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.

RETURN TO PETITION FOR REHEARING

This return is filed pursuant to Rule 240(e) of the South Carolina Appellate Court Rules. In addition to requesting rehearing, FedEx suggested that the Court hear this issue *en banc*. Rule 219(b) of the appellate court rules prohibits any response to this suggestion.

Like FedEx's original motion to amend, the argument goes that the Respondent will not be prejudiced by allowing FedEx to amend its notice of appeal and that the failure to attach the previously un-attached order or reference the order are clerical errors, but an error does not become a "clerical error" just because it was inadvertent, and none of the South Carolina cases describing clerical errors are fairly comparable. The guiding principle of the relevant cases is that where the notice of appeal and accompanying documents are technically deficient but are such that they logically imply an appeal of a certain scope, amendments that

conform the notice to that scope are permissible. Amendments that take the scope of the appeal beyond that which is logically implied in the notice and accompanying documents are not permissible, and a party may not use an amended notice to cure an un-perfected appeal outside the appeal deadline. That is what FedEx is attempting to do here.

I.

Mr. Jarrard agrees that this petition for rehearing is appropriate under the rules, but applying that to the circumstances of this case should say something about the notice of appeal, the errors in it, and some of the arguments in the rehearing petition.

Mr. Jarrard agrees that denying FedEx's motion to amend has the effect of deciding the appeal of the attendant care order (docket number 2010-CP-23-7077), and as the parties have observed, FedEx's motion results from the fact that these two workers' compensation appeals have different case numbers. FedEx's petition for rehearing downplays the significance of the case numbers. It points out that "the cases stemmed from the same injury and had the same case number in the Workers' Compensation Commission[.]" (Petition, p.2). FedEx also offers that Mr. Jarrard "must have been aware that [FedEx] desired to appeal the attendant care award worth $700,000, particularly when the propriety of the award was the near-exclusive topic of discussion during the circuit court hearing." (Petition, pp.5-6). The argument seems to be that despite the fact that the notice of appeal contains only one docket number, has only one order attached, and is written in the singular — it says "*the* order" — Mr. Jarrard must have known an appeal of the attendant care order was included.

One fair push-back to this argument is the fact that FedEx's actions with respect to the lump-sum order (lower court docket number 2011-CP-23-898) tell the opposite story.

Although the lump-sum order was attached to the notice of appeal, and the docket number for that order was listed on the notice, the initial brief FedEx filed in this Court never argues that the lump-sum order is wrong. See **Attachment A** (FedEx's Initial Brief). The lump-sum order does not involve a trivial amount of money; it orders FedEx to pay Mr. Jarrard's attorney roughly $170,000 in attorney's fees and grants Mr. Jarrard roughly $16,000 for repairs to his house. Here is the point: it is a bit of double-speak to say that Mr. Jarrard should have anticipated an appeal of the order that is *not* referenced in the notice of appeal when the appeal of the only order that *is* referenced in the notice is being abandoned.

This point is not a game-changer. This says nothing about whether these errors are truly "clerical" or whether the Court was correct when it held that FedEx had failed to perfect an appeal of the lump-sum order. But it is not fair to say that "the error was not discovered by the clerk's office," (Petition, p.4), and that Mr. Jarrard should have known this other order was included in the appeal. The notice of appeal appears correct on its face; there was no error for the clerk's office to discover. And to someone who knew about both issues in the case, the notice gave the signal that FedEx was not appealing the attendant care order. Sometimes litigants abandon issues. FedEx now appears to be doing that very thing with the lump-sum order; the order they unquestionably appealed.

II.

One of the guiding principles of the clerical error cases is that context — not inadvertence — matters. For example, it was fair to call the omission of one docket number "clerical" when the case was one of six related cases, five of the cases were identical, the cases were all resolved in a single order, and appealing only five of the six cases would have

been fatal to the appeal. That was the situation in *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). On the other side, it was not fair to attempt to add a party from trial as a respondent after the deadline for serving a notice of appeal had passed. Although the appellant could legitimately claim that the eleventh-hour respondent was not *truly* prejudiced — the respondent would still have the full time to file a respondent's brief — and although the omission may have been inadvertent, the fact of the matter was that the appellant had failed to perfect an appeal as to those parties. This was the situation in *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002).

This principle runs throughout the clerical error cases. Where a notice of appeal gives fair notice of what is in play, a technical deficiency in that notice does not defeat an appeal. See *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005) (notice adequate to inform the respondent of the issue presented); *State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002) (notice accurate on its face but served on the clerk of the wrong lower court); *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) (notice did not directly refer to the order, but the order was attached); *Moody v. Dickinson*, 54 S.C. 526, 32 S.E.563 (1899) (caption incorrectly read "Moody *as administrator* v. Dickinson" instead of "Moody *and others* v. Dickinson"). On the other side, where an alteration would change the scope of the document — in most cases, a judgment — the alteration is not "clerical," regardless of whether its omission from the original document was inadvertent. See *Brown v. Brown*, 392 S.C. 615, 709 S.E.2d 679 (Ct. App. 2011). This is not a hidden danger for the unwary. Saying that perfecting an appeal requires a party to either attach the order or reference the order in some way is not setting much of a trap.

III.

As Mr. Jarrard's original return described, nobody likes pressing a procedural point, but the parties cannot confer jurisdiction over an appeal by consent. *Conner*, 348 S.C. at 461, 560 S.E.2d at 609 (court cannot extend the deadline for serving the notice of appeal); *Plante v. State*, 315 S.C. 562, 463, 446 S.E.2d 437, 438 (1994) (parties cannot confer jurisdiction by consent). Yes, these cases had the same case number before the workers' compensation commission, but that was not always the case. See **Attachment B**, p.5, ¶14 (from the hearing commissioner's order in the lump-sum case). Moreover, it made sense that the cases had separate numbers in circuit court; they were handled separately at the commission, and by the time the commission issued its order on the lump sum, the appeal of attendant care issue had been pending for almost five (5) months. See **Attachment C** (the lump sum order and the petition for judicial review of the attendant care case). The conclusion that the notice did not confer jurisdiction over the attendant care order is sound.

Respectfully submitted,

July 26, 2012

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ATTACHMENT 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.

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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.[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.

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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.[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).

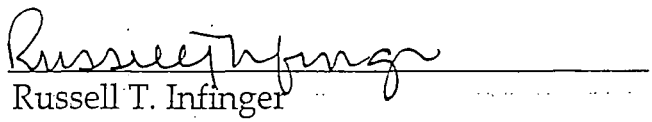
Additionally, Mrs. Jarrard has no training in nursing. While Ms. Lustig testified that Mrs. Jarrard provides excellent care to Mr. Jarrard, the fact remains that this care is unskilled. Compensation should not be premised on hourly rates applicable to skilled nursing services.

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,



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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
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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

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ATTACHMENT B

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 0217907

Michael Jarrard, Claimant, vs. Federal Express, Employer, Sedgwick CMS, Carrier/Defendants.	ORDER

STATEMENT OF CASE

Claimant suffered two chemical exposures while working as a hazardous material handler for Defendant. Claimant suffered inhalation poisoning from toxic chemicals. Claimant suffered injury to his lungs and physical brain injury. Claimant suffers from permanent and total disability with a 40% whole person impairment or loss of use of the lungs. Claimant also suffers from Parkinson's or seizure disorder caused by permanent physical brain damage suffered from the chemical exposures and subsequent treatment. Claimant suffers extensive physical and cognitive limitations because of his injuries.

Pursuant to the Full Commission and as affirmed by the Circuit Court, Claimant has been awarded a lifetime award and medical care and treatment pursuant to section 42-9-10 for physical brain injury.

Claimant has required attendant care for all activities of daily living since his causally related brain surgery. Claimant's wife has provided attendant care 24 hours a day, seven days a week since the onset of his physical and cognitive limitations. She has not been able to provide care by any other means. Ms. Jarrard has not yet been compensated for the attendant care as this issue is currently awaiting review by the Full Commission. The enormous amount of care Claimant requires has caused the Jarrards significant physical, emotional, and financial hardship. Claimant is unable to meet all of his financial needs, and Ms. Jarrard has not been able to remedy the family financial problems because she cannot work outside of the home.

Claimant has managed his financial condition as best as possible but unforeseen events have caused additional financial stress. Claimant has not been able to maintain his house as needed. He has not been able to fix his HVAC unit, repair his roof, repair damage to the home caused by a fallen limb, and has had difficulties paying for multiple other repairs necessary to maintain the home.

Claimant also has been unable to pay legal fees for services rendered on his behalf. On October 7, 2009, Claimant signed a Form 61 Attorney Fee Petition. This fee petition was signed and approved by the Commission on March 10, 2010.

Claimant seeks relief in the form of a partial lump sum payment to pay for the above-referenced needs.

In addition, and due to the multiple exposures, two dates of injury and two commission file numbers have been assigned to this claim. In order to promote judicial economy the two file numbers 0119870 and 0217907 should be combined as 0217907.

Claimant is represented by C. Daniel Vega of Columbia and defendants are represented by Russell Infinger of Greenville.

EVIDENCE OF CASE

Claimant sought bids from contractors for the cost of the necessary repairs to his house. A review of the bids demonstrates: Williams Roofing priced the roof repair at $3,500.00; repairs to the storage attachment at $3,000.00; and replacement of the windows at $3,400.00. Bill James and Sons, Inc. priced the removal and replacement of the water closet and wall-hung lavatory at $908.00. Creighton Laircey Company, Inc. priced installation of the HVAC unit at $5,500.00. These repairs to the house will thus total $16,308.00.

Claimant also submitted pictures of the condition of the home demonstrating the home's disrepair.

The Form 61 Fee Petition stated the attorney's fee is $165,412.48 and the costs are $3,840.79 for total legal fees and costs of $169,253.27.

FINDINGS OF FACT

1. Claimant's home is in need of repair.
2. Claimant submitted copies of contractor bids and pictures demonstrating the need for the repairs.
3. Williams Roofing's prices of $3,500.00 for the roof repair; $3,000.00 for repairs to the storage attachment; and $3,400.00 for window replacements are reasonable and necessary expenses for repairing Claimant's house.

4. Bill James and Sons, Inc. price of $908.00 for removal and replacement of the water closet and wall-hung lavatory is a reasonable and necessary expense for repairing Claimant's house.

5. Creighton Laircey Company, Inc.'s price of $5,500.00 for installation of an HVAC unit is a reasonable and necessary expense for repairing Claimant's house.

6. Claimant made repairs to his home prior to his injuries. Claimant has physical limitations that limit his ability to perform or obtain these repairs. But for Claimant's limitations he would have attempted the repairs and or contracted with someone to make these repairs.

7. A partial lump-sum payment for repairing Claimant's house is in Claimant's best interest.

8. The amounts of these payments to the contractors need to be held in trust until they become due and then paid to the contractors.

9. Claimant reviewed and signed the settlement memorandum and fee petition on October 7, 2009.

10. This fee petition was signed and approved by the undersigned Commissioner on March 10, 2010.

11. The fee petition lists legal fees and costs of $169,253.27.

12. A partial lump-sum payment for payment of legal fees and costs is in Claimant's best interests.

13. Defendants are to make partial lump-sum payments for repair of he home and legal fees and costs incurred by Claimant.

14. File number 0119870 and file number 0217907 shall combined as file number 0217907 in order to promulgate judicial economy.

CONCLUSIONS OF LAW

1. Pursuant to section 42-9-301, a partial lump-sum payment of the above costs for home repair and legal fee and expenses is appropriate and in Claimant's best interest.
2. Pursuant to Cox v. Mills, 286 S.C. 226, 332 S.E.2d 562 (S.C. App. 1985), there is no abuse of discretion in ordering partial lump-sum payment where the employee needed to do major repair work to the home.
3. The payment of attorney's fees for services in procuring the award is a proper element to be considered in passing upon a petition for the allowance of a lump-sum settlement under Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E. 2d 390 (1947).

ORDER

IT IS THEREFORE ORDERED the findings of fact and rulings of law are incorporated herein as if set forth verbatim and the Defendants shall:

1. Make payment of $9,900.00 for roof repair, replacement of the storage attachment, and replacement of windows at Claimant's house.
2. Make payment of $908.00 for the removal and replacement of the water closet and wall-hung lavatory at Claimant's house.
3. Make payment of $5,500.00 for the installation of the HVAC unit at Claimant's house.

4. Make payment to Claimant's attorney of $169,253.27 for legal services to Claimant.

Susan S. Barden, Commissioner

Date: April 22, 2010

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 22nd day of April, 2010

By KRISTI LOVE

Administrative Assistant to the Commissioner

ATTACHMENT C

STATE OF SOUTH CAROLINA

COUNTY OF ~~RICHLAND~~ Greenville

IN THE CIRCUIT COURT

2010-CP-23-7077

MICHAEL JARRARD,

Claimant,
Respondent

vs.

FEDERAL EXPRESS CORPORATION,

Employer and Self-Insured,
Petitioners.

Case No. ~~10-CP-40-~~ _____

PETITION FOR JUDICIAL REVIEW

(Non-Jury Appeal from Workers' Compensation Commission)

The Petitioners, pursuant to S.C. Code Ann. §1-23-380 and S.C. Code Ann. § 42-17-60, hereby petition 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.

1. Federal Express Corporation, Employer, seeks judicial review of a decision of an administrative agency, the South Carolina Workers' Compensation Commission. This Court has jurisdiction to hear this appeal pursuant to S.C. Code Ann. § 42-17-60 and Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E. 2d 598 (1994).

2. Michael Jarrard, Respondent, was employed by Federal Express Corporation in Richland County, South Carolina.

3. Respondent by order of the Commission sustained injuries due to exposure to chemical products on the job resulting in damage to his pulmonary system and brain damage due to the aggravation of a pre-existing brain tumor.

4. A hearing was held on August 27, 2009, in Columbia, South Carolina, before Commissioner Wilkerson. The issues before the Commissioner were whether the claimant's wife was entitled to attendant care for the claimant and whether additional home additions were required to be made by the defendants.

5. The Single Commissioner found that the claimant's wife was entitled to attendant care and continuing for the rest of the claimant's life as outlined in a life care plan. The wife was given $12.00 per hour for 20 hours per day 7 days a week beginning November 14, 2002 until the present and continuing and the claimant was entitled to an adequate bathroom..

6. The matter was appealed to the Full Commission. The Full Commission affirmed the Single Commissioner's decision. However, two of the three commissioners dissented to the affirmation of the order of the Single Commissioner.

7. The grounds for appeal and the exceptions to the Order of the Commission are as follows:

X a. Did the Commission err in finding that the defendants should pay for the amount quoted for the bathroom repair when competitive quotes were not allowed and if the defendants are to control the medical the defendants have the right to select the proper vendor?

X b. Did the Commission err in finding that the claimant was entitled to the newly added life care plan with the Commission and Court had already approved and ordered a life care plan?

X c. Did the Commission err in finding that Mrs. Jarrard is entitled to $12.00 per hour when the finding is based on similar care that would be provided by a health care professional and Mrs. Jarrard admitted she has no training in that area?

X d. Did the Commission err in finding that Mrs. Jarrard is entitled to payment for 20 hours a day when it is unreasonable and in error to believe that Mrs. Jarrard is involved in active care of the claimant for 20 hours a day, 7 days a week?

X e. Did the Commission err in finding that Mrs. Jarrard is entitled to payment dating back to November 14, 2002, in that the payment of the same has never been requested and would be barred pursuant to the statutory and common law including the WC Act, statute of limitations and laches?

X Did the Commission err in finding that Mrs. Jarrard is entitled to payment $12 per hour, 20 hours per day, 7 days per week when it is unreasonable to find that the wife is engaged in attendant care at that level every day of the year and has been doing so since November 2, 2002?

X Did the Commission err in finding that Mrs. Jarrard is entitled to back payment of attendant care when such a retro active award is unreasonable and not supported by the facts, common law and statutory law and further represents a prejudice to the defendants since the payment and benefits were not requested until 2009?

X Did the Commission err in finding that Mrs. Jarrard is entitled to provide nursing services to the claimant when she has no education and training in that matter and her errors and omissions could impose liability on the defendant since they have no control over the treatment or care she will provide?

X Did the Commission err in awarding every item in Ms. Lutswig's plan when items in the plan are unnecessary, redundant and not the responsibility of the WC defendant?

X Did the Commission err in awarding every item in Ms. Lutswig's plan when the Court has already ordered the care due to the claimant from a different plan so that the current order is unreasonable and unnecessary under the facts of the case and the WC Act?

X Did the Commission err in affirming in total the award of the Single Commissioner when the Full Commission panel did not reach an majority opinion regarding the order of the Single Commissioner?

X Did the Full Commission err as a matter of law affirming the award of the Single Commissioner when the appellate panel did reach a majority opinion regarding the facts, law and order of the claim?

m. The Commission erred in that its findings and decision are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

WHEREFORE, the Petitioners pray that this Court review the record and issue its Order affording one or more of the following forms of relief: (a) reversing the Order of the Full Commission; or, alternatively, (b) ordering such further relief as the Court should determine to be reasonable and necessary.

Russell T. Infinger
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, SC 29601
(864) 370-2211

Attorneys for Petitioners

August 25, 2010
Greenville, South Carolina

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0217907

Michael Jarrard	Employee, Claimant Respondent,
-V-	
Federal Express Corp.,	Employer,
And	
Federal Express Corp.,	Self-Insured Carrier, Defendants/Appellants.

Appellate Panel, Commissioners David Huffstetler, Bryan Lyndon, and Andrea Roche, review held in Columbia, South Carolina

Appellate Panel Decision and Order filed

1/7, 2010

Claimant/Respondent represented by C. Daniel Vega, of Columbia, South Carolina.

Defendant/Appellants represented by Russell T. Infinger, of Greenville, South Carolina.

Statement of the Case

On September 23, 2009, Claimant's attorney filed on behalf of the Claimant a petition for partial lump-sum payments of the award. On November 10, 2009, attorney filed the motion with documentation requested by the commission. The commission scheduled a hearing for March 10, 2010 with Commissioner Susan Barden. On April 22, 2010, Commissioner Barden signed an order granting relief to the Claimant in the form of partial lump-sum payments. She issued the following Findings of Fact, Rulings of Law, and Orders:

FINDINGS OF FACT

1. Claimant's home is in need of repair.
2. Claimant submitted copies of contractor bids and pictures demonstrating the need for the repairs.
3. Williams Roofing's prices of $3,500.00 for the roof repair; $3,000.00 for repairs to the storage attachment; and $3,400.00 for window replacements are reasonable and necessary expenses for repairing Claimant's house.
4. Bill James and Sons, Inc. price of $908.00 for removal and replacement of the water closet and wall-hung lavatory is a reasonable and necessary expense for repairing Claimant's house.
5. Creighton Laircey Company, Inc.'s price of $5,500.00 for installation of an HVAC unit is a reasonable and necessary expense for repairing Claimant's house.
6. Claimant made repairs to his home prior to his injuries. Claimant has physical limitations that limit his ability to perform or obtain these repairs. But for Claimant's limitations he would have attempted the repairs and or contracted with someone to make these repairs.
7. A partial lump-sum payment for repairing Claimant's house is in Claimant's best interest.
8. The amounts of these payments to the contractors need to be held in trust until they become due and then paid to the contractors.
9. Claimant reviewed and signed the settlement memorandum and fee petition on October 7, 2009.
10. This fee petition was signed and approved by the undersigned Commissioner on March 10, 2010.
11. The fee petition lists legal fees and costs of $169,253.27.
12. A partial lump-sum payment for payment of legal fees and costs is in Claimant's best interests.

13. Defendants are to make partial lump-sum payments for repair of he home and legal fees and costs incurred by Claimant.
14. File number 0119870 and file number 0217907 shall combined as file number 0217907 in order to promulgate judicial economy.

CONCLUSIONS OF LAW

1. Pursuant to section 42-9-301, a partial lump-sum payment of the above costs for home repair and legal fee and expenses is appropriate and in Claimant's best Interest.
2. Pursuant to Cox v. Mills, 286 S.C. 226, 332 S.E.2d 562 (S.C. App. 1985), there is no abuse of discretion in ordering partial lump-sum payment where the employee needed to do major repair work to the home.
3. The payment of attorney's fees for services in procuring the award is a proper element to be considered in passing upon a petition for the allowance of a lump-sum settlement under Ashlev v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E. 2d 390 (1947).

ORDER

IT IS THEREFORE ORDERED the findings of fact and rulings of law are incorporated herein as if set forth verbatim and the Defendants shall:

1. Make payment of $9,900.00 for roof repair, replacement of the storage attachment, and replacement of windows at Claimant's house.
2. Make payment of $908.00 for the removal and replacement of the water closet and wall-hung lavatory at Claimant's house.
3. Make payment of $5,500.00 for the installation of the HVAC unit at Claimant's house.
4. Make payment to Claimant's attorney of $169,253.27 for legal services to Claimant.

Counsel for the Defendants filed a Request for Commission Review in the case setting forth his reasons. An Administrative Order was issued on May 14, 2010, dismissing the appeal for failure to timely file appeal pursuant to S.C. Reg. 67-701 and Reg. 67-205. Subsequently no Request for Reinstatement was filed by the appellant. An Administrative Order was issued September 15, 2010, reinstating the Request for Commission Review.

By appeal, Defendants respectfully submit the following:

1. Did the Single Commissioner err in finding that the defendants must make a partial lump sum payment to the claimant when the claimant failed to prove that making such a lump sum was in the best interest and not prejudicial to the defendant?
2. Did the Single Commissioner err in finding that the defendant must pay up front legal fees of the claimant's attorney when the evidence does not support such a finding?
3. Did the Single Commissioner err in finding that the defendant must pay up front legal fees of the claimant's attorney when the common law and statutory requirements are not supported in the claim or order?

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusion of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review in the instant case, the Decision and Order of the Single Commissioner is affirmed and the Order is sustained in its entirety. The Hearing Commissioner's decision is incorporated by reference as is set forth verbatim herein.

Order

It is, therefore, ordered the order of the Single Commissioner filed in the above-captioned matter on April 22, 2010 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

And it is so ordered!

S.C. Workers' Compensation Commission

David W. Huffstetler, Commissioner

Concurring:

Bryan Lynch, Commissioner

Andrea Roche, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage prepaid in the United States mail addressed to attorney or attorneys for said parties.

This 7th day of January, 2011

By Valerie D Diller

Administrative Assistant to the Commissioner

C. Daniel Vega

Russell T. Hafner

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 *Return to Petition for Rehearing* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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

Erin Bridges

July 26, 2012

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

BNTD
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.

July 26, 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 *Return to Petition for Rehearing* in regards to this case. I have also enclosed a proof of service upon counsel for the Appellant. 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.

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

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