

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F301559**

**VICTOR HERZOG, EMPLOYEE**

**CLAIMANT**

**CONAGRA,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED JUNE 7, 2004**

Hearing conducted on March 17, 2004, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Mountain Home, Baxter County, Arkansas.

The claimant was represented by The Honorable Frederick "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by The Honorable Bill H. Walmsley, Attorney at Law, Batesville, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on March 17, 2004, in Mountain Home, Arkansas. Although Administrative Law Judge Don N. Curdie conducted this hearing, he left the Arkansas Workers' Compensation Commission before an opinion could be prepared. After notice to the parties, and without objection, I reviewed the transcript and exhibits in order to prepare this Opinion as Judge Curdie's successor.

A Prehearing Order was entered in this case on December 16, 2003. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time.

The following stipulations were submitted by the parties, either in the Prehearing Order or at the start of the hearing, and are hereby accepted:

1. The employee-employer relationship existed at all relevant times.
2. Claimant sustained a compensable injury on January 29, 2003.
3. Claimant is permanently and totally disabled as a result of his compensable injury.

By the terms of the Prehearing Order, and by agreement of the parties at the hearing, the issues to be litigated and resolved at the present time are limited to the following:

1. Whether Respondent is liable to provide Claimant with a functioning heating and air conditioning unit, as reasonably necessary medical treatment.
2. Whether Respondent is liable to provide Claimant with a new handicapped-accessible van, as reasonably necessary medical treatment.
3. Whether Claimant's parents are providing reasonably necessary medical services to Claimant, such that they should be compensated by Respondent.
4. Whether Claimant is entitled to an attorney's fee.

With regard to the heating and air conditioning unit, Claimant notes that this unit functioned properly prior to his compensable injury. After the compensable injury, Respondent made certain modifications to Claimant's home to accommodate his wheelchair; one of these modifications required moving the heating and air conditioning unit. Because the unit ceased to function properly after being moved, Claimant argues that Respondent should either repair the existing unit or provide a new unit.

Respondent contends that the unit is over fifteen years old, and that it did nothing in moving the unit that should cause it not to function. Respondent offered to pay Claimant \$250.00, the estimated value of the unit.

Claimant argues that Respondent should provide him with a new wheelchair-accessible van. Claimant contends that modifying a car or truck would not be sufficient, because he injures his feet entering these types of vehicles. Respondent is willing to convert or modify any vehicle Claimant chooses to purchase. However, Respondent does not believe that it should provide the vehicle.

Claimant seeks compensation from Respondent for certain services provided to Claimant by his parents. Claimant characterizes these services as reasonably necessary medical treatment or services. Respondent counters that, with therapy, training, and additional modifications to the house, Claimant could provide himself with these services.

## **DISCUSSION**

### **A. Repair or Replacement of the Heating and Air Conditioning Unit**

Claimant testified that the heating and air conditioning unit was part of the house when it was purchased eight years prior to the hearing. Claimant did not know how old the unit was, but it appeared new to him. Prior to his compensable injury, the unit worked well without any problems. After the injury, a doctor ordered modifications to Claimant's home to make it wheelchair accessible. One of these modifications required installing a ramp at a door close to Claimant's room; installation of this ramp necessitated moving the heating and air conditioning unit. Claimant testified that after the unit was moved, it would not heat and cool the home.

Claimant's father, Victor Herzog, testified that the home was purchased eight years ago. The unit worked properly until it was moved to put the ramp in; it did

not work after that. Mr. Herzog requested that the unit be either repaired to working order or replaced. He did not want to accept the Respondent's offer of \$250.00 as the value of the heating and air conditioning unit.

Respondent conceded that it had some responsibility for the heating and air conditioning unit. However, Respondent does not want to repair a unit that it understands to be over fifteen years old, nor does Respondent want to install a new heating and air conditioning unit. Susan Kay Damron, an employee of Corvell Corporation who served as Claimant's field case manager, testified on behalf of Respondent. She acknowledged that the heating and air conditioning unit did have to be moved to accommodate the emergency exit ramp, and that a subsequent inspection revealed that the unit's compressor was broken. She confirmed that Respondent offered to pay Claimant \$250.00 as the value of the unit.

Claimant argues that Respondent should be required to either repair or replace the heating and air conditioning unit under Ark. Code Ann. § 11-9-508(a). That section states that "[t]he employer shall promptly provide for an injured employee such medical ... services ... and other apparatus as may be reasonably necessary in connection with the injury received by the employee." *Id.* The Workers' Compensation Law must be construed strictly. See Ark. Code Ann. § 11-9-704(c)(3). The Workers' Compensation Law must also be construed in light of the expressed purpose of the law, which is to provide benefits to workers after they have been injured on the job in order to enable them to return to work. Farmers Cooperative v. Biles, 77 Ark. App. 1, 6, 69 S.W.3d 899, \_\_\_ (2002) (citing Ark. Code Ann. § 11-9-101(b)).

Construing the Workers' Compensation Law strictly and in light of its

purpose, I do not find statutory authority to require Respondent to either repair or replace Claimant's heating and air conditioning unit. Section 11-9-508(a) concerns payment for medical benefits, but in this case the record does not contain proof that a functioning heating and air conditioning unit is a medical service or apparatus. The Claimant may have a claim for property damage, breach of contract, or some other cause of action. However, I do not find authority for the Commission to adjudicate such a claim under section 11-9-508(a) or any other statute. Cf. Johnson v. Little Rock School District, Full Workers' Compensation Commission Opinion filed April 4, 2002 (E700511 & F011921) (the Commission found that it lacked concurrent jurisdiction to adjudicate an apparent violation of Ark. Code Ann. § 6-17-1209(a)(2) raised by the claimant); Larry W. Sanders v. Sunbelt Couriers, Full Workers' Compensation Commission Opinion filed March 15, 1994 (E105668) (the Commission found that it did not have authority or jurisdiction to settle an independent contractual dispute between the claimant and an insurance company).

Respondent acknowledges its responsibility for Claimant's heating and air conditioning unit. However, this acknowledgment does not confer authority or power upon the Commission to determine whether the heating and air conditioning unit should be repaired or replaced. That question must be resolved by agreement of the parties or in another forum.

**B. Purchase and Modification of a New Van**

Claimant requests that Respondent provide him with a wheelchair-accessible van. Claimant testified that he is able to drive and would like to be less dependent upon his parents for transportation. Claimant's 1993 Chevy Cavalier needs

a new water pump and has not been modified to accommodate Claimant. Claimant wants a new van because it would be more reliable and easier for him to use. He explained how a van equipped with a chair lift and other items would be easier for him to access and operate. The only thing he will be satisfied with is a new van. Claimant gets sores on his feet, usually by bumping his feet on a car door when getting in. He explained in some detail how he has to enter a car, how he bumps his feet, and how a van would alleviate that problem. He does not want a car or truck; he believes that only a van will keep him from bumping his feet and causing sores.

Claimant's father, Mr. Herzog, also testified in favor of a new van for Claimant. He explained that Claimant gets sores on his feet from the car door not swinging wide enough, causing Claimant to rake his feet on the underside of the door. Mr. Herzog also explained how a van would be better for Claimant; Mr. Herzog wants a new van, not an older model that would be less reliable. Claimant has looked at a fairly expensive new van; Mr. Herzog testified that he would not put Claimant in a twenty-year-old vehicle. Claimant's mother, Doris Jean Herzog, testified in favor of a newer vehicle that would not break down.

Susan Kay Damron, the claims manager testifying on behalf of Respondent, explained that Respondent is prepared to pay for any needed vehicle modifications, but that purchase of the vehicle is Claimant's responsibility. In Ms. Damron's experience, of those persons with injuries similar to Claimant's that drive, approximately half drive vans and the other half drive cars. Ms. Damron testified that a van would be preferable and that she would recommend a van if money were available for its purchase.

Claimant's physician, Dr. Thomas Kiser, opined that Claimant is not limited to a van only. A report signed by Michelle Joyner, addressed to Jennie Felch, for the period ending March 13, 2003, notes as follows:

3. Driving evaluation - will need to practice more before discharge. Currently using claimant's car (Cavalier two-door) for practice. Claimant and his parents have voiced concern of the car size and requested a van. Dr. Kiser felt the two-door car is better and claimant will improve on maneuvering himself with practice. Claimant will need a wheelchair lift for car in the near future.

A subsequent note signed by Dr. Kiser on July 18, 2003, indicates that a car or truck would be as acceptable as a van. Found at page 158 of the transcript, the relevant part of the note reads as follows: "It is my belief that a reliable, handicapped accessible, van is reasonable and necessary to give this man some semblance or [sic] a normal life [the rest of this sentence is handwritten], or a car [with] training on how to load a wheelchair, or a truck [equipped with] w/c lift."

The issue is whether Respondent should provide Claimant with a van; Respondent has already agreed to be responsible for any modifications, regardless of the vehicle Claimant uses. In terms of the statute, the question is whether the van is a reasonably necessary medical service or apparatus under Ark. Code Ann. § 11-9-508(a). Claimant has the burden of proving that he is entitled to requested medical treatment or services. See Guerra v. Langston Gin Co., Inc., Full Workers' Compensation Commission Opinion filed January 5, 2004 (F005245). Claimant must sustain his burden of proof by a preponderance of the evidence. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 206, 989 S.W.2d 543, \_\_\_ (1999). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean

preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947). The number of witnesses is not controlling and the statement of a single witness may be entitled to more consideration. Id. at 497, 206 S.W.2d at \_\_\_.

I find that Claimant has not demonstrated by a preponderance of the evidence that a new van is a reasonably necessary medical service or apparatus. In terms of Ark. Code Ann. § 11-9-508(a), a new van is reasonable, but the evidence of greater convincing force indicates that a new van is not necessary. Specifically, I am convinced by Dr. Kiser's note that a properly modified car or truck would be just as acceptable for Claimant as would a new van. Dr. Kiser's statement is supported by Ms. Damron's testimony: in her experience with drivers having injuries or conditions similar to Claimant's, approximately half drive vans and the other half drive modified cars.

I do not discount Claimant's testimony concerning the injury done to his feet when he enters the family's automobiles; however, there is no testimony that these automobiles have been modified in any way. There is no testimony in the record stating that a car or truck cannot be modified so as to prevent Claimant from bumping his feet. Dr. Kiser's note states that any one of the three types of vehicles - a car, truck, or van - would be acceptable if modified.

Further, I find that Respondent is not responsible for purchasing a vehicle; rather, Claimant should provide the vehicle of his choice, with Respondent making all reasonably necessary modifications to the vehicle. This situation is distinguishable from the facts in Liberty Mutual Insurance Co. v. Chambers, 76 Ark. App. 286, 64 S.W.3d 775 (2002). In Chambers, the proof demonstrated that modifications to the

claimant's car would not be sufficient, and that only a wheelchair-accessible, hand-controlled van would be appropriate for claimant's use. Further, there was testimony that the claimant could not afford such a van. In the case before the Commission, Dr. Kiser writes that a car or truck could be equally appropriate as a van; further, there is no testimony or proof that Claimant cannot afford a reliable car, truck, or van. Thus, Claimant failed to demonstrate by a preponderance of the evidence that he is entitled to a vehicle (whether a car, truck, or van) purchased by Respondent.

### **C. Compensation for Claimant's Parents**

Claimant seeks compensation for his parents in light of the services they provide to him. He testified that his parents assist with him with a diaper that he cannot put on alone, his father bandages his feet, his mother prepares his meals, and his father transports Claimant wherever he needs to go. Claimant conceded that his mother prepared his meals when he lived at home prior to his injury. However, Claimant believes his parents should be compensated for the care they provide.

Claimant's father, Mr. Herzog, described "dressing" Claimant's feet. He testified concerning the amount of time he spends driving Claimant to various places, including disassembling and reassembling Claimant's wheelchair. He also described helping Claimant put on the diaper. Mr. Herzog estimated that he and his wife spend about forty hours a week caring for Claimant. He broke this down to include fifteen hours per week providing transportation, twenty-one hours per week preparing meals, an hour per week for laundry, and approximately two hours and twenty minutes per week for changing the diaper. Mr. Herzog did note that his wife retired five or six years ago, and that she prepared the meals both before and after Claimant's injury. Similarly,

Mr. Herzog's wife has done the family laundry for years.

Claimant's mother, Mrs. Herzog, testified that she and her husband provide forty hours of care per week; she requested \$7.00 or \$8.00 per hour for compensation. She helps with changing Claimant's diaper, but that only takes a few minutes a day. She agreed that she has been the family cook for years, she does the laundry for everyone, and she cleans the Claimant's bathroom and bedroom.

Susan Kay Damron, the claims manager testifying on behalf of Respondent, noted that she is a registered nurse with advanced management training and case management continuing education. She testified that rehabilitation teaches independence in bowel and bladder management. If Claimant's parents weren't available, Ms. Damron would recommend some sort of assisted living for Claimant, maybe for five or six hours a day. A nurse's aide would generally provide such service, and nurse's aides make anywhere from minimum wage up to \$7.00 or \$8.00 per hour. She first testified that six hours per day would be for nursing services since Claimant could do his own laundry and meals with training; she later testified that eight hours per day might be average and reasonable. She reiterated that with training and proper modifications in the home Claimant could fix his own meals and do his own laundry. When specifically asked if she believed payment of eight hours a day in nursing services is reasonable in this case, Ms. Damron responded that some days may require more hours and other days require less, but "eight hours would probably be the max, probably the minimum would be maybe three."

Dr. Kiser provided a note concerning the care given by Claimant's father. The relevant part of the note is as follows:

Mr. Herzog is a 40-year-old white male who sustained a T5 complete spinal cord injury secondary to a fall. Because of his injury, he needs help from family members with bowel and bladder management, help with dressing, bathing, and skin care. His father is providing nursing care, which is very helpful, and is a medical necessity for him at this point in his injury.

This note is found at page 159 of the transcript.

Under section 11-9-508(a), Respondent must provide “such ... nursing services ... as may be reasonably necessary in connection with the injury received by” Claimant. As noted above, Claimant has the burden of proving that he is entitled to the requested nursing services. See Guerra v. Langston Gin Co., Inc., supra. Claimant must sustain his burden of proof by a preponderance of the evidence. Dalton, 66 Ark. App. at 206, 989 S.W.2d at \_\_\_\_\_. “Preponderance of the evidence” means evidence of greater convincing force, and implies an overbalancing in weight. Smith, 212 Ark. at 496-97, 206 S.W.2d at \_\_\_\_\_.

I find that Claimant’s parents are entitled to compensation for providing nursing services. Claimant and his parents testified to such services as dressing wounds and assisting Claimant with bowel management, Ms. Damron conceded that nursing services through assisted living would be recommended if Claimant’s parents were not available, and Dr. Kiser’s note is specific about the nursing services being rendered and their necessity. The preponderance of the evidence clearly points to the need to compensate Claimant’s parents for their services under section 11-9-508(a).

The problem, of course, is in determining the amount of compensation due. Not all of the services provided by Claimant’s parents are compensable. While compensation may be awarded for nursing care provided by a relative, compensable

nursing services do not include assistance with household and personal tasks which the claimant is unable to perform. Pickens-Bond Constr. Co. v. Case, 266 Ark. 323, 327, 333, 584 S.W.2d 21, \_\_\_ (1979). The services contemplated by the term “nursing services” are those rendered in tending or administering to another in sickness or infirmity. Little Rock Convention and Visitors Bureau v. Pack, 60 Ark. App. 82, 90, 959 S.W.2d 415, \_\_\_ (1997) (citations omitted). The Workers’ Compensation Commission notes a distinction between “nursing services” which are compensable, and “custodial services” which are not. Leach v. WBC Construction, Full Workers’ Compensation Commission Opinion filed July 13, 1995 (E304749). Nursing services include such things as helping administer medication to an individual or helping with physical therapy; custodial services generally are services which include assistance with household and personal tasks which a claimant may be unable to perform, such as cooking. Id.

In the absence of detailed records to the contrary, I find that Claimant’s parents should be compensated for providing five and one-half hours of nursing services per day. Ms. Damron’s testimony is of the greater convincing force, based upon her education, work experience, and familiarity with Claimant’s case. She testified that if Claimant’s parents weren’t available she would recommend some sort of assisted living at the rate of five or six hours per day for the purpose of providing nursing services. When specifically asked if she believed payment for eight hours a day of nursing services would be reasonable in this case, Ms. Damron responded that the time would vary on a daily basis, but eight hours a day would probably be the maximum time required, and three hours a day would be the minimum time required.

While Ms. Damron's testimony conflicts with that of Claimant's parents, it is understandable that they may not appreciate the nature or scope of the tasks they are performing. Many of the services Claimant's parents are providing are for household or personal tasks, such as preparing meals or doing laundry. These are not compensable. See Pack, 60 Ark. App. at 90, 959 S.W.2d at \_\_\_\_\_. Based upon Mr. Herzog's testimony alone, compensation would only be due for two hours and twenty minutes of nursing services per week, his estimate of the time needed to assist Claimant with his diaper. However, Dr. Kiser's note and Ms. Damron's testimony both demonstrate that the parents are providing substantially greater services than they estimated. Dr. Kiser lists a greater range of services needed from Claimant's family and states that Mr. Herzog is providing nursing care that is a "medical necessity." Ms. Damron's familiarity with this case and past experience supports her testimony that five or six hours per day would be expended on nursing services if Claimant's parents were not available, rather than two hours and twenty minutes per week.

Further, I find that Claimant's parents should be compensated based upon the hourly minimum wage. Ms. Damron testified that this would be the minimum for which a nurse's aide could be hired to perform these services. Claimant's parents do not have the formal training or experience in this area to justify a higher rate, and the testimony indicates that their care is sufficient at this point in time.

#### **D. Attorney's Fees**

Claimant seeks an award of attorney's fees. Claimant's compensable injury occurred on January 29, 2003, which means that this request is governed by Ark. Code Ann. § 11-9-715(a), as amended by Act 1281 of 2001.

I find that an attorney's fee cannot be awarded to Claimant. All of the issues raised by Claimant concern compensation or payment for medical benefits or services. Section 11-9-715(a)(1)(B) provides that "[a]ttorney's fees shall not be awarded on medical benefits or services" with an exception not applicable here. Given the nature of Claimant's issues raised under section 11-9-508(a), section 11-9-715(a) does not authorize an award of attorney's fees.

### **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

1. Claimant sustained a compensable injury on January 29, 2003, which rendered him permanently and totally disabled.
2. The employee-employer relationship existed at all relevant times.
3. The Arkansas Workers' Compensation Commission does not have the statutory authority to adjudicate Claimant's claim for a functioning heating and air conditioning unit.
4. Claimant has failed to establish by a preponderance of the evidence that Respondent is liable to provide him with a new, handicapped accessible van.
5. Claimant has established by a preponderance of the evidence that his parents should be compensated for nursing services rendered for five and one-half hours per day at the hourly minimum wage rate.
6. Claimant's attorney is not entitled to a controverted attorney's fee because the applicable statute prevents awarding an attorney's fee on the basis of medical benefits or services allowed.

**AWARD**

The Respondent is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY III,  
Administrative Law Judge