

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. C907639

JOHN H. KEYS, JR.,
EMPLOYEE

CLAIMANT

ARKANSAS HIGHWAY & TRANSPORTATION
DEPARTMENT, EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 24, 2006

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

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.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals an administrative law judge's order and opinion filed March 3, 2005. The administrative law judge found that the claimant proved "the purchase of a hand controlled, wheelchair accessible suitable van by respondents is reasonable and necessary." The administrative law judge found, "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." After

reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

The parties stipulated that there was a compensable injury on April 20, 1979, and that the claimant was permanently and totally disabled.

Terry Kee testified that he owned Arkansas Conversion Center. Mr. Kee's testimony indicated that the claimant owned a 1991 Ford van, and that "it is not refurbishable (sic). I mean, you will spend a whole lot more money trying to get it refurbished than you would getting the man something else and start over again. I mean, you are going to have it back in there every few days even after you refurbish. I mean, when they are wore out, they are wore out."

Doris Taylor, an adjuster for the respondents, testified that she assumed the claimant's file in January 2000. Ms. Taylor testified, based on her research, that "there was a van bought in July of 1991 for \$7,000. In other words, a check was cut to Mr. Keys for \$7,000, and then he bought the van with the money. And the file indicated that the circumstances of that transaction was, he

needed a van, the cost to convert the van to make it workable for him was going to exceed the price of this van that Mr. Keys had located on his own, is the way I understand it. He located it through, I think, this gentleman that was here earlier, Mr. Kee, and they worked out a deal on this van. And so, the case manager at the time made the decision that, although our position is we don't purchase vans, that that is not our obligation, in that particular case, it was more cost effective to go that route than to, you know - it didn't make any sense to do it otherwise, in other words. It was just an agreement that was done at that time. There wasn't any intent to establish a pattern of buying vans, but it was an exception for that particular circumstance."

The claimant testified on direct examination:

Q. But let's tell the Judge, actually, about your medical condition, and kind of how it changed in the spring of 2003, and what kind of procedures you went through, and how that affected you?

A. Okay. I had a double amputation April 10, 2003; and as a result of the double amputation, I had a blood clot and it caused a heart attack April 13th, 2003. Then, April 23rd, 2003, I had a triple bypass. So I got out of the hospital May 9th, and went home. And everything changed. I had to have a lot more care from my wife taking care of me. Workmen's comp was paying for a

nurse, but I had made an agreement with workers' comp.

Q. Go ahead and tell the Judge about what you are basing this nursing service on.

A. Workmen's comp was paying a nurse two hours a day, \$90 an hour, so that was 1260 a week. And I made a deal with workmen's comp, at the time my wife wasn't working, if y'all would pay her half that amount, 630 a week, that would be like having a nurse 24 hours a day instead of just two hours a day at a set time, because you need, the condition I am in, you are liable to need a nurse one hour, then two hours later need her again, then it might be four hours and need her again, instead of just one hour in the morning and one hour in the evening....

Q. Did they, in fact, pay 630 a week to your wife for a period of time?

A. Yeah, they paid my wife 630 a week for several months....Then, later on, she dropped it down for some reason, why I don't know....

Q. Now, do you know when she dropped that amount down, or did you recognize any change or any change in the amount of care your wife was providing to you?

A. None whatsoever. She is still giving me the same amount of care, if not more.

Q. We need to talk about this care, and make sure that the Judge knows. I mean, is this just like heating up a can of soup or is this some kind of medical treatment? Tell the Judge what she was doing after you came home.

A. 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....

Q. Have you seen any decrease in the amount of, I guess, medical service your wife has provided since you came home in May of 2003?

A. Have I seen any decrease?

Q. Decrease, yes.

A. No, no decrease....She is taking care of me more.

Q. Go ahead and tell the Judge what kind of van you have got and how many miles and what condition it is in?

A. The van is a '91 Ford Van 250. It has got 189,000 miles on it. The top is leaking. The power door openers don't work right. The wheelchair lift is not dependable. The power seat is about wore out. And just the van in general is breaking down occasionally. It needs a tune-up real bad now....

Q. Are you having any problems with the engine or air conditioner or transmission?

A. The air conditioner doesn't work at all. The transmission, I have already had overhauled once, and it is still giving me problems. A lot of things don't work on it. It is just old and wore out.

Q. Okay. Can you afford a van, new or used, that is dependable?

A. No, I can't afford a van at all. Terry Kee recommended we get a 350 van, because the heavier duty van you get, the longer it will last....

Ms. Taylor testified that the respondents began paying the claimant's wife \$11 per hour, 21 hours weekly, for nursing services, beginning November 29, 2003.

The claimant's wife, Beverly Keys, testified that she began working 40 hours weekly at Dollar General Store beginning October 2004.

A pre-hearing order was filed on November 22, 2004. According to the pre-hearing order, the claimant's contentions were, "1. Entitlement to home improvements, a van and proper compensation for home health care." The respondents contended, "1. The respondents have agreed to remodel the bathroom, to remove the hot tub, and to take a van and make accommodations. 2. The respondents have also agreed to pay lodging for the claimant during the remodeling."

The issues to be litigated were, "Entitlement to home improvements, a van, and proper compensation for home health care."

A hearing was held on February 2, 2005. Beverly Keys, the claimant's wife, testified:

Q. And going back to the services you provided more than in May, what kind of services are you providing today, and I guess since November of '03 through today?

A. 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.

Q. Anything else you do for him as far as the condition and change the urine -

A. I change his catheter and I empty the urine bags and all that.

Q. Who gets all the medical supplies and goes and picks all that stuff up?

A. I do....

Q. How many hours on a day, tell the Judge, would you say you actually do medical - you know, for his medical condition would you provide services?

A. It could be anywhere from, I feel like, four to eight hours a day, because it is constant. If he needs something in the night, I get up and do that. A lot of times he has got to where he has a lot of pain and he gets cramps, and I have to, you

know, massage that cramp or help him turn over.
Just a lot of different things....

The administrative law judge found, in pertinent part:

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 ... 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 respondents appeal the administrative law judge's finding with regard to the van. The claimant cross-appeals the administrative law judge's finding with regard to nursing services. We affirm on appeal and cross-appeal.

II. ADJUDICATION

The claimant sustained a compensable injury on April 20, 1979. Therefore, the claim is governed by Ark. Stat. Ann. §81-1311 (Repl. 1976), which statute provides:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee....

The respondents are liable only for those medical services which are reasonably necessary. *Deboard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). What constitutes reasonably necessary medical treatment under this section is a question of fact for the Commission. *Meadors Lbr. Co. Et Al v. Wysong*, 262 Ark. 425, 557 S.W.2d 395 (1977). The Workers' Compensation Act, as applicable to the instant claim, is highly remedial and is entitled to a liberal construction. *Williams Mfg. Co. v. Walker*, 206 Ark. 392, 175 S.W.2d 380 (1943). The Act should be accorded a broad construction and doubtful cases should be resolved in favor of compensation. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944).

A. Van

The administrative law judge determined in the present matter, "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 Full Commission affirms this finding. We find that purchase of such a new van for the claimant is "other apparatus as may be reasonably necessary for the treatment of the injury received by the employee," pursuant to §81-1311. We note that the claimant has undergone a double amputation and underwent a triple bypass surgery as a result of the amputation. The claimant is in fact permanently and totally disabled. Mr. Kee testified that providing the claimant with a new physically appropriate vehicle would cost less money than attempting to refurbish the claimant's 1991 van. The decision of the administrative law judge is affirmed.

B. Nursing Services

The administrative law judge found, "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 Full Commission affirms this finding. Ark. Stat. Ann. §81-1311 (Repl. 1976) requires that the employer provide nursing services for an injured employee. The Arkansas Supreme Court has recognized that a wife, under appropriate circumstances, should be compensated for such

services rendered her husband, especially when she has found it necessary to leave her employment to do so. *Pickens-Bond Const. Co. Et Al v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979), citing *Dresser Minerals v. Hunt*, 262 Ark. 281, 556 S.W.2d 138 (1977).

The claimant on appeal essentially argues that his wife is entitled to more than \$11 per hour, 21 hours weekly, a total of \$231 per week. The claimant asserts that his wife should be paid \$630 weekly. However, the Full Commission notes correspondence of record to the respondents from Dr. Thomas S. Kiser, dated January 7, 2004:

I talked to Rebecca Olson today and she reported that you needed a more specific number of hours that she needs to spend taking care of Mr. Keys. Due to his shoulder arthritis and difficulty with transfers, she needs to help get him up first thing in the morning and help with getting him back to bed at night. On an infrequent basis, she needs to help with management of his suprapubic catheter, bowel program, and bathing which is not done every day, so on some days she may need to spend 4 hours and on other days 2 hours, *but I think an overall number or average time would be about 3 hours daily, and this would be adequate to meet his needs at the present time* [emphasis supplied].

The Full Commission also notes that Ms. Keys testified she was working full-time outside the home, and was thus no longer providing full-time care to the claimant.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that purchase of a hand-controlled, wheelchair-accessible van by the respondents was reasonably necessary pursuant to Ark. Stat. Ann. §81-1311. We also affirm the administrative law judge's finding that nursing services of three hours per day, paid at the rate of \$11 per hour, was reasonably necessary for treatment of the claimant's injury. The claimant's attorney is entitled to the maximum fee for legal services, pursuant to Ark. Stat. Ann. §81-1332 (Repl. 1976). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of One Hundred Dollars (\$100), pursuant to Ark. Stat. Ann. §81-1332.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the

Majority's finding the claimant should be entitled to a purchased hand controlled wheelchair accessible van.

However, I must respectfully dissent from the portion of the decision finding that the claimant is only entitled to three hours of paid nursing services from his wife.

The claimant contends that he needs more care than that previously provided to him and argues that his wife quit her job after the respondent agreed to pay her \$630 per week. In my opinion, the evidence supports the claimant's contention that his wife has to provide a myriad of medical services for him and that those services take more than three hours per day to perform. Specifically, I find that the respondent should be required to honor their initial agreement to pay the claimant's wife \$630 per week.

Ark. Stat. Ann. 81-1311 (Repl. 1976) required that the employer provide nursing services from an injured employee. Pickens-Bond Const. Co. Et. al. v. Case, 266 Ark. 323; 584 S.W. 2d 21 (1979). Further, at times, employers have been held responsible to compensate a spouse for carrying for their spouse, particularly when the spouse had to leave employment in order to do so. Dresser Minerals v. Hunt, 262 Ark. 280, 556 S.W. 2d 138(1977). Courts have

further extended nursing services to include services provided by a spouse that has no medical training. Tibbs v. Dixie Bearings, Inc., 9 Ark. App. 150, 654 S.W. 2d 588 (1983). However, nursing services constitutes more than a wife's ordinary care for a sick husband. Dresser; See supra.

In the present case, the claimant is a double amputee who relies on his wife to perform multiple health-related services for him. The claimant testified that his wife helps him dress, helps him take a bath, helps him get on the commode, changes his catheter, empties his urine bag, frequently cleans up diarrhea, picks up medical supplies, massages his cramps, and treats his bed sores. In my opinion, these services go above and beyond the care that a wife would ordinarily provide her husband. Furthermore, it appears from the record that the employer does not dispute that the claimant's wife provides nursing services. Instead, it appears they are arguing that she does not provide more than three hours of nursing services per day.

The Majority relies on the medical report from Dr. Kiser which indicated the claimant needed three hours per day in services. However, this note does not take into

account that these services are not needed in a consecutive time period. The claimant testified that his care was sporadic in nature. He said, "...the condition I am in, you are liable to need a nurse one hour, then two hours later need her again, then it might be four hours and need her again, instead of just one hour in the morning and one hour in the evening."

Likewise, the claimant testified that there had been an increase in the amount of care provided by his wife since having his legs amputated and said that he now has problems with balance and falls. The claimant's wife corroborated the claimant's testimony and indicated that she estimates spending four to eight hours a day caring for the claimant. She also said that the claimant's care was not scheduled and that in the past she has paid her niece to care for her husband because she was unable to get to him due to working.

In my opinion, the claimant's testimony that the amount of care provided for her husband varies from day to day and that it is needed at unpredictable times indicates that the claimant needs to be available to care for her husband for more than three hours per day. The evidence is

clear that at one point the claimant's wife quit her job to care for her husband and that this was amenable to Dr. Kiser and the respondents. Since the reduction in payment, the claimant's wife has been forced to seek outside employment, and is only able to care for her husband at times she is not working instead of the times that her husband actually needs care. In fact, she has been forced to pay relatives to care for her husband while she is at work. Given the nature of the services needed by the claimant and the sporadic nature of the services, one can only presume that the claimant needs more than three hours of care.

In conclusion, I find that the claimant's wife should receive payment in the amount of \$630 per week, in accordance with their prior agreement. Therefore, I would affirm the portion of the Administrative Law Judge's decision awarding the claimant a van, and would reverse the portion of the decision denying payment for nursing services in excess of three hours per day. For these reasons, I respectfully concur in part and dissent in part from the Majority opinion.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part with, and dissent, in part from, the majority's opinion. Specifically, I concur in the finding that nursing services of three hours a day at the rate of \$11 per hour is reasonable and necessary for care provided by the claimant's wife. However, I must dissent from the majority's finding that the claimant was entitled to a hand controlled, wheelchair-accessible van. In my opinion, the claimant has failed to meet his burden of proof.

The claimant in this case was injured in 1979, therefore the applicable statute is Arkansas Statute Annotated 81-1311.

The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee. If the employer fails to provide the services or things mentioned in the foregoing sentence within a reasonable time after knowledge of the injury, the Commission may direct that

the injured employee obtain such service or thing at the expense of the employer, and any emergency treatment afforded the injured employee shall be at the expense of the employer.

When the law was amended in 1993, ambulatory devices were added to that section of the statute. A van would be considered an ambulatory device. Arkansas Statute Annotated § 89-1311 contains no such requirement. It is clear that the majority applied the new 1993 law to an old law case as the claimant's injury was in 1979. If the claimant had been injured after July 1, 1993, it is clear, that based upon Liberty Mutual Ins. Co., v. Chambers, 76 Ark. App. 286 (2002), the claimant would be entitled to the modified hand-controlled van. The Chambers court stated:

Section 11-9-508(a) was amended by the 1993 act and no longer ties "apparatus" to medical services, but rather "other apparatus as may be reasonably necessary in connection with the injury received by the employee."

Clearly, from the Court's statement in the Chambers case, apparatus was tied to medical services in Arkansas Statute Annotated 89-1311. Because apparatus is tied to medical

services, it is clear that a van is not an apparatus that is needed for medical services.

Further, I find that a van is not reasonable and necessary for the treatment for the injury received by the claimant. The van is clearly not for the treatment of the claimant's injury, but is merely a way for the claimant to get around.

Simply put, I cannot find that the claimant is entitled to the wheelchair accessible hand-controlled van. Even if I were to find that the claimant was entitled to the van, a finding I do not make, I would note that the claimant is not entitled to a brand new van at the respondent's expense. Although there was testimony that the claimant's current van could not be refurbished because of the problems and the age, it is apparent that there are used vans available that could be modified for the claimant's use. Therefore, I respectfully concur, in part with, and dissent, in part from, the majority opinion.

KAREN H. MCKINNEY, Commissioner