

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
ST. PETERSBURG DISTRICT OFFICE

Joseph L. Chessher, Employee/Claimant,	)	
	)	OJCC Case No. 81-000181DSR
vs.	)	
	)	Accident date: 6/4/1981
Lykes Pasco, Inc./Travelers Indemnity Company, Employer/ Carrier/ Servicing Agent.	)	
	)	Judge: Donna S. Remsnyder
	)	
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FINAL COMPENSATION ORDER

This cause was heard before the undersigned at St. Petersburg, Pinellas County, Florida on August 25, 2011, upon the Claimant's claims for authorization of 24-hour and/or other amount of attendant care pursuant to the recommendations of Dr. McBath, the authorized treating physician, penalties, interest, costs and attorney fees. The Petition for Benefits was filed on January 12, 2011. Mediation occurred on April 7, 2011, and the parties' pretrial compliance questionnaire was filed on April 7, 2011. Bradley G. Smith, Esq. was present on behalf of the Claimant. C. Brad Drummond, Esq. was present on behalf of the Employer/Carrier.

The defenses were that the attendant care was not medically necessary or related to the work injury, that no penalties, interest, costs nor attorney fees were due and owing.

The following documentary items were received into evidence:

1. Pretrial Stipulation Sheet and Order dated April 13, 2011, together with the documentary items required by Rule 9.180 (Court's Exhibit #1).
2. Employer/Carrier's Motion for Appointment of an Expert Medical Advisor (EMA) filed on August 10, 2000 (Court's Exhibit #2).
3. Claimant's Objection to Appointment of EMA filed on August 24, 2011 (Court's Exhibit #3).
4. Claimant's Motion to Appoint Guardian filed on August 25, 2011 (Court's Exhibit #4).

5. Employer/Carrier's Objection to Motion to Appoint Guardian filed on August 25, 2011 (Court's Exhibit #5).
6. Order Denying Motion to Appoint EMA (Court's Exhibit #6)
7. Final Compensation Order entered October 9, 2009 (Court's Exhibit #7).
8. Opinion of First District Court of Appeal Order entered April 26, 2010 (Court's Exhibit #8).
9. Final Compensation Order After Remand entered July 6, 2010 (Court's Exhibit #9).
10. Deposition of Daniel McBath, M.D., taken on August 3, 2011 (Claimant's Exhibit #1).
11. Deposition of Rodolpho Eichberg, M.D., taken August 9, 2011 (Employer/Carrier's Exhibit #1).

At the hearing, the Claimant, Joseph Chessher, Cecelia Nelson, and April Nelson appeared and testified before me. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The items to which the parties were in agreement on the pretrial stipulation sheet are accepted and adopted as findings of fact.
2. The parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of his employment on June 4, 1981, and that he injured his hip and back as a result of the accident.
3. This claim has been the subject of prior litigation. On October 9, 2009, the undersigned entered an Order awarding 8 hours of attendant care and that Order was appealed to the 1st District Court of Appeal. The Opinion was remanded and an Order was entered by the undersigned on July 6, 2010, delineating the attendant care as awarded according to the recommendations of the Claimant's treating physician, Dr. Daniel McBath. On July 8, 2010, Dr. McBath wrote another prescription increasing the

amount of attendant care.

4. Dr. McBath testified by deposition taken on August 3, 2011. Dr. McBath has been the Claimant's authorized physician for at least 20 years. Dr. McBath testified that the Claimant requires increased attendant care based on the deterioration in his condition. Dr. McBath specifically indicated that the Claimant had a decreased range of motion and he had a decreased level of functioning. As such, Dr. McBath testified that the Claimant required 18 hours per day of attendant care. Dr. McBath indicated that the Claimant's daughter and granddaughter (and other family members) were the most appropriate providers of the attendant care. Otherwise, the Claimant would be forced to go to a nursing facility which would cause further deterioration of the Claimant.

5. The Employer/Carrier has utilized Rodolpho Eichberg as their Independent Medical Examiner (IME) on two occasions. Dr. Eichberg initially saw the Claimant on August 24, 2009, and again on July 19, 2011. Dr. Eichberg testified by deposition taken August 9, 2011. It was Dr. Eichberg's testimony that he could discern no change in the Claimant's condition which would be the basis for an increase in the attendant care previously awarded.

6. Based on the conflict in the medical opinions the Employer/Carrier filed a Motion for Appointment of an Expert Medical Advisor (EMA). That Motion was heard on August 25, 2011. Due to this accident occurring in 1981, the undersigned issued an Order indicating that the appointment of an EMA was not appropriate as that provision did not exist in the 1981 statute. Florida Statute §440(13)(9) affects the substantive rights of the parties, and as such, cannot be applied retroactively, Snider v. Mumford, Inc., 36 FLW D1477 (Opinion filed July 7, 2011).

7. Based on the totality of the evidence before me I find that Dr. McBath is still in the best position to determine the attendant care needs of the Claimant. I accept the opinions of Dr. McBath over the opinions of Dr. Eichberg as to the needs of the Claimant. Dr. McBath has treated this individual for over 20 years and has personally witnessed the deterioration in the Claimant's level of functioning as a result of his industrial injuries. Dr. McBath delineated the reduction in the range of Motion and decreased

mobility of the Claimant. The decreased mobility has also been witnessed by the Claimant's daughter, Cecelia Nelson, and the Claimant's granddaughter, April Nelson, both of whom testified at the hearing. The Claimant also admitted to the deterioration in his level of functioning which has necessitated him using a cane and a walker to keep him from stumbling and falling. The uncontroverted testimony of all witnesses is that the Claimant cannot drive so that his family members must do all his grocery shopping for him, take him to his medical appointments, cook his food for him, but most importantly, observe him almost constantly based on his lack of mobility and potential for falling. According to April Nelson, the Claimant did in fact fall very recently, but fortunately fell only on the couch and did not hit the floor, and as such, the family is setting up 12-hour shifts so that the Claimant is not alone at his house in the future.

8. Based on the totality of the evidence before me I find that the Claimant would be entitled to 18 hours per day of non-professional attendant care as prescribed by Dr. McBath. I accept the testimony of the Claimant, Dr. McBath, Cecelia Nelson and April Nelson that the family members are the most appropriate providers of that attendant care. As indicated in the prior Order, the family members do not work so the appropriate rate of pay for attendant care is the Federal Minimum Wage.

9. Pursuant to Florida Statute §440(13)(2)(b)(2):

A family member or combination of family members providing non-professional attendant care may not be compensated for more than a total of 12 hours per day.

10. Case law is clear that the statutory provision in effect on the date of the provision of the attendant care is the statutory section applicable. Even though it is clear that the Claimant needs 18 hours per day of attendant care, and the family members have been providing that care, the family members are limited to 12 hours per day. The Employer/Carrier shall attendant care to the family members for 12 hours per day at the Federal Minimum Wage rate from July 8, 2010, and for so long as reasonable, medically necessary, and causally related to the industrial accident.

11. Since the Claimant has prevailed on this medical only claim he is entitled to reimbursement of taxable costs at the Employer/Carrier's expense. Jurisdiction is reserved on the amounts if the parties are unable to agree.

12. Since the Claimant has prevailed on this medical only claim, his attorney is entitled to be paid a fee at the Employer/Carrier's expense. Jurisdiction is reserved on the amount if the parties are unable to agree.

**WHEREFORE, it is hereby ORDERED and ADJUDGED that:**

1. The Employer/Carrier shall pay to the Claimant non-professional attendant care for 12 hours per day from July 8, 2010, to date, and for so long as reasonable, medically necessary, and causally related to the industrial accident.

2. The Employer/Carrier shall reimburse the Claimant's family members at the Federal Minimum Wage for the provision of the attendant care.

3. The Employer/Carrier shall pay the taxable costs of these proceedings. Jurisdiction is reserved on the amounts if the parties are unable to agree.

4. The Employer/Carrier shall pay to the Claimant's attorney a reasonable fee for securing the medical benefits herein. Jurisdiction is reserved on the amount if the parties are unable to agree.

**DONE AND ORDERED IN CHAMBERS AND ELECTRONICALLY MAILED** this

29<sup>th</sup> day of August, 2011, in St. Petersburg, Pinellas County, Florida.



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Donna S. Remsnyder  
Judge of Compensation Claims

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