

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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

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Federal Express Corporation, ..... Appellant,

v.

Michael Jarrard, ..... Respondent.

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**INITIAL BRIEF OF APPELLANT**

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## 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.<sup>1</sup> Nothing precluded Mr. Jarrard from

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<sup>1</sup> 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.

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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.<sup>2</sup>

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.

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<sup>2</sup> 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).

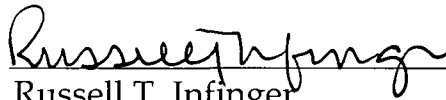
Additionally, Mrs. Jarrard has no training in nursing. While Ms. Lustig testified that Mrs. Jarrard provides excellent care to Mr. Jarrard, the fact remains that this care is unskilled. Compensation should not be premised on hourly rates applicable to skilled nursing services.

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,



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June 11, 2012

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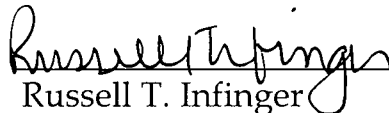
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CERTIFICATE OF COUNSEL

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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



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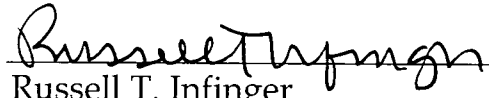
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I certify that I have served the Initial Brief of Appellant on Michael Jarrard by depositing a copy of it in the United States mail, postage prepaid, on June 11, 2012, addressed to his attorneys of record,

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