

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410313

JOSEPH POWELL, EMPLOYEE	CLAIMANT
PRODUCERS RICE MILL, EMPLOYER	RESPONDENT
LIBERTY MUTUAL, CARRIER	RESPONDENT

**OPINION FILED MAY 16, 2008**

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

Claimant represented by HONORABLE JASON C. KIDD, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

Respondents appeal from a decision of the Administrative Law Judge finding that the claimant has proven by a preponderance of the evidence entitlement payment of "nursing services" performed by his wife at the rate of \$5.75 for five hours a day, seven days a week from the date of the claimant's injury through a date yet to be determined excluding dates the claimant was hospitalized. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find

that the claimant has failed to establish entitlement to nursing services provided by his wife to the extent awarded by the Administrative Law Judge. Therefore, we find that the decision of the Administrative Law Judge must be affirmed as modified.

The claimant sustained a compensable injury to his lower extremities when his legs were caught and dismembered by an auger. The respondents have accepted the claimant as permanently and totally disabled. In all aspects, the carrier has provided for the claimant above and beyond that which it is legally required to do. For instance, noting that the claimant did not own the property where he lived in a single wide trailer at the time of his injury, the carrier purchased a the claimant a home and deeded it over to the claimant. Once the home was purchased, modifications were made to the home and paid for by the carrier to make it handicapped assessable. The carrier, likewise, purchased the claimant a pickup truck and modified it for driving and with a lift to place his wheelchair in the back. While the carrier was responsible for the handicapped modifications,

the carrier was not legally obligated to purchase either the house or the truck for the claimant.

The claimant's wife was not working at the time of his accident. For the two years prior to his injury, the claimant's wife only performed seasonal work, one and a half months a year. She had just completed her seasonal work when the claimant sustained his injury. Claimant's wife testified that she does not feel that she can leave her husband alone in order to go back to work. However, the evidence reveals that the claimant is as independent as he can be in his situation. The claimant can drive himself, hunt, fish, attend medical appoints, all without the assistance of his wife. The "nursing services" claimant contends his wife must now, or had to perform in the past include, bathing him, changing the linen after an accident, massaging his back, helping with home exercises, and dressing his wounds, as well as perform yardwork, cook, pick up after and otherwise generally care for him.

Under Arkansas law, employers are responsible for nursing services which are reasonably necessary in

connection with the claimant's compensable injury. The Arkansas Supreme Court has held:

The nursing services for which the employer is responsible are those reasonably necessary for the treatment of the injury. Ark. Stat. Ann. § 11-9-81-1311 (Repl. 1976) This does not include those services which one spouse is normally expected to render to another. In Dresser Minerals v. Hunt, supra., we have given recognition to the fact that the term "nursing services" embraces more than a wife's ordinary care for a sick husband, and indicated that the service contemplated with those rendered intending or administering to another in sickness or infirmity. The problem lies in establishing a line of demarkation between the two types of services when both are rendered by one spouse to another.

Pickens Bond Constr. Co. v. Case, 266 Ark. 323, 548 S.@.3d

21 (1979). The Court further stated:

Nursing services do not include assistance with household and personal tasks which the claimant is unable to perform. To extend the meaning of the term to include such services would be judicial legislation.

Where services provided to the claimant include compensable as well as non compensable services, the

claimant is only entitled to compensation for the portion of the services representing compensable services. Leach v. WBC Constr., Full Commission opinion filed July 13, 1995 (E304749); Pine Bluff Parks and Recreation v. Porter, 6 Ark. App. 154, 639 S.W.2d 363 (1982). There is a distinction between "custodial services" and "nursing services." Nursing services include such things as helping administer medication or helping with physical therapy or home exercises. Custodial services generally are services which include assistance with household and personal tasks. Benefits for nursing services have been allowed where the services consisted of medical care, including changing bandages and cleaning wounds, (Tibbs v. Dixie Bearings, Inc., 9 Ark. App. 150, 654 S.W.2d 588 (1983)), giving injections, enemas, hot baths, and leg and back rubs (Dresser Minerals v. Hunt, 266 Ark. 323, 584 S.W.2d 21 (1979)), physical therapy, (Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516 (1984)), and where the claimant was mentally and physically helpless with no control over his bodily functions and needed twenty-four hour per day car

(Sisk v. Philpot, 244 Ark. 79, 423 S.W.2d 871 (1968)). Nursing services were not allowed where the claimant needed supervision because he was depressed and suicidal (J.P. Price Lumbar Co. v. Adams, 258 Ark. 630, 527 S.W.2d 932 (1975)) or where the claimant only needed encouragement or verbal cues to do personal tasks to care for himself although medical evidence indicated that the claimant was incapable of living alone (Little Rock Convention & Visitors Bur. v. Pack, 60 Ark. App. 82, 959 S.W.2d 415 (1997)).

Although the Pickens Bond case as well as many of the other cases cited above interpreted the old law, the legislature did not amend or attempt to change or clarify the term "nursing services" when it enacted Act 796 of 1993. As noted by the Arkansas Supreme Court in Pickens-Bond Const. Co. v. Case, 266 Ark. 323, 584 S.W.2d 21 (1979), "Dividing the services between those the claimant has a right to expect from his wife, and those which are nursing services for which she should be compensated, is not an easy or simple task." In Pickens-Bond, supra, the court noted that one factor to look to is whether the spouse had to

leave employment in order to care for the claimant. At the time of the injury, the claimant's wife, was for all practicable purposes, a housewife all but one and a half months out of the year. She did not need to forego employment in order to care for her husband. Nevertheless, the evidence establishes that some of the services performed by the claimant's wife constitute nursing services under the law for which she is entitled to compensation.

It is understandable that the claimant's wife may feel compelled to constantly watch, monitor, and care for her husband following his severe injury; however, there is no evidence that this constant care was necessary as nursing services. There were, however, several services that the claimant's wife performed that fall on the nursing services side of the demarkation line. For instances, the evidence reveals that until their home was modified, the claimant's wife had to assist the claimant in getting from his wheelchair onto a smaller rolling chair and into the bathroom. After the claimant bathed, she would then have to help him out of the bathroom and back into his wheelchair.

After the home modification were made, the evidence reveals that the claimant no longer required assistance getting into and out of the bathroom. However, a preponderance of the evidence demonstrates that the claimant had fallen at least twice out of his shower chair. Accordingly we find that the claimant continues to require precautionary nursing services while bathing to assist the claimant with balance. Both the claimant and his wife offered testimony that the claimant requests assistance from his wife with washing his back. We cannot find that this service is, in fact, a nursing service contemplated under the workers' compensation laws as it is a task which most people would prefer assistance if offered by a spouse.

With regard to assistance with home exercises, the claimant provided a letter from his treating physician stating that he requires assistance from his wife. In this regard, Dr. Thomas Kiser authored a letter dated November 2, 2006, in which he stated:

Mr. Powell has contacted me concerning all the help that he needs at home. His wife is unable to get a job due to the help that she is providing him since his

injury. As you are aware, he has bilateral above-knee amputations and some pelvic abnormalities due to pelvic fractures. This makes sitting for prolonged times difficult for him. He has been unable to advance to any type of prosthetic wear due to heterotopic ossification in the left hip and pelvis region. He gets around at a wheelchair level. His wife has to do all the heavy household tasks that he previous did, such s mowing the yard, taking care of the vehicles, and any heavy lifting. She also is doing all of the household chores around the house and is helping him with his + home exercise program. Due to these activities, she is unable to get a job to help support the family. Mr. Powell is wanting the insurance company to help pay her to do these tasks for him within the home.

Dr. Kiser had previously authored a letter dated January 30, 2006, stating that the claimant required assistance from his wife "for simple household tasks, such as getting things off the floor and things from high shelves, and for long distance mobility with his wheelchair." With the exception of assistance with the home exercise program all the tasks listed by Dr. Kiser simply do not fall within the realm of nursing services. As the evidence reveals that the claimant required and continues to

require assistance from his wife to perform his home exercises, we find that the claimant's wife is entitled to compensation for such nursing services.

Claimant further contends that his wife must massage his back. Although there is no order for massage therapy in the record, we note that such activity has been awarded as nursing services by the Arkansas Supreme Court in Dresser Minerals v. Hunt, 262 Ark. 280, 556 S.W.2d 138 (1977), without any evidence that leg and back rubs were actually prescribed for that claimant who did not suffer from a back injury but had become disabled after losing sight in his right eye. In the present claim, the claimant suffers from a double amputation and has documented back pain from his injury. Accordingly, we find that back massages are specifically included within the definition of nursing services for which compensation is warranted.

With regard to the changing of linen, the evidence reveals that the claimant has been provided with a means through bed pads and adult diapers to avoid dirty linen caused by mucus leakage. The claimant has chose not to

avail himself of this protection. Thus, the dirty linen is an avoidable problem. Nevertheless, we find that the changing of dirty linen is a nursing service for which the claimant's wife should be compensated. See Pickens-Bond Const. Co. v. Case, supra. Changing bed linen due to urinary or bowel accidents has specifically been found to be a nursing service.

The evidence further reveals that the claimant was required to attend rehab or physical therapy in Stuttgart, which was a round trip of 24 miles. Until such time that the claimant had a modified automobile to transport himself to rehab, his wife was required to drive him to and from Stuttgart for these services. Accordingly, we find that providing transportation for the claimant when he was not provided with the means to independently transport himself constitutes a form of nursing services for which his wife is entitled to compensation. The respondents records will show the date on which the truck was purchased and provided to the claimant. The records will further show the dates on which the claimant attended rehab or physical therapy prior

to the purchase of the modified truck. We find that the claimant's wife is entitled to payment for 1\2 hour per day for every day that she had to drive him to Stuttgart for this treatment, together with one hour of waiting time for the claimant to complete physical therapy.

The evidence further reveals that for a period of approximately of two months after he was initially discharged from the hospital and for a similar period of time after his more recent surgery, the claimant required assistance with dressing his wounds. Although the claimant and his wife testified that the home health nurse did not come to the home on a daily basis for this task, the nurse case manager offered testimony to the contrary. In our opinion, the assistance the claimant's wife provided in caring for his wounds constitutes nursing services. The issue then becomes, how often did a home health nurse actually come to the home and when was such care no longer necessary. Rather than guess or speculate as to the length of time such services were necessary, we find that the carrier must supply the commission with an itemized billing

statement from the home health nurse provider indicating the days such services were provided through the date that the claimant no longer required home wound care. For any day from the date of his discharge from the hospital, through the date of his release from the need from home wound care that a home health nurse did not go to the claimant's home to inspect his dressing, the claimant is entitled to his wife to be paid for one half hour of nursing services.

As for the other tasks claimed by the claimant including but not limited to yard work, cooking, cleaning, picking up after, and otherwise general care, we cannot find that such services were prescribed or are anything more than assistance with household and personal tasks.

In summary, we find that the claimant wife is entitled to compensation at the minimum wage rate for nursing services for limited services as driving the claimant to physical therapy and rehab until such time as a means of transportation was provided to the claimant as well as for attending to the claimant's wounds and bandages during that period of time that he required such care and a

home health nurse did not come to his residence. We further find that the claimant is entitled to compensation at the minimum wage rate for nursing services including assisting the claimant with his bath and for assistance with home exercises, massages, and changing of bed linen. This amounts to an ongoing award of two hours per day, seven days a week for nursing services, together with the limited award of nursing services for driving the claimant to rehab and changing of the claimant's dressing as awarded above. Therefore, we find that the decision of the Administrative Law Judge should be affirmed as modified.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

\_\_\_\_\_I must respectfully dissent from the majority opinion. Based upon a de novo review of the record in its entirety, I find that the claimant has shown by a preponderance of the evidence that his wife is entitled to compensation for nursing services which are reasonable and necessary in relation to the claimant's compensable injury at a rate of \$5.75 for 5 hours a day, seven days a week, excluding the dates the claimant was hospitalized, from the date of injury to a date yet to be determined, as awarded by the Administrative Law Judge.

The majority has found that the following constitute reasonably necessary medical services provided and to be provided by the claimant's wife for which she is entitled to compensation: shower assistance, balance only, past and future, no back-washing; home exercise assistance, past and future; massage therapy, past and future; linen changing, past and future; transportation to rehab or physical therapy, past only, payment limited to one and one-

half hour per day for every day that claimant's wife had to drive him to Stuttgart and wait for him to complete therapy; and, wound-dressing, past only, compensation based on the respondent carrier providing the Commission a statement from the home health nurse provider indicating what dates the nurse did not change the claimant's dressing, thereby indicating the dates the claimant's wife changed the dressing, limited to one-half hour per day.

The majority reduced the compensation awarded for the above-listed future services from the five-hours per day awarded by the Administrative Law Judge, to two-hours per day. I find that the majority's decision to modify the Administrative Law Judge's award is mean-spirited, confusing, and has unnecessarily complicated this claim, potentially leading to further litigation.

Furthermore, based on the preponderance of the evidence of record, I find that the majority's opinion does not adequately compensate the claimant's wife for reasonably necessary medical services she has performed and will perform due to her husband's catastrophic injuries. I do not

believe that any fair-minded person could reasonably conclude that the above-listed tasks, which the majority has found to be nursing services worthy of compensation, only total two-hours of nursing services per day.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner