

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. C907639

JOHN H. KEYS, JR.

CLAIMANT

**ARKANSAS HIGHWAY & TRANSPORTATION
DEPARTMENT**

RESPONDENT EMPLOYER

PUBLIC EMPLOYEE CLAIMS

RESPONDENT CARRIER

ORDER AND OPINION FILED MARCH 3, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN R. MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM L. WHARTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on February 2, 2005. A prehearing conference was held on November 22, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on April 20, 1979.
2. The claimant is permanently and totally disabled.
3. The compensation rate is \$106.12.

The claimant had three major contentions: entitlement to a wheelchair accessible van; proper compensation for nurse's services provided by the claimant's wife and

some home repair. Specific contentions were provided in the claimant's prehearing filing, which was identified as Claimant's Exhibit No. 2.

Respondents contend it has agreed to remodel the bathroom, remove the hot tub and take a van provided by the claimant and make accommodations to it.

Respondents also agree to pay lodging for the claimant and his spouse during the term of the remodeling. Respondents' prehearing filing responses were introduced as Respondents' Exhibit No. 1. A videotape of the claimant's home was introduced as Respondents' Exhibit No. 2 without objection.

ISSUES TO BE LITIGATED

1. Wheelchair accessible van.
2. Proper compensation for nursing services.
3. Home repairs.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable injury on April 20, 1979.
2. The claimant is permanently and totally disabled.
3. The compensation rate is \$106.12.

4. The claimant has proven by a preponderance of the evidence that the purchase of a hand controlled, wheelchair accessible suitable van by respondents is reasonable and necessary.

5. The preponderance of evidence provides that the nursing services of three hours per day paid at the rate of \$11 per hour is reasonable and necessary for care associated with the claimant's injury.

6. The claimant has proven by a preponderance of the evidence that some home renovations are reasonable and necessary and these include: bathroom remodel, widened doorways, new entrance door, hot tub removed from the bedroom of the home, foundation work repaired in the hot tub room, sheet rock work repaired in the hot tub room, new flooring in the home, repair of the wall by the electric bed, closets rebuilt in the bedroom, either a cabinet for medical supplies or a closet for medical supplies and cabinet doors in the kitchen replaced.

DISCUSSION

The claimant, now 46 years old, sustained a compensable injury on April 20, 1979. Respondents accepted the claimant as permanently and totally disabled and benefits have continued to be paid in this matter. The claimant is in a wheelchair and had both legs amputated in 2003. The claimant owns a home in Benton and is requesting some renovations. A videotape of the home was introduced into evidence; however, the claimant expanded on some of the needs for the home.

A summary of the requests include:

1. A new door from the carport damaged by the wheelchair butting it.

2. New, wider doorways in the home required because he has a wider wheelchair than the standard.
3. Cabinet doors replaced under the kitchen sink removed when he had legs.
4. New flooring in the home due to wheelchair damage and leaking urine bag and catheter.
5. Wall repaired by bed damaged from electric bed going up and down.
6. Cabinet for medical supplies to be stored.
7. A bathtub added to the bathroom.
8. Remove the hot tub and place on a concrete pad and put a fence around it and a gazebo over it.
9. Repair the foundation from the hot tub being in the room.
10. Repair the sheet rock in the bedroom where the hot tub was since it was damaged from foundation problems.
11. Closets returned to the rooms, since they were taken out to put the hot tub inside the home.

The claimant underwent a double amputation April 10, 2003, and as a result of the surgery, experienced a blood clot which caused a heart attack on April 13, 2003. On April 23, 2003, the claimant had a triple bypass and was released from the hospital on May 9, 2003. The claimant's needs at home were greater following his hospital release. A nurse was being paid \$90 per hour for two hours per day and the claimant made arrangements with respondents to pay the claimant's wife half that amount, since she was there 24 hours per day. Respondents paid the claimant's wife for several

months and subsequently reduced the pay. The claimant described the kinds of things his wife helps him with:

She would assist me getting in and out of bed and out of my wheelchair; in and out of the shower; she changes my catheter for me; any medications I need, as far as doctoring pressure sores or anything like that, she does that; she helps me with my bath; just any medical assistance, like a transfer. The wheelchair always wants to roll a little bit, so I just have her hold the chair while I transfer. Any medical assistance, she does it for me. So they don't have to pay the high price of sending a nurse at \$90 an hour. Some days it is a lot more hours; some days it is less. But it is hard to put an exact amount on a daily average. (T., p. 19, lines 2-12.)

According to the claimant, since his leg amputation, he has more difficulty with transfers from bed to chair, etc., and has fallen out of bed on more than one occasion because of balance problems. The claimant contends his needs for assistance are greater since his leg amputation. The claimant's wife has now taken a job outside the home to help with expenses. The claimant contends that she should receive additional money for all her extra assistance she must provide him because of his health concerns.

Beverly Keys, wife of the claimant, described some of the services she provides to the claimant:

Okay. I still, I help him get dressed; I help him take a bath; he has a lot of problems using the bathroom, I help him get up on the commode chair and all that, but he has a lot of problems of, and I guess it is from his injury and inactivity, of diarrhea, so he has times that he doesn't realize that – he doesn't have the feeling to know he is going to go to the bathroom, so I have to come home and clean up diarrhea and help him get a bath and change the beds and all that. That has been a pretty chronic problem for the last, I guess, year now. (T., p. 53, lines 23-25; p. 54, lines 1-6.)

* * *

I change his catheter and I empty the urine bags and all that.
(P. 54, lines 9-10.)

Ms. Keys testified that she would estimate that she spends from four to eight hours per day helping the claimant with his care and treatment. She further testified that she believed the \$630 per week she was previously paid was fair compensation and she was not forced to work outside the home when she was paid that amount. Ms. Keys now works a 40-hour week outside the home.

Ms. Doris Taylor, claims adjuster for the respondent, verified that the claimant's wife was being paid more money for his care following his release from the hospital in May 2003. After the critical phase was past, Ms. Taylor made arrangements to contact the claimant's doctor, Dr. Thomas Kiser, to determine how many hours of personal care the claimant would now need and he responded on December 9, 2003, stating the claimant needed a minimum of two hours' care and later increased the time to three hours. Ms. Taylor conducted some research of pay rates for personal care and began paying the claimant's wife \$11 per hour for three hours daily.

The claimant's wife is currently being paid \$11 per hour for three hours per week for nursing services she provides the claimant because of his injury. The claimant's treating physician was asked about how much special care the claimant's wife would provide and he gave an average of 3 hours per day. The claimant's wife has testified that she spends more time than that caring for her husband. The Arkansas Supreme Court has provided some direction on nursing services in *Pickens-Bond Const. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979), by stating that nursing services for which the employer is responsible are those reasonably necessary for the treatment of the

injury and this does not include those services which one spouse is normally expected to render to another.

After considering all the credible evidence, I find the preponderance of the evidence supports the respondents' position that payment of three hours per day at \$11 per hour to the claimant's spouse is reasonable and related to the compensable injury.

The claimant next described his current transportation, which is a 1991 Ford Van 250 with 189,000 miles. The problems with the van are many: the top leaks, the power door openers do not always work, wheelchair lift is not dependable, power seat is worn out, constantly breaks down, needs a tune-up, air conditioner does not work and transmission problems. The claimant testified that he cannot afford another van. According to the claimant, Terry Kee, a handicap conversion specialist, recommended a 350 Van since it is heavier and will last longer.

The next issue to consider is whether the claimant is entitled to a hand-controlled, wheelchair accessible van pursuant to Ark. Code Ann. §11-9-508(a). This statute provides:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee.

Doris Taylor, claims adjuster for the respondent, testified that she has handled this claim for about five years. She testified a van was bought for the claimant in July 1991, for \$7,000.

The present case is on point with the Court of Appeals decision in *Liberty Mutual Ins. Co. v. Chambers*, 76 Ark. App. 286, 64 S.W.3d 775 (2002). The Court in *Chambers* upheld the Commission's finding that respondents were liable for the cost of a suitable van (not necessarily a new van) and for the costs of the van modifications. This finding resulted from the interpretation of Ark. Code Ann. §11-9-508(a) (Repl. 1996). In the present case, the claimant testified that he was unable to afford a van and, therefore, would essentially be eliminated from recovery of such benefits the statute provides. I find respondents are liable for the cost of a suitable van.

Under cross examination, the claimant verified that some maintenance on the home has not been done because of finances. The claimant was questioned about the use of the hot tub and he confirmed that because he has a catheter, he would have to take some special precautions to avoid problems with the chemicals invading his body. The claimant had not used the hot tub for several years.

Ms. Taylor verified that some work had been done on the claimant's home in 1990, to include some work done in the bathroom, some cabinet doors removed in the kitchen and some ramps built. Ms. Taylor agreed to have some closets installed in the room where the hot tub is being removed. If the bathroom permits size-wise, she also agreed to install a bathtub.

Beverly Keys, wife of the claimant, testified that in 1980 the doors were widened on the home; however, the claimant had a smaller wheelchair at that time and he now scrapes his hands each time he goes through the doors. If the doors are widened, the flooring will be messed up more than it now is and new floor covering will be needed.

The claimant has requested a number of home modifications or renovations. Respondents have provided a videotape of the residence and has attempted to highlight some of the requested changes. Respondents have agreed to make modifications and updates to the single bathroom of the claimant. The claimant has requested in addition to the walk-in shower that a bathtub be installed. If room permits for this addition, I see no reason why this addition cannot be included, since the bathroom is going to be updated.

Respondents have also agreed to remove the hot tub that was originally placed in a bedroom in the home. Testimony revealed that the claimant has not used the hot tub for a number of years and he would have to take some special precautions today, since he has a catheter if he attempted to use the hot tub. Claimant requested the hot tub be moved in the back to a concrete pad with a cover built over the hot tub and fence. Since the hot tub has not been used for a number of years, I am unable to find that a concrete pad, cover and fence for the hot tub to be reasonable and necessary. The claimant had his legs amputated, since the hot tub was purchased, and his ability to get in and out of the hot tub has changed. I am unable to find that the hot tub is now reasonable and necessary for the claimant's continued use. Respondents have agreed to remove the hot tub.

The claimant has requested that the foundation in the room with the hot tub be reviewed and repaired as well as the sheet rock in that room due to foundation problems. The claimant has also requested that closets be rebuilt in that room. Closets were removed when the hot tub was placed in that bedroom. The foundation problems appear to be related to the hot tub and the hot tub was originally used by the

claimant pursuant to his compensable injury and provided by respondents. I find the preponderance of the evidence provides that repairs to the foundation and walls are reasonable and necessary. I also find that rebuilding some closets would also be reasonable and necessary. These repairs would be the responsibility of respondents.

The claimant has requested that the doorways be widened to accommodate his larger wheelchair. The claimant showed his scraped hands at the hearing from banging them on the doorways as he was trying to maneuver through. I find the preponderance of evidence provides that the doorways should be widened to allow for the claimant's wider wheelchair and that these repairs are reasonable and necessary and the responsibility of the respondents.

Another request by the claimant was new flooring. The house now has some carpet and some vinyl flooring but it is worn and stained from urine spills and just wheelchair wear and tear. The claimant testified that he has less upper body strength now due to his legs being amputated and his heart attack afterwards and now has more difficulty maneuvering on carpet floors. With the door widening project, the floor coverings will be affected. I find the preponderance of evidence provides that some suitable floor covering should be installed and the responsibility of respondents. The combination of urine spills, wheelchair wear and tear and widening of the doors would necessitate a more suitable floor covering.

The claimant's hospital bed is in the living room and that is where he sleeps now. He testified that the wall is damaged near the bed from operating the electric bed. Apparently, the bed has hit the walls and damaged the paint. That repair appears to be somewhat minor and might require some sheet rock repair and some paint. While that

repair is more cosmetic rather than essential for the claimant's livelihood, it was caused by the electric bed and but for the injury, the electric bed would not be used. The preponderance of evidence supports the wall repair and paint is the responsibility of respondents

The claimant next contends that a new door is needed for entry to the home. The claimant contends that his wheelchair hitting the door has caused a hole in the door. If the doorways are widened, a new door will be needed. While interior doors might not be added with the widened doorways, certainly an entrance door would be needed. I find respondents are liable for a new entrance door after door widening.

The claimant has also requested a closet or cabinet for the medical supplies that are stored in one bedroom. It seems that closets were removed from the house to accommodate some of the renovations made in the early 1980s. Since medical supplies are required for the catheter and to treat pressure sores, it would be appropriate to have either a special cabinet or some closet space built for that purpose. I find respondents are responsible for supplying either a cabinet or closet for medical supplies. I find the preponderance of the evidence supports the need for a storage place for the medical supplies.

The claimant has requested that cabinet doors be replaced in the kitchen where they were previously removed. Additional storage is needed to provide the claimant more area to maneuver in the home. Since the cabinet doors were taken off to assist the claimant when he had legs and was in the wheelchair, he no longer needs the added space under the cabinets for leg room. After hearing the testimony and

reviewing the videotape, I find replacing the cabinet doors under the kitchen sink to be reasonable and necessary to provide more storage for the claimant in the kitchen.

ORDER

The preponderance of evidence provides that the nursing services of three hours per day paid at the rate of \$11 per hour is reasonable and necessary for care associated with the claimant's injury. The claimant has proven by a preponderance of the evidence that the purchase of a hand controlled, wheelchair accessible suitable van by respondents is reasonable and necessary. The claimant has proven by a preponderance of the evidence that some home renovations are reasonable and necessary and these include: bathroom remodel, widened doorways, new entrance door, hot tub removed from the bedroom of the home, foundation work repaired in the hot tub room, sheet rock work repaired in the hot tub room, new flooring in the home, repair of the wall by the electric bed, closets rebuilt in the bedroom, either a cabinet for medical supplies or a closet for medical supplies and cabinet doors in the kitchen replaced.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**