere "words" or rhetoric to that effect in the guise of expert opinion. The stream of raw medical testimony purporting to adhere to rigorous methodology establishing facial necessity should pass through a purely legal filter—and whereas the task of differentiating the wheat from the chaff is not easy—that is why we carefully vet who is to sit upon our courts in preference to simply installing software. This is a crucial means, in conjunction with *Daubert* and *Frye*, of insulating industry from unwarranted expense, based on personal proclivities masquerading as expert opinions.

Uniquely Attributable

This second criterion in our test informs inquiry into medical necessity. It is deceptively easy to misunderstand or even overlook this component, even in states where medical benefits may not be apportioned: it is both possible *and* appropriate to determine whether a whole pie is "medically necessary"—or just one slice. This is an important means to limit the *extent* of employer responsibility: break down "big" objects into component parts to accurately track liability. It helps deflate potentially "full" house, van, pool, etc., awards into partial responsibility, *e.g.*, for only the difference in cost between a modified and unmodified vehicle for instance. Illustrative case examples are the following two "car" and "phone" cases.

The Car

After amputation of four fingers, a claimant could no longer drive her modest car, then only a few years old, which lacked automatic transmission and power steering. She brought a claim for reimbursement of the cost of a slightly upgraded make and model car that was a couple of years older than her original. The judge awarded a whole (used) car, without crediting the trade-in value of the prior vehicle to the employer, along with all insurance, major maintenance and repair costs. *Temps & Co. v. Cremeens*, 597 So. 2d 394 (Fla. Dist. Ct. App. 1992). The claimant tried to portray the replacement car as a medical apparatus, the cost of which could not be apportioned. The appellate court accepted the employer's analogy to houses, vans and similar awards in other cases. In this case, the accident and its sequelae did not necessitate a medical apparatus in the form of a car. The medical apparatus necessitated by injury "was the special ATS/PS options, not the Camero itself, that met this definition of "medically necessary" and the components, that is, apparatus used to mitigate the effects of the injury."

Recalling a case in which a claimant presented the entire cost of a new home built to specifications to accommodate his injury, the court pointed out:

> [W]e held the e/c responsible only for the necessary and reasonable costs of making the home wheel-chair accessible, an amount about 1/10 the cost of the entire house. The modifications were a medical apparatus that were deemed not to be apportionable. The modifications themselves were deemed the "medically necessary" apparatus that was not subject to "apportionment. By analogy the AT/PS options are the medical apparatus necessary to permit claimant to drive, and thereby constitute medical apparatus the cost of which should be borne by the e/c.

Temps & Co., 597 So. 2d, at 396.

The court also reversed the insurance and maintenance and repair award, stating, that prior to her accident:

> [C]laimant was responsible for the incidental costs of automobile ownership such as insurance, gasoline, title and license plate. As with the home-related cost of utilities in (citation omitted), *the need of insurance, maintenance and repair of the replacement vehicle was not caused by claimant's accident. The e/c responsible for only those expenses uniquely attributable* to providing the medically required ATS/PS options and making those options continuously available to claimant.
>
> . . .
>
> In (citation omitted) the e/c were made responsible for insurance, maintenance and repair cost related to the award of a wheel chair van. The case *sub judice* is different from that decision and (cite omitted) in that claimant's medical benefits were the ATS/PS not the entire vehicle or swimming pool, respectively.

Id. at 397 (emphasis added).

The "Phone" Case

Compare the car case with the discussion of the "phone" case in *Polk County Board of County Commissioners v. Varnado*, 576 So. 2d 833 (Fla. Dist. Ct. App. 1991). In this case the court wrestled with award of "all of claimant's monthly water, sewer and electrical charges as well as the cost of one telephone in the home." It reversed award of costs associated with simple operation of the home on the basis that these were not uniquely attributable, *i.e.*, "necessitated by an accident and found to be medically necessary." If there was no showing that the need for utilities was "caused by claimant's accident or that such items are medically necessary," they were not compensable because "utilities are generally

considered as necessities in every home in our society and a claimant will have a difficult time demonstrating that necessity for such items was caused by the compensable accident such as could be properly awarded as medical benefits."

The court articulated a key principle: loss of income normally used for day-to-day needs is provided for under the indemnity sections of the act. The court, however, allowed award of a phone and its service because there was evidence it was "medically necessary" that the claimant have a phone. But the court wrestled with the *apparent* contradiction in allowing this "ordinary" utility—the phone—compared with those that it denied. The court reasoned, first that "[w]hile one may argue that a telephone is also a basic necessity in our society, there is evidence that would support that the telephone is medically necessary in this particular case… [i]n light of the extreme reliance of the claimant on his wife." *Varnado*, 576 So. 2d at 838–39.

The court explained further, unlike other utilities, there is a base charge associated with availability of phone service unrelated to usage costs: "[T]here is no statutory authority for apportioning the actual usage cost of furnishing the medically necessary apparatus." *Id.* at 839.

Takeaway Tools: Ways to Put Uniquely Attributable *Parts Together*

A local supermarket manager can testify, accurately, that "the injured worker will need food from now on. In fact, it's an emergency: if she does not get this proven medical necessity soon, she will die."

This factious scenario is not much different from the trips to the beach or ball park established as "medically necessary" via testimony in *Kowalski*, and is compelling, to a lay person. The key to what is uniquely attributable is the word "prescription," which is based on *genuine* medical necessity. On the one hand, if a doctor might be guilty of malpractice for failing to prescribe a benefit, the benefit is likely a "prescription." On the other hand, if what is prescribed is an equally common need to all living persons, it is unlikely "uniquely attributable" to injury, and expert testimony relying on such an argument is easy to expose as based on personal preferences influenced by quality of life concepts. These personal proclivities amount to reserve-eating guerilla legislation rather than anything actually contemplated by legislatures and caused by injury.

For instance, assume our hypothetical store manager establishes need for "*especially* nutritious food" during a particular healing period, or an expert establishes that need through medical testimony. The author suggests presenting testimony that attention to proper nutrition in light of healing needs is *not* a need uniquely generated by the accident, regardless of "poor dietary habits" before the accident, but is prudent for anyone.

However, if a claimant requires something truly special, *e.g.*, bamboo shoots or eucalyptus leaves, as a proven medical necessity, its cost is likely compensable. A New York case permitted the difference in cost between *medically necessary* "organic" foods and "ordinary" foods in *Morrell v. Onondaga County*, 244 A.2d 695, 664 N.Y.S.2d 168 (N.Y. App. Div. 1997). However, as long as indemnity benefits flow, an injured worker must use them to meet the basic necessities of life.

Secondary Services and an Additional Rule to Help Enforce the Uniquely Attributable *Requirement*

There are cases that seem at first to defy the "uniquely attributable" rule. *See*, *e.g.*, *DeLong v. 3015 W. Corp.*, 558 So. 2d 108 (Fla. 1990) (lawn care); *Southern Industries v. Chaumney*, 613 So. 2d 74 (Fla. Dist. Ct. App. 1993) (driveway maintenance); *Doctor's Hospital of Lake Worth v. Robinson*, 411 So. 2d 958 (Fla. Dist. Ct. App. 1982) (child care). To meet the uniquely attributable requirement, a claimed service *must* be *provided to* or *performed for* the claimant. In short, a claimant *must have the service*—not merely *refrain* from performing it. As the court in one case put it, "[a]lthough claimant presented testimony from his treating physician to the effect that it was medically necessary for someone *other* than claimant to mow his yard, the physician admitted that avoiding yard work would not improve claimant's condition or aid his recovery." *Varnado* at 839.

The *Varnado* court made a distinction between its consideration of lawn care, and another case that awarded household services: "medical testimony from the physician in that case supported the need for an award of such services which were found to have been necessitated by the accident." *Id.*

Under this analysis, child care was awarded in a case in which psychiatric testimony established that a totally disabled mother in traction would have a mental breakdown if her child was not cared for during her extensive traction—not an unreasonable predicate. The only surprise is that such claims are not common. The award was affirmed on the somewhat contrived but conceptually valid grounds that child care was effectively psychiatric treatment for the worker, not something that the worker must "refrain from" doing. *Doctors Hospital of Lake Worth v. Robinson*, 411 So. 2d 958 (Fla. 1s DCA 1982). If, for instance, the woman's injury simply precluded her from providing care to her child, child care would not qualify as "necessary" benefit. A recent Maryland "alarm" case also alluded to this rationale. *See Simmons*, *supra*.

If what is prescribed is an equally common need to all living persons, it is unlikely "uniquely attributable" to injury.

Further, in *Varnado*, the trial judge awarded "decorator services" and all new furniture because the unfortunate claimant had soiled some of these materials at home, citing a Michigan case, *Romano v. South Range Construction Co.*, 154 N.W.2d 560 (Mich. Ct. App. 1967) (unique "clothes" were destroyed in consequence of a covered accident, but the Michigan court held that was not "injury" cognizable at law). The *Varnado* court reversed the decorator and furniture awards.

Other complex cases included *Doctors Hospital of Lake Worth vs. Robinson*, 411 So. 2d 958 (Fla. Dist. Ct. App. 1982), in which an injury adversely impacted a pregnancy, causing premature birth, requiring extra medical treatment and specialized

attendant care for the child. The trial judge awarded benefits on the theory the fetus was an integral part of the worker's body. The appellate court reversed because the child was not an employee, and only employees could receive medical benefits. *See also Globe Sec. v. Pringle*, 559 So. 2d 720 (Fla. Dist. Ct. App. 1990). Conversely, a New York case permitted award of a medical procedure that would be necessary, as a result of a work-related injury, in order for an injured worker to impregnate his wife. *Spyhalsky v. Cross Constr.*, 294 A.D.2d. 23, 743 N.Y.S.2d 212 (N.Y. App. Div. 2002).

Only in the most "extreme cases" might an entire house be awarded as a nonapportionable "medical benefit."

Takeaway Tools: Putting the Unusual Service *Rules Together*

On the one hand, some of the distinctions described here may not seem fair, such as denying child care in a compelling case on the sole rationale "that's what indemnity is for." That is why, in the serious case, it may be better to overcompensate a little than to risk bad law (and penalties/fees).

However, it should now be easier to understand a case that awarded *AAA* membership, lawn service, maid service, cleaning supplies, air-conditioning, driveway seal coat, and a smoke detector. *Southern Indus v. Chumney*, 613 So. 2d 74 (Fla. Dist. Ct. App. 1993). In *Chumney*, evidence established that as a result of the claimant's quadriplegia, he needed to maintain his body temperature via air-conditioning, required basic telephone service for communication regarding his medical problems, and that he "must have a clean, dust free and odor free environment so as not to aggravate his sensitive pulmonary condition. The environment outside of claimant's home should also be reasonably clean." *Id.* at 75–76.

In short, to maintain proper body temperature, the air-conditioning was awarded as a needed "apparatus" uniquely attributable to the accident and its sequelae, as was the *AAA* membership, in case the claimant's vehicle broke down by the highway, which again was determined necessary to maintain body temperature. The telephone expenses were awarded because they constituted an unapportionable medical apparatus.

The lawn and maid service awards in *Chumney* warrant special mention. They are embraced by our tests: the claimant needed to have pollen and dust arrested as a genuine medical necessity, uniquely attributable to the claimant's "delicate respiratory" condition brought about by injury. It was not that the claimant should merely "refrain," or could no longer tend to his yard and home. Likewise, the driveway sealant was awarded so that the soft asphalt of the claimant's driveway might have a firm foundation for wheel chair transfers and the like. It was *necessary* that he have this service and product.

Conversely, in *Chumney*, the court reversed award of garbage collection as an ordinary living expense, not uniquely attributable to the claimant's condition, along with well service, window tinting, cleaning of drains, repair of bathroom lights, and the life-care plan of the rehab specialist. Full electrical service and home insurance awards were modified to include only amounts and costs generated by needs uniquely attributable to the accident, such as additional costs of running the air-conditioning and the fractional cost of insurance due to the home modifications.

It is generally impermissible to award or even for the judge to deal with matters of title, length of leases, or other similar matter that are generally either the employer's prerogative, or depend on durations established by expert testimony. *All Clear Locating Services v. Shurman*, 855 So. 2d 1208 (Fla. Dist. Ct. App. 2002).

Genuinely Expert Opinion

It is best, and in most cases required, that testimony supporting extraordinary medical devices and services emanate from genuine medical experts, not vendors: beware of strangers and their plans (and bills)!

Life-care plans and delegation for implementation of plans to strangers is generally repudiated at the appellate level, absent default or estoppel on the employer's part. Sharp looking plans also tend to lead judges astray, given the temptation to delegate "fact-finding" functions to the "planner," (notwithstanding the *extra digits* usually embedded into the overall costs). Vendor-driven plans were reversed in *DeLucia* and *Diamond R. Fertilizer v. Davis* (above). However, a case articulating in detail a judge's efforts at taking on the management of such a case, absent waiver or estoppel on the employer's part, with some success and some excess, is found in a "primer" of sorts, *All Clear Locating Services Inc. v. Shurrum*, 855 So. 2d 1208 (Fla. Dist. Ct. App. 2003).

In *Shurrum*, the court reversed award of a particular "brand" of portable mobile home, of a particular size, along with details of "required" financing and the length of the lease—all per the reports of a hired "expert" vendor. The judge also erred in failing to separate that part of the housing and insurance expense *uniquely attributable* to the injury. The court reiterated that the home was not the medical apparatus. Only the modifications allowing accessibility were the medically necessary apparatus uniquely attributable to the injury. The court added in a note that only in the most "extreme cases" might an entire house be awarded as a nonapportionable "medical benefit."

Excessive Cost—According to Whom?

Courts in most jurisdictions will reverse in cases in which an injured worker argues, or the "stranger" (vendor) proves that the employer's chosen means of addressing a particular problem, such as housing, transportation, availability of a pool at some distant location requiring transportation), seems excessively costly—and that the vendor's idea is more practical in dollars and cents. The courts usually allow employers to make their own economic decisions. "Strangers," however, will be more warmly received, and their bills may be awarded, if need is readily apparent, and the employer ignores the obvious.

Conclusion

Jurisdictions generally follow one of three paths in awarding extraordinary medical benefits, however, while each jurisdiction

has its own statute and cultural answers when difficult questions arise about workers' compensation coverage of extraordinary medical benefits, answers in many if not most jurisdictions remain in flux. Whatever "state" your state is in will have a huge bearing on an outcome. Highly sympathetic cases such as *Chumne*, demonstrate that while courts in most jurisdictions may not "give away the farm," they often err on the side of awarding exotic, "grey area" benefits. A defense strategy should focus on rebutting inauthentic proof of medical necessity—uniquely attributable to injury—while insisting on genuine expert opinion that conforms to a legal standard.

Employers should not pay for big ticket, medium ticket, or even small ticket items emanating from the personal preferences of physicians, vendors and judges based on the luck of the draw. Too much is at stake. There are defense tools, starting with control of the rhetoric, and followed by some of the suggestions discussed herein. It is also recommended that each jurisdiction recognize the counterproductive free-for-alls engendered by lack of predictability in this area, as well as the necessity that raw medical opinion testimony in this quasi-medical realm receives critical scrutiny as only a fully functioning legal filter at the appellate level can provide. Adherence to some of these suggestions, and implementation of some of these recommendations, will help insulate industry from unwarranted exposure based on mere personal preferences—while preventing unreasonable denials to workers with critical needs based merely on the fear of opening floodgates.