G4302

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrad, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

RECEIVED
JUN 14 2012
SC Court of Appeals

MOTION TO STAY APPEAL

This motion is filed pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, which governs motions and petitions generally. The respondent requests an order staying the briefing deadlines in this case until this Court has ruled on the appellant's motion to amend its notice of appeal.

This is a workers' compensation appeal involving two orders from the circuit court. The appellant has filed a motion requesting leave to amend its notice of appeal to cover both orders, and the respondent has opposed that motion.

The appellant has since served and filed its initial brief. That brief, which is attached to this motion as Exhibit A, covers issues that arise exclusively out of the circuit court order that was not attached to the original notice of appeal. Compare Exhibit A (the initial brief)

and Exhibit B (the original notice of appeal and the attached order).

If the Court denies the motion to amend the notice of appeal, the matters covered in the initial brief will not be properly before the court. In light of this fact, the respondent respectfully submits that imposing a stay while the Court considers that motion would allow the attorneys to conserve their energy and the parties to conserve their financial resources. A stay is not currently in place because the pending motion is not a motion to dismiss and the Court has not ordered otherwise. See Rule 240(b), SCACR.

Respectfully submitted,

June 14, 2012

Blake A. Hewitt, SC Bar No. 73674
John S. Nichols, SC Bar No. 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

C. Daniel Vega
CHAPPELL SMITH & ARDEN
Post Office Box 12330
Columbia, SC 29611

Attorneys for Respondent

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Greenville County, South Carolina
Honorable Edward W. Miller, Circuit Court Judge

WCC No. 0217907
Case No. 11-CP-23-898
Case No. 10-CP-23-7077

Federal Express Corporation, ... Appellant,

v.

Michael Jarrard, ... Respondent.

INITIAL BRIEF OF APPELLANT

Russell T. Infinger
Tracey R. Perlman
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
PHONE: 864.370.2211
FACSIMILE: 864.282.1177
RInfinger@nexsenpruet.com
TPerlman@nexsenpruet.com

Attorneys for Appellant
Federal Express Corporation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. Because Federal Express was not notified of the need for attendant care services until March 2009, the retroactive portion of the award should be reversed. 9

II. The attendant care award should be modified because the record evidence supports neither the number of hours per day nor the hourly rate. 12

A. Commissioner Wilkerson erred in awarding compensation for 20 hours per day of attendant care. 14

B. Commissioner Wilkerson erred in awarding compensation at the hourly rate of $12.00. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Boylan v. Verizon Wireless,
685 S.E.2d 155 (N.C. Ct. App. 2009) 8, 10

Fishbourne v. ATI Sys. Int'l,
384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) 13

Frame v. Resort Servs., Inc.,
357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004) 13

Hampton v. Big Boy Steel Erection,
121 S.W.3d 220 (Mo. 2003) 17

Holley v. Owens Corning Fiberglass Corp.,
301 S.C. 519, 392 S.E.2d 802 (Ct. App. 1990) 9

Hutson v. State Ports Auth.,
390 S.C. 108, 700 S.E.2d 462 (2010).. 9

Jerome v. Farmers Produce Exch.,
826 S.W.2d 3 (Mo. Ct. App. 1991)... 17

Lark v. Bi-lo, Inc.,
276 S.C. 130, 276 S.E.2d 304 (1981).. 9

Levens v. Guilford Cty. Sch.,
567 S.E.2d 767 (N.C. Ct. App. 2002) 18

Mehaffey v. Burger King,
718 S.E.2d 720 (N.C. Ct. App. 2011) 10

Pilgrim v. Eaton,
391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010) 13

Richey v. Dickinson,
359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004) 12

Shackleton v. S. Flooring & Acoustical Co.,
712 S.E.2d 289 (N.C. Ct. App. 2011) 14

St. Clair v. County of Grant,
797 P.2d 993 (N.M. Ct. App. 1990) 11

Warren Trucking Co. v. Chandler,
277 S.E.2d 488 (Va. 1981)... 14

STATUTES

N.C. Gen. Stat. § 97-90(a) 10

S.C. Code Ann. § 42-15-60 (Supp. 2011) 8, 13, 16

TREATISES

2 Modern Workers Compensation § 202:29 16

William J. Appel, Annotation, *Worker's Compensation: Recovery for Home Service Provided by Spouse*, 67 A.L.R.4th 765 (1989) 8

STATEMENT OF ISSUES

1. Did the Commission err in awarding attendant care compensation retroactive to the date of total disability, when Mr. Jarrard waited for seven years to request such compensation?

2. Did the Commission err in awarding attendant care compensation for hours in which Mrs. Jarrard was not actually caring for her husband (including time spent performing ordinary household tasks), at an hourly rate that is not supported by the evidence?

STATEMENT OF THE CASE

This is a workers' compensation case. Respondent Michael Jarrard was exposed to hazardous chemicals during the course of his employment with Appellant Federal Express. These exposures resulted in lung damage and physical brain injury. In July 2006, Commissioner Childs found Mr. Jarrard permanently disabled and awarded lifetime benefits. (Order, July 14, 2006.) This award was affirmed by an appellate panel (Order, Jan. 8, 2007) and by the Circuit Court. (Order, Oct. 31, 2008.)

In March 2009, Mr. Jarrard sought an additional award of compensation to be paid to his wife for attendant care. (Form 50, Mar. 20, 2009.) Mr. Jarrard further claimed that this award should be made retroactive to November 14, 2002. Federal Express denied this request. (Form 51, Apr. 17, 2009.) Commissioner Wilkerson conducted a hearing on September 11, 2009, following which he awarded compensation for attendant care 20 hours per day, 7 days per week, at the rate of $12.00 per hour. (Order, Jan. 4, 2010.) An appellate panel reviewed Commissioner Wilkerson's award but could not reach consensus. (Order, July 21, 2010.) Accordingly, the award was confirmed.

In a separate Form 24 filed September 23, 2009, Mr. Jarrard sought a partial lump-sum award to make repairs to his home and to pay his

attorney's fees. Commissioner Bardon granted this request. (Order, Apr. 22, 2010.) An appellate panel affirmed this award. (Order, Jan. 7, 2011.)

Federal Express appealed the attendant care order and the lump-sum order to the Circuit Court, which conducted a single hearing concerning both appeals. (Hearing Tr. July 25, 2011.) The Circuit Court, Judge Edward R. Miller, affirmed both awards. (Order, Nov. 3, 2011; Order, Nov. 3, 2011.) Federal Express appealed. (Amended Notice of Appeal.)

STATEMENT OF FACTS

Mr. Jarrard was employed by Federal Express as a truck driver and Dangerous Goods Specialist. In June 2001, he was exposed to chemicals from a leaking package causing uncontrollable coughing. Mr. Jarrard was exposed to chemicals a second time in October 2002, again causing uncontrollable coughing. These chemical exposures have resulted in permanent lung damage. (Order, July 14, 2006, at 9.) The chemical exposures also aggravated an existing lesion in Mr. Jarrard's brain. (*Id.*) Mr. Jarrard underwent surgery in November 2002, during which he suffered a hemorrhage that resulted in physical brain damage. (*Id.* at 7.) Following his surgery and continuing to the present, Mr. Jarrard's wife has taken care of him, assisting him with medications, preparing his meals, taking him to doctor's appointments, and helping him care for himself.

In 2005, Mr. Jarrard obtained a life care plan from Hollenback and Associates (APA pp. 189-243), which included a proposal for attendant care for 16-20 hours a day (APA p. 156). Mr. Jarrard sought an award of permanent disability, in January 2005, submitting the life care plan as part of the evidence in support of his claim. (APA pp. 189-243.) Although the life care plan included a provision for attendant care, and although Mrs. Jarrard was providing attendant care at that time, Mr. Jarrard did not

request compensation for past or future attendant care. (Form 50 filed Jan. 13, 2005.) Mrs. Jarrard testified at the hearing, but Mr. Jarrard's counsel did not ask her to describe the care she provided for him. (Hearing Tr. July 13, 2006, at 15-20.) In her order awarding lifetime benefits, Commissioner Childs ordered payment for "[c]harges for the medical care of the Claimant's injury ... as outlined in the Life Care Plan." (Order, July 14, 2006 at 10.) The order made no specific provision for attendant care services, and Mr. Jarrard did not appeal the absence of such an award. Commissioner Childs's order was affirmed by an appellate panel and the Circuit Court and to date remains the law of the case.

In March 2009 (three years after Commissioner Childs's order), Mr. Jarrard obtained a second life care plan. This plan, prepared by Sarah Lustig, R.N., called in part for Mr. Jarrard to receive attendant care provided by Mrs. Jarrard 24 hours a day, 7 days per week, at a rate of $12.00 per hour. (APA p. 26.) Based on this new plan, Jarrard petitioned for payment of both past and future attendant care. (Form 50, Mar. 20, 2009.) On September 11, 2009, Commissioner Wilkerson heard testimony on this matter. Commissioner Wilkerson thereafter ordered that Mrs. Jarrard should receive payment for providing attendant care 20 hours per day, 7

days per week, at $12.00 per hour, commencing on November 14, 2002 and continuing during Jarrard's lifetime. (Order, Jan. 4, 2010 at 13.)

Federal Express appealed Commissioner Wilkerson's order (Form 30, Jan. 22, 2010), but the appellate panel could not reach consensus. Commissioner Huffstetler would have affirmed the award, but Commissioners Williams and Beck both found error in the retroactive portion of the award. Commissioner Williams would have limited retroactivity to 2005, while Commissioner Williams would not have made any part of the award retroactive. (Order, July 21, 2010, at 7.) Accordingly, the Order of Commissioner Wilkerson was deemed affirmed. (Order, July 21, 2010.) Federal Express thereafter appealed this issue to the Circuit Court. (Petition for Judicial Review, Aug. 25, 2010.) On July 25, 2011, Judge Edward W. Miller conducted a hearing on this matter as well as on Federal Express's appeal of a partial lump-sum award. (Hearing Tr., July 25, 2011.) On November 3, 2011, Judge Miller entered orders affirming both awards.

SUMMARY OF ARGUMENT

Commissioner Wilkerson's award of attendant-care benefits is improper in two ways. First, Commissioner Wilkerson erred in making the award retroactive to November 14, 2002. Mr. Jarrard did not request attendant care benefits until March 2009. As a matter of simple fairness, Federal Express should not be required to pay for attendant care prior to the date it first received notice that such care was being sought.

Second, the record evidence does not support the full extent of the compensation awarded by Commissioner Wilkerson. The award of compensation for care provided 20 hours per day is improper because it provides compensation for hours when Mrs. Jarrard is not actually caring for her husband, including time spent doing ordinary housework. The hourly rate of $12.00 is also improper. This rate may be appropriate for skilled nursing services, but the record is clear that much of what Mrs. Jarrard does is not skilled nursing care and should be compensated, if at all, at a lower hourly rate.

The Circuit Court order should be reversed and the case remanded for modifications to the attendant care award.

ARGUMENT

Commissioner Wilkerson ruled that an award of compensation for attendant care provided by a claimant's spouse is permitted by S.C. Code Ann. § 42-15-60(C) (Supp. 2011), which provides in relevant part:

> In cases in which total and permanent disability reasonable and necessary nursing services ... and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit.

Federal Express does not dispute that compensation for attendant care provided by a spouse or other family member may be awarded by the Commission as "other treatment or care." While the South Carolina appellate courts have never addressed this issue, the majority of states approve of such awards. *See* William J. Appel, Annotation, *Worker's Compensation: Recovery for Home Service Provided by Spouse*, 67 A.L.R.4th 765 (1989). In particular, North Carolina courts have explicitly approved the payment of workers' compensation benefits for attendant-care services provided by a family member. *See, e.g., Boylan v. Verizon Wireless*, 685 S.E.2d 155, 159-60 (N.C. Ct. App. 2009). Because South Carolina's workers' compensation law was modeled on North Carolina's, the decisions of the North Carolina court are "entitled to great weight" in construing the South Carolina act. *See Holley v. Owens Corning Fiberglass Corp.*, 301 S.C. 519, 523,

392 S.E.2d 802, 806 (Ct. App. 1990). In sum, as a general matter the Commission may award compensation for attendant care provided by a claimant's spouse as "reasonable and necessary ... other treatment."

This appeal presents two specific questions regarding Commissioner Wilkerson's award of compensation for attendant care provided by Mrs. Jarrard. First, did the Commissioner err in awarding compensation retroactive to November 14, 2002—*seven years* before Mr. Jarrard's first request for such benefits? Second, does the evidence in the record support Commissioner Wilkerson's decision to award compensation for 20 hours per day, at a rate of $12.00 per hour? The answer to both of these questions is "No."

I. Because Federal Express was not notified of the need for attendant care services until March 2009, the retroactive portion of the award should be reversed.

The Administrative Procedures Act establishes the standard for judicial review of worker's compensation decisions. *Lark v. Bi-lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The Full Commission is the ultimate finder of fact in workers' compensation proceedings, but its conclusions of law are entitled to no particular deference. *See Hutson v. State Ports Auth.*, 390 S.C. 108, 113, 700 S.E.2d 462, 465 (2010).

In affirming the retroactive portion of the attendant care award, the Circuit Court relied on *Boylan v. Verizon Wireless*, 685 S.E.2d 155 (N.C. Ct. App. 2009). *Boylan* is different from this case, however, and does not aid in resolving the issue raised by Federal Express. In *Boylan*, the North Carolina Commission awarded compensation for past attendant care services provided by various members of the claimant's family. On appeal, the employer argued that the retroactive portion of the award was improper because the claimant failed to seek prior approval for attendant care under N.C. Gen. Stat. § 97-90(a). *Id.*at 158. Section 97-90(a) requires Commission pre-approval of "charges of health care providers for medical compensation." The North Carolina Court of Appeals rejected this argument, reasoning that attendant care provided by a family member is not "medical compensation." *Id.* at 159.

Boylan is not on point because the issue here is not Mr. Jarrard's failure to seek pre-approval for attendant care services; it is his failure to seek payment for those services in 2005, when he first sought an award of benefits from the Commission.[1] Nothing precluded Mr. Jarrard from

---

[1] Additionally, *Boylan* is substantially undermined by the North Carolina Court of Appeals' subsequent decision in *Mehaffey v. Burger King*, 718 S.E.2d 720 (N.C. Ct. App. 2011). In *Mehaffey*, the court rejected an award of retroactive attendant care benefits because the claimant had

seeking an award of attendant care at that time; his wife had been providing attendant care for over two years by that point, and the life care plan prepared by Hollenbeck & Associates noted that attendant care would be appropriate. It is Mr. Jarrard's failure to provide timely notice, not any failure to seek pre-approval, that precludes a retroactive award.

A more helpful case is *St. Clair v. County of Grant*, 797 P.2d 993 (N.M. Ct. App. 1990). Quaid St. Clair obtained a judgment of total disability due to brain injury in 1984, in an award that included payment of future medical expenses. Although his wife had been providing attendant care since the date of the accident in 1983, St. Clair did not seek compensation for attendant care until 1986, two years after the initial award of total disability. *See id.* at 996. The commission granted attendant care benefits retroactive to the date of injury, but the New Mexico Court of Appeals reversed. The court reasoned that the commission's award of *future* benefits in 1984 permitted modification of the award to include attendant care services, *but only prospectively*. *See id.* at 999.

The Court should reach the same result in this case. The doctrine of laches applies in workers' compensation cases. *Richey v. Dickinson*, 359 S.C.

---

failed to obtain pre-approval as required by the workers' compensation fee schedules. *See id.* at 724.

609, 612-13, 598 S.E.2d 307, 309-10 (Ct. App. 2004). A workers' compensation claimant cannot sleep on his rights but rather "must prosecute his claim in a timely fashion." *Id.* Mr. Jarrard failed to do so, and as a result Federal Express has been prejudiced.

The notice requirements of the Worker's Compensation Act are necessary to allow employers to investigate claims and to provide appropriate, cost-effective care. Those purposes are disserved by retroactive awards like the one in this case, which holds Federal Express liable for *seven years* of attendant care. Had Mr. Jarrard made a timely request for attendant care benefits in January 2005, when he filed his first Form 50, Federal Express could have addressed the issue then. Mr. Jarrard's delay in making this claim deprived Federal Express of any ability it might have had to investigate the need for attendant care or to mitigate the cost.

Accordingly, Commissioner Wilkerson's award of attendant care benefits should be modified to exclude retroactive payments.

II. The attendant care award should be modified because the record evidence supports neither the number of hours per day nor the hourly rate.

The Court must affirm the Commission's factual findings if they are supported by substantial evidence in the record as a whole. *See Frame v.*

Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494-95 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Id.*at 527-28, 593 S.E.2d at 495. "[A]n appellate court can reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Fishbourne v. ATI Sys. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 599-600 (Ct. App. 2009).

Federal Express does not dispute that Mr. Jarrard needs attendant care. But it is Mr. Jarrard's burden to establish that the requested compensation is both "reasonable *and* necessary." S.C. Code Ann. § 42-15-60; *see Pilgrim v. Eaton*, 391 S.C. 38, 48-49, 703 S.E.2d 241, 246 (Ct. App. 2010). The proof offered by Mr. Jarrard does not support Commissioner Wilkerson's award. First, the award of 20 hours per day rests entirely on Mrs. Jarrard's testimony that she has slept no more than four hours per night since November 14, 2002. Second, the evidence does not support an hourly rate

of $12.00. While the care Mrs. Jarrard provides is important, it is not skilled nursing care and should not be compensated as such.

Some courts have adopted a four-factor test for the determination of whether attendant care provided by a spouse is compensable. *See, e.g., Warren Trucking Co. v. Chandler*, 277 S.E.2d 488, 493 (Va. 1981). North Carolina, however, has rejected this standard in favor of a "flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence." *Shackleton v. S. Flooring & Acoustical Co.*, 712 S.E.2d 289, 300-01 (N.C. Ct. App. 2011).

A. Commissioner Wilkerson erred in awarding compensation for 20 hours per day of attendant care.

A critical aspect of this case is that Mr. Jarrard seeks payment only for attendant care services provided by his wife, and the award must be viewed through the lens of that request. The request for attendant-care compensation rests on the assumption that *only* Mrs. Jarrard will provide care for Mr. Jarrard for 20 hours per day, 365 days per year. Federal Express does not question Mrs. Jarrard's devotion to her husband or the quality of the care she provides. But as a practical matter it is unlikely that Mrs. Jarrard has been caring for Mr. Jarrard 20 hours of every day since

November 2002. It is far more likely that Mrs. Jarrard has provided care for a smaller number of hours every day.

On September 11, 2009, a hearing on the issue of attendant care was held before Commissioner Avery Wilkerson. During the course of the hearing, Ms. Lustig testified she based her assessment on a single visit to the Jarrard home that lasted for four or five hours. (Hearing Tr. Sept. 11, 2009 at 40.) She admitted that she did not witness Mrs. Jarrard actually caring for her husband, but instead based her recommendation on Mrs. Jarrard's demonstration of how she cared for her husband. (*Id.* at 41-42.) Ms. Lustig testified that while she recommended Jarrard's wife be paid for 24 hours a day, 7 days a week for attendant care, she acknowledged that Mrs. Jarrard is not actually providing care during all of those hours, and indeed may not be present at all. (*Id.* at 43-44.) In essence, Ms. Lustig testified that because *someone* is with Mr. Jarrard for 24 hours of every day, *Mrs. Jarrard* should be compensated for 24 hours of attendant care every day.

An award of 20 hours per day of attendant care might be appropriate if Mr. Jarrard requested care to be provided by more than one provider, or care only by Mrs. Jarrard for fewer than 20 hours. An award based on such a request would have more support in the evidentiary

record. Having requested compensation only for Mrs. Jarrard, however, Mr. Jarrard must prove that Mrs. Jarrard is actually occupied with caring for Mr. Jarrard for 20 hours per day.[2]

The award of 20 hours per day is also improper because much of what Mrs. Jarrard does is not "treatment." S.C. Code Ann. § 42-15-60 (authorizing benefits for "other *treatment* or care" (emphasis added)). To be compensable under § 42-15-60, the services provided by Mrs. Jarrard "must be incident to medically necessary attendant care services and *central* to the employee's physical health or personal care. *Nonmedical homemaking services are not compensable as 'nursing' services.*" 2 Modern Workers Compensation § 202:29 (emphasis added). Mrs. Jarrard's testimony establishes that she does provide "treatment" to Mr. Jarrard by monitoring his medications, seeing to his physical comfort, and assisting him with personal care. (Hearing Tr. Sept. 11, 2009, at 9, 18). But she also spends part of her day on household tasks such as cooking, cleaning, and doing laundry—all things she did before Mr. Jarrard's disability. (*Id.*at 24-26.). Such ordinary household services are not compensable under § 42-15-60. *See Jerome v. Farmers Produce Exch.*, 826 S.W.2d 3, 6-7 (Mo. Ct. App.

[2] Actually, Mr. Jarrard requested that Mrs. Jarrard receive payment for 24 hours per day of attendant care.

1991) (affirming commission order that granted compensation for 11½ hours per week of nursing care but denied compensation for 13½ hours of meal preparation and planning), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Because the evidence does not support an award of 20 hours per day for "other treatment" provided by Mrs. Jarrard, the award should be modified so that the number of hours per day reflects only those hours that Mrs. Jarrard actually spends providing necessary care to Mr. Jarrard.

B. Commissioner Wilkerson erred in awarding compensation at the hourly rate of $12.00.

The evidence does not support the hourly rate of $12.00 awarded by Commissioner Wilkerson. Ms. Lustig testified that her recommendation that Mrs. Jarrard be paid $12.00 per hour came from calling three private agencies that provide attendant care and skilled nursing. (Hearing Tr. Sept. 11, 2009 at 45.) She did not, however, perform any research into the qualifications of these facilities, nor did she do any additional research regarding the appropriate rate of pay for spousal care. (*Id.*) Furthermore, Ms. Lustig based her estimate on the amount these agencies *charged clients* for their services—an amount that would include the agencies' overhead and profit margin—rather than the amount those agencies *paid their employees*. The North Carolina Court of Appeals, however, has held that

the amount nursing assistants are paid is the proper measure of compensation for spousal attendant care, not the amount an agency charges for nursing services. *See Levens v. Guilford Cty. Sch.*, 567 S.E.2d 767, 771-72 (N.C. Ct. App. 2002).

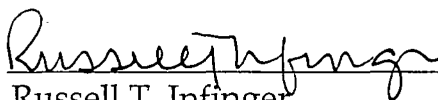
Additionally, Mrs. Jarrard has no training in nursing. While Ms. Lustig testified that Mrs. Jarrard provides excellent care to Mr. Jarrard, the fact remains that this care is unskilled. Compensation should not be premised on hourly rates applicable to skilled nursing services.

Because the evidence does not support an award of $12.00 per hour for Mrs. Jarrard's services, the award should be modified to reflect a more appropriate hourly rate.

CONCLUSION

For the reasons set forth above, Federal Express asks the Court to reverse or modify Commissioner Wilkerson's order by (a) vacating the retroactive portion of the award; (b) reducing the number of hours of attendant care per day; and (c) reducing the hourly rate.

Respectfully submitted,



Russell T. Infinger
Tracey R. Perlman
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
PHONE: 864.370.2211
FACSIMILE: 864.282.1177
RInfinger@nexsenpruet.com

Attorneys for Appellant
Federal Express Corporation

June 11, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Greenville County, South Carolina
Honorable Edward W. Miller, Circuit Court Judge

WCC No. 0217907
Case No. 11-CP-23-898
Case No. 10-CP-23-7077

Federal Express Corporation, ... Appellant,

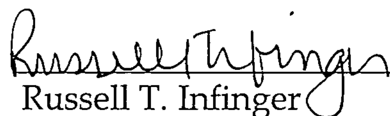
v.

Michael Jarrad, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Initial Brief of Appellant complies with the South Carolina Supreme Court's August 13, 2007 order.

June 11, 2012



Russell T. Infinger
Tracey R. Perlman
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
PHONE: 864.370.2211
FACSIMILE: 864.282.1177
RInfinger@nexsenpruet.com

Attorneys for Appellant
Federal Express Corporation

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

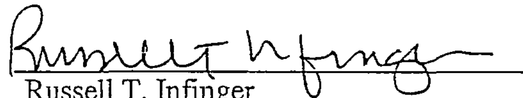
Michael Jarrard...Respondent,

v.

Federal Express Corporation...Appellants.

NOTICE OF APPEAL

Federal Express Corporation appeals the Order of The Honorable Edward W. Miller dated November 3, 2011. Appellants received a copy of this Order on November 9, 2011.



Russell T. Infinger
NEXSEN PRUET, LLC
PO Drawer 10648
Greenville, South Carolina 29603
Tel: 864-282-1122
SC Bar No. 2886

rinfinger@nexsenpruet.com

December 2, 2011

Attorney for Appellants

Other Counsel of Record:

C. Daniel Vega, Esquire
Chappell Smith & Arden
P.O. Box 12330
Columbia, SC 29611

Attorney for Respondent

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2011 NOV -3 PM 2:21

CASE NO: 2010CP2307077

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Michael Jarrard *vs.* Federal Express Corporation

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: ____________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

____
PRESIDING JUDGE -

This judgment was entered on the 3rd day of November, 2011, and a copy mailed first class this 3rd day of November, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

C Daniel Vega Chappell Smith & Arden P O Box 12330 Columbia, SC 29611

ATTORNEY(S) FOR THE PLAINTIFF(S)

Russell Thomas Infinger Nexsen Pruet, Llc P.O. Drawer 10648 Greenville, SC 296030648

ATTORNEY(S) FOR THE DEFENDANT(S)

____
Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

2011 NOV -3 PM 2:21
FILED-CLERK OF COURT
GREENVILLE CO. S.C.

IN THE CIRCUIT COURT

Case No. 10-CP-23-7077

Michael Jarrard,

Claimant/Respondent,

vs.

Federal Express,

Employer and Self-Insured/Petitioner.

ORDER

(Non-Jury Appeal from Workers' Compensation Commission)

INTRODUCTION

In this non-jury appeal from an Order of the Full Commission of the Workers' Compensation Commission, this matter comes before this Court on Petitioner's appeal concerning the Respondent's entitlement to ongoing medical care and other treatment and whether the 3-member panel of the Workers' Compensation Commission properly affirmed the decision of the Single Commissioner.

Counsel for the Employer & Petitioner, Federal Express, and the Claimant & Respondent, Michael Jarrard, submitted memoranda of law related to the present appeal, which the court has considered.

A hearing was held on July 25, 2011. At the hearing, the Claimant & Respondent was represented by C. Daniel Vega. The Petitioner & Employer was represented by Russell T. Infinger.

STATEMENT OF THE CASE

This non-jury appeal is in regard to the Workers' Compensation case of Michael Jarrard (hereinafter, "Respondent"), WCC No.: 0217907. The Respondent sustained work-related

#1

injuries due to exposure to chemical products resulting in damage to his pulmonary system and brain damage due to the aggravation of a pre-existing brain tumor. In a July 14, 2006 Order, Commissioner Childs found that the Respondent was entitled to full-time attendant care pursuant to a Life Care Plan. The Full Commission affirmed this Order in its entirety on January 8, 2007. In an Order dated October 3, 2008, Judge James R. Barber, III found that the "Full Commission rightly determined Claimant suffered injury by accident in the course of scope of employment." After the Petitioner failed to appeal that Order to the court of appeals, Commissioner Childs' initial Order became the controlling law of the claim.

A hearing was held on August 27, 2009, to determine the rate at which the Respondent's wife should be compensated for the attendant care Respondent's wife had been providing since November 2002 and whether the Respondent was entitled to bathroom repairs to better accommodate his disability. In his January 4, 2010 Order, Commissioner Wilkerson found Respondent's wife was entitled to payment for attendant care administered from November 14, 2002, to the present and continuing for the rest of the Respondent's life (affirming the July 14, 2006 Order). Respondent's wife was awarded payment at a rate of $12.00 per hour, 20 hours per day,. 7 days per week in order to compensate her for the full-time attendant care she provides for her husband. Commissioner Wilkerson also found Respondent was entitled to have his bathroom remodeled in order to accommodate the special needs that are the result of his disability. The Petitioner appealed the decision of the Commissioner Wilkerson to the Full Commission, where it was affirmed in its entirety in an order dated July 21, 2010.

Now, Petitioner, pursuant to S.C. Code Ann. § 1-23-380 and § 42-17-60, petitions this court for judicial review of the Order of the South Carolina Workers' Compensation Commission dated July 21, 2010, and by reference the Order of July 14, 2006. Petitioner alleges the Commission made errors of law in finding Respondent was entitled to compensation for the

attendant care his wife provides and that Respondent was entitled to repairs to his bathroom to suit his needs in light of his disability. Respondent contends the Commission's order was entirely in compliance with the Act and, therefore, Respondent is entitled to back payment of attendant care and payment for bathroom repairs.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of workers' compensation decisions. *Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this Court can reverse or modify the decision of the Workers' Compensation Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Transp. Ins. Co. v. South Carolina Second Injury Fund,* 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)).

The Commission is the ultimate fact finder in workers' compensation cases. *Jordan v. Kelly Co.,* 381 S.C. 483, 674 S.E.2d 166 (2009); *Shealy v. Aiken County,* 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 541, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." *Hill v. Eagle Motor Lines,* 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Id.*

FINDINGS

After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court makes the following findings of law:

The totally disabling brain injury suffered by the Respondent entitles him to lifetime compensation and medical care, pursuant to S.C. Code Ann. § 42-15-60 (C). In coming to the decision to allow the attendant care in his January 4, 2010 Order, Commissioner Wilkerson reviewed a Life Care Plan prepared by Sarah Lustig, a Registered Nurse and Certified Life Care Planner. Nurse Lustig collaborated with the Respondent's treating physician, Dr. Edwin Scott, in forming this plan. Nurse Lustig and Dr. Scott agreed after extensive observation and collaboration that the Respondent was in need of full-time attendant care and that his wife was well-qualified to provide it. Upon a review of the cost of attendant care services in the surrounding area, Nurse Lustig concluded these services would cost $12.00 per hour. Finally, Respondent's wife testified at the hearing she used all of her waking time to provide care for her husband, sleeping 4.5 interrupted hours per night. Defendants offered no contradicting evidence and the Full Commission found the witnesses to be credible and the plans of the medical professionals to be in accordance with substantial evidence. Therefore, Respondent was awarded attendant medical care to be provided by his wife at the rate of $12.00 per hour for 20 hours per day and 7 days per week from November 14, 2002 to the present and continuing for the rest of the Respondent's life.

Additionally, in her Life Care Plan, Nurse Lustig testified Respondent would need remodeling work done on his bathroom in order to make it functional in light of his disabilities. Petitioner offered no contradicting evidence on this point. Like the award of the attendant care,

Commissioner Wilkerson found this award to be entirely reasonable and in accordance with substantial evidence.

Section 42-15-60 (C) of the South Carolina Code provides "[i]n cases in which total and permanent disability results, reasonable and necessary nursing services . . . and other treatment ... shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit." S.C. Code Ann. § 42-15-60. Therefore, unlike other types of medical care where the Defendants have the right to control the medical provider, attendant care gives the employer less control. Additionally, the medical professionals in charge of the Respondent's case determined that the attendant care to be provided by his wife was entirely reasonable and necessary. The Full Commission reviewed this award and determined that it was in compliance with the statute in its July 21, 2010 Order.

In its appeal, Petitioner also alleges Respondent is not entitled to an award of attendant medical care from November 14, 2002, because the Respondent did not request this care until 2009. Petitioner contends an employee cannot receive back payment for medical care unless the employee has requested this care and the employer has notice of that request. The claimant contends, and a review of the Commission file demonstrates, claimant alleged entitlement to attendant care on multiple Form 58 pre-hearing briefs dated March 9, 2004 and May 18, 2004. The Order of Commissioner Childs issued July 14, 2006 included an award for attendant care with which defendants refused to comply. For this reason, the Claimant sought a hearing before Commissioner Wilkerson, who issued his Order granting the Claimant attendant care on January 4, 2010. This Order was later affirmed in its entirety by the Full Commission.

The Claimant also contends § 42-15-60 of the South Carolina Code requires employer to provide medical care "as reasonably may be required" once a compensable injury has occurred. S.C. Code Ann. § 42-15-60. The court of appeals has determined the commission is "not outside

its discretion in ordering the [employer] to pay for [medical treatment], once it determined the treatment was medically necessary." *Clark v. Aiken County Gov't,* 366 S.C. 102, 114, 620 S.E.2d 99, 100 (Ct. App. 2005). This is regardless of whether employer had notice of the treatment or the employee has requested that treatment. *Id.*

Neither the Workers' Compensation Act nor the case law reveals any interpretation in accordance with the Petitioner's reading of the requirements for notice in order for Claimant to receive compensable medical care. Once the employer has notice that the accident occurs, pursuant to § 42-15-20, it is obligated to provide reasonably necessary medical care to the employee, if the injury is a compensable one. S.C. Code Ann. § 42-15-20. In *Clark,* the employee received medical care without requesting it from his employer or giving his employer notice that he was to receive the care. *Clark* at 106-107, 620 S.E.2d at 101. However, because the treatment was determined to be medically necessary, neither prior notice nor a prior request was required in order for the Commission to order the employer to pay for the care. *Id.* at 114, 620 S.E.2d at 100. In the present case, the Commission found, as an uncontroverted fact, the attendant care is reasonably and medically necessary.

While South Carolina appellate courts have never decided a case regarding the payment of back benefits for attendant care, the Court of Appeals of North Carolina has upheld the retroactive payment of attendant care benefits. Like South Carolina, North Carolina does not require pre-approval of attendant care performed by a family member in a Workers' Compensation case. The court stated "N.C.G.S. § 97-90(a) does not require pre-approval of fees charged by health care providers, except for physicians, hospitals, or other medical facilities. Plaintiff's brother does not fit into the exceptions for N.C.G.S. § 97-90(a). This interpretation is consistent with our case law, which has allowed compensation to health care providers similar to plaintiff's brother, without the Commission's pre-approval." *Boylan v. Verizon Wireless,* 201

N.C. App. 81, 86, 685 S.E.2d 155, 159 (Ct. App. 2009) (quoting *Ruiz v. Belk Masonry Co.*, 559 S.E.2d 249, 253-54 (Ct. App. 2002)).

Boylan and its line of reasoning was favorably adopted in a case in the Court of Common Pleas of South Carolina, *McDaniel v. Hans Lenger, LLC,* 2011-CP-46-0464 (2011). In *McDaniel*, the Commissioner found Claimant required 24-hour attendant care since the date of the injury in 2006, but failed to award attendant care benefits until they were requested in 2009. *Id.* The court found that because Claimant was entitled to treatment and care between 2006 and 2009, the Commission committed an error of law in failing to award those benefits during that time. *Id.*

The final argument of Petitioner is that the Full Commission improperly affirmed the Order of the Single Commissioner because it did not come to a majority opinion in making this determination. Section 42-3-20 of the South Carolina Code allows three-member panels to review decisions of the Single Commissioner. S.C. Code Ann. § 42-3-20. It also states that "[t]he decisions of three-member panels have the same force and effect as full commission reviews." *Id.* The process by which these appeals take place is laid out in Regulation 67-709. S.C. Code Ann. Regs. 67-709. (2010). Subsection (E) allows for the Commission to modify the findings of the Single Commissioner but notes that "a vote to affirm and modify is deemed a vote to affirm." *Id.*

In the Full Commission's 2010 Order, Commissioner Huffstetler voted to affirm, Commissioner Williams voted to provide the benefits from 2005, and Commissioner Beck voted to provide the benefits from 2009. While the Commissioners noted their position on these issues, the Full Commission nevertheless affirmed the Single Commissioner's decision *in its entirety*. These other opinions did not affect the Commission's decision to affirm the award of attendant care benefits from 2002, and Commissioners Williams and Beck voted to affirm and

modify. Regardless of this fact, the rulings of Commissioners Beck and Williams to award benefits only from the date of the request for that medical care is not in accordance with the previously discussed case law.

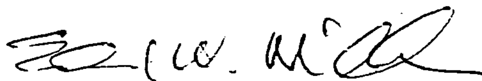
CONCLUSION

After due deliberation, review of the memoranda, case law, exhibits, and argument of counsel, the Court makes the following rulings:

Because the decision of the Full Commission in affirming Commissioner Wilkerson's 2010 Order was made in accordance with substantial evidence and without error of law, the Petitioner's appeal to overturn the award of Claimant's bathroom repairs and attendant care is DENIED;

The Order of the Full Commission, dated July 21, 2010, and by reference the Order of July 14, 2006, is hereby AFFIRMED by this Court, and the Claimant is entitled to bathroom repairs and attendant care; the attendant care is to be provided by his wife in accordance with the July 21, 2010 Order of Commissioner Wilkerson;

AND IT IS SO ORDERED!



The Honorable Edward W. Miller
Circuit Court Judge

Greenville, SC

Date: November 3, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ...Respondent,

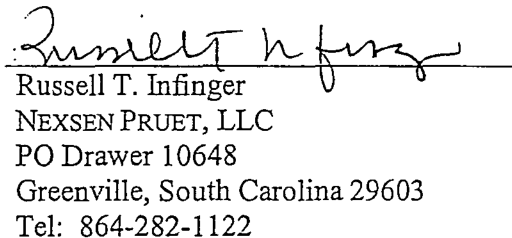
v.

Federal Express Corporation,.................. ....Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Notice of Appeal on Michael Jarrard by depositing a copy of same in the United States Mail, postage prepaid, on December 2, 2011, addressed to his attorney of record, C. Daniel Vega, Chappell, Smith & Arden, P.O. Box 12330, Columbia, SC 29611.

December 2, 2011



Russell T. Infinger
NEXSEN PRUET, LLC
PO Drawer 10648
Greenville, South Carolina 29603
Tel: 864-282-1122

rinfinger@nexsenpruet.com

Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-898

Michael Jarrard, ... Respondent,

v.

Federal Express Corporation, ... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the Respondent's *Motion to Stay Appeal* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

Russell T. Infinger
NEXSEN PRUET, LLC
P.O. Drawer 10648
Greenville, SC 29603

June 14, 2012

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

RECEIVED
JUN 14 2012
SC Court of Appeals

BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

Margaret Miles Bluestein
John Shannon Nichols
Stacy Elizabeth Thompson
John Dennis Delgado
Allison Paige Sullivan
Ashley Trout Thompson
Blake Alexander Hewitt

OF COUNSEL
O. Eugene Powell, Jr.

RECEIVED
JUN 14 2012
SC Court of Appeals

June 14, 2012

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Jarrard v. Federal Express
Case Tracking No.: 2011-204646

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Respondent's *Motion to Stay Appeal* in regards to this case. I have also enclosed a proof of service of this document on counsel for the Appellant and a $25.00 check for filing this motion. Please return the additional filed copy to me via our courier.

Thank you for your attention to this mater. If you need any additional information, please to not hesitate to contact me.

Yours sincerely,

Erin Bridges
Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: C. Daniel Vega, Esquire
Russell T. Infinger, Esquire

COLUMBIA 1614 Taylor Street
PO Box 7965 | Columbia, SC 29202
P·803 779.7599 F·803 779.8995

FLORENCE 248 South Irby Street
Florence, SC 29501
P·843 665.9779

TOLL FREE 877 524.4675

BNTDLAW.COM