COMPENSATION FOR SPOUSAL CARE OF INJURED WORKERS

Presented for the VTLA Fall Fiesta
September 28, 2002

By:

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of compensation being provided by the Workers' Compensation insurance company, there is little hope of being fairly compensated for it at a later time. This is true in spite of the fact when the spouse provides the care that there is tremendous financial windfall for the Workers' Compensation insurance company. It may be irrelevant that this is often the same type of care which would be provided by medical personnel if they were brought into the home.

II. ***Warren Trucking Co. v. Chandler***

In order for a spouse to be compensated for the care of their injured husbands, they must meet a very strict four-part test, which requires: 1) that the employer knows of the medical need for home care; 2) the care is under the direction and control of the physician; 3) the care is of the type normally performed by nurses and trained medical attendants; 4) and that there is a means to determine the value of the services rendered.

The first time that the Virginia Supreme Court considered the question of when home care provided by a spouse should be paid for by the Workers' Compensation insurance company was in the case of ***Warren Trucking Co. v.***

Chandler*, 221 Va. 1108, 277 S.E. 2d 488 (1981).** This was based on the earlier version of §65.2-603 which also required the employer to provide physicians and such "other necessary medical attention" (Exhibit 1 hereto). In that case, the court indicated that they would adopt the view taken by the majority of courts around the country. The ***Warren court stated as follows:

> We generally subscribe to the view of the courts employing the "modern rule." Consequently, under §65.1-88, we think nursing care at home given a disabled employee by the spouse is allowable, provided the care is "medical attention" and provided it is "necessary." Neither the statute nor the Act defines those terms. Thus, using the approach taken on the subject in other jurisdictions under similar statutory provisions, we think the employer must pay for the care when it is performed by a spouse, if (1) the employer knows of the employee's need for medical attention at home as a result of the industrial accident; (2) the medical attention is performed under the direction and control of a physician, that is, a physician must state home nursing care is necessary as the result of the accident and must describe with a reasonable degree of particularity the nature and extent of duties to be performed by the spouse; (3) the care rendered by the spouse must be of the type usually rendered only by trained attendants and beyond the scope of normal household duties; and (4) there is a means to determine with proper certainty the reasonable value of the services performed by the spouse. See ***In Re Klapac's Case***, 355 Mass. At 50, 242 N.E.2d at 864-65; ***Spiker v. John Day Co.***, 201 Neb. at 519, 270 N.W.2d at 309.

221 Va. at 1116.

What is most troubling about the ***Warren Trucking*** case is the final conclusion. In that case, the court decided that while the employer knew that the claimant needed medical attention at home, the doctors indicated that at least the claimant needed "moderate nursing care which his wife was providing," and there was a reasonable basis for determining the value of the services, the Court still held that the spouse should not be compensated for those services. This was because of the ***Warren Trucking*** court's conclusion that the claimant's wife's care was not beyond the scope of "normal house duties". In that case, her care consisted of bathing, shaving, etc. Somehow, the ***Warren Trucking*** court determined that this was not the type of care usually rendered only by trained attendants and that these were normal household duties for a spouse. The court stated as follows:

> Furthermore, the care rendered by the wife was not beyond the scope of normal household duties. According to the evidence, the care consisted of bathing, shaving, feeding, assistance in walking, help with braces, aid upon falling, driving and administering routine medication. None of these duties, when considered in the light of the claimant's condition and the extent of his disability, is of the type usually rendered only by trained attendants.

221 Va. at 1118.

In a more recent case, ***Kenbridge Construction Co. v. Poole*****, 25 Va. App. 115, 46 S.E. 2d 567 (1997)**, the Court of Appeals agreed that a spouse should be

compensated partly for services rendered. In that case, medical aides provided assistance to the worker during the day, but the spouse was the only person who cared for him at night between 10:00 p.m. and 8:00 a.m. every day. The spouse had received extensive training at hospitals and from a registered nurse. She testified that she had to get up between 4 to 15 times each night to care for her husband. On that basis, she sought to be compensated for the entire 10 hours that she was on call. The Commission only ordered her compensation for 3 hours per night on the theory that she was not awake and monitoring her husband constantly from 10:00 p.m. to 8:00 a.m. every day. In fact, the claimant would sometimes wake her during the night when he needed attention. Obviously, this was another case where the spouse saved the Workers' Compensation insurance company a great deal of money, but this is not a consideration in terms of whether the spouse should be compensated.

III. Other Specific Cases of Interest

Other cases of interest dealing with home care include ***Sensabaugh v. Vulcan Material Co.*, 62 O.I.C. 398 (1983)**, where the Commission ruled that certain home care provided by the wife of a quadriplegic constitutes "necessary

medical attention" and therefore is not barred by the 90 day rule which applies to a change of condition claim.

Consideration is given to the fact that a family member has left employment to provide nursing care authorized by the attending physician. ***Womble v. E.C. Womack*, 49 O.I.C. 339 (1967); *Sugg v. Commercial Trading Corp.*, 53 O.I.C. 358 (1971); *Hullihen v. J.A. Lap, Inc.*, 46 O.I.C. 114 (1964); *Porter v. Harris Heating & Plumbing, Inc.*, 59 O.I.C. 245 (1980).**

An employer is not liable to a family member who attends claimant in the ordinary course of their household duties without discontinuing their regular employment. ***Foster v. Lumber & Manufacturing Co.*, 2 O.I.C. 79 (1920).**

It is reasonable to compensate the spouse for home care at a rate lower than that paid to professional nurses. ***Judge v. Robert Whitmer, C. Kirk Reilly & Associates v. NRT Construction Corp.*, 62 O.I.C. 257 (1983).**

IV. Strategic Problem with Getting Compensation for a Spouse

Spouses must be willing to "call the bluff" of the Workers' Compensation insurance companies and risk having care provided by medical personnel.

Contrary to what any Commission ruling or the courts may say, spouses are providing care which is routinely provided by nurses or certified nursing assistants. This care includes taking care of such mundane items as administering medication, feeding, helping with bathing, shaving or bathroom functions. The difficulty is that if an appropriate statement is provided from a doctor that home care is necessary, then the Workers' Compensation insurance company may insist on someone else providing that care besides the spouse. Most spouses are not willing to take this step. This issue was considered in the case of ***Judge v. Whitmer*, 6 Va. App. 152, 366 S.E. 2d 713, appeal denied, 372 S.E. 2d 919 (Virginia 1988).** In that case, the injured employee was a respirator-dependant quadriplegic who required 24-hour nursing care. A nursing company was hired to provide such care and the employer's insurance carrier also paid the wife for services rendered when the nursing service could not work. When the wife began submitting more and more frequent bills for services rendered, control of the nursing care furnished

became an issue. The court in that case held that since the employer had the burden to provide the necessary medical treatment, it had the right to determine who would render the nursing care. That holding may be somewhat limited to the facts of the ***Judge v. Whitmer*** case because in that case, the Commission had held as far back as 1983 that as long as nursing care provided was reasonable, the carrier had the right to provide such care through a nursing service company. Also, it would appear to conflict with general Workers' Compensation law on medical care and referral rules to say that health care providers should not be the ones to determine who should provide the care, whether it be a nursing agency or a spouse. There is case law that stands for the proposition that the employer has the right to change a provider if in doing so, monies would be saved. ***Jackson v. Clemons Agency*, 70 O.I.C. 268 (1991).** Typically, however, care provided by a spouse would be cheaper than any care that could be provided by a nursing agency or a nursing home. Claimants and their spouses must be willing to "call the bluff" of the Workers' Compensation insurance company when claims are filed for payment of spousal care so that the carrier truly runs the risk of more expensive care being provided by an outside agency.

V. Statutes of Limitation or Laches

Claims for home care should not be barred by statutes of limitations or laches.

We can find no authority in Virginia or elsewhere applying statute of limitations to nursing services or home care provided by spouses. This is significant because it is extremely frequent that spouses provide care for long periods of time without even considering that possibility. In fact, I recently had a case where a spouse provided that care for in excess of 10 years before she came to our office and we discussed with her the possibility of her being paid for that care.

We also can find no cases which apply the doctrine of laches to claims for Workers' Compensation benefits in this state. There have actually been a number of cases in other states where the doctrine of laches has been held not applicable to Workers' Compensation on the theory that the doctrine of laches is peculiar to courts of equity and Workers' Compensation is a special statutory proceeding. ***Homeland Insurance Co. v. Rankin*, 848 P.2d 587 (Okla. Ct. App. 1993); *Ivezaj v. Federal Mogul Corp.*, 197 Mich. App. 462, 495 N.W.2d 800 (1992) *appeal denied*, 442 Mich. 926, 503 N.W.2d 901 (1993).** (Both cases enclosed at Exhibit

2.) In the latter case, the court held that a wife's claim for nursing care benefits for services she provided to her husband, the Workers' Compensation claimant suffering from a work related psychiatric disability, was not barred on the basis of the doctrine of laches. This was true in spite of the fact that the wife began providing her services in 1971 but did not petition for reimbursement under the Workers' Compensation Act until 1981.

It is true that when an attorney seeks fees from health care providers or third party insurance carriers in regards to medical bills, the insurance carrier or health care provider must be given "reasonable notice" and a motion for an award or fees will be made. This requirement is regulatory, under Rule 6 of the Workers' Compensation Commission Rules, and is completely distinguishable from an attempt by a health care provider or spouse to obtain payment for services rendered. The law does require health care providers to provide medical reports upon request within a reasonable time or forfeit the right to payment for services rendered. §65.2-604A (Exhibit 3), ***Jenkins v. Lowe's of Norfolk, Inc.*, 59 O.I.C. 149 (1980).**

VI. Constitutionality of *Warren Trucking* and the So-called Modern Rule

The belief that spouses are performing normal household duties when they take care of their husbands' personal needs is based on an antiquated and perhaps unconstitutional principle.

Any review of case law in this state or around the country where the issue of compensation for spousal care of injured workers has come up demonstrates beyond question that we are talking about an issue of a wife taking care of the husband. In fact, it is a rare instance that the husband stays home and takes care of his wife. Sometimes, parents take care of children. For a survey of some of the cases, see **Worker's Compensation: Recovery for Home Service Provided by Spouse, 67 A.L.R. 4th, 765; Worker's Compensation: Evaluation of Home Services Provided by Victims Relatives, 65 A.L.R. 4, 442; Larsen's Worker's Compensation Law, Section 94.03 D[4][b].** Therefore, the view that all of the tasks performed by the spouse fall under the category of normal household duties could only be a throw back to an antiquated time long before the laws of equal protection were recognized.

The only Virginia cases this researcher could find in regards to the duty of a

husband and wife to each other were covered in cases dating to the 1940's and 1950's, wherein it was described that the husband and wife have a duty to live together, to provide each other with consortium and companionship and a duty to be the "helpmeet" of the other. ***Ballard v. Cox*, 192 Va. 654, 62 S.E.2d. 1 (1950).** Even this old law does not stand for the proposition that a wife has a duty to bathe and clean her husband, let alone perform some of the other tasks that a spouse performs. The concept that a wife had an obligation to perform duties of the type provided by a spouse is based only upon the antiquated "necessaries doctrine". However, that doctrine which stood for the proposition that a husband's role was to provide financial support and a woman's role was to provide domestic services in return has been held unconstitutional. This question came up in the context of a claim by a hospital against a husband to pay a medical bill incurred by his spouse. The claim was based on the "necessaries doctrine." In finding against the hospital on appeal, the Virginia Supreme court held the "necessaries doctrine" unconstitutional. ***Schilling v. Bedford Co. Hospital*, 225 Va. 539, 303 S.E.2d 905 (1983).** As the ***Schilling*** Court clearly recognized:

> It is apparent that the necessaries doctrine has its roots in the same common, now outdated, assumptions as to the proper roles of males and females in our society. It therefore creates a gender-based classification, not substantially related to serving important governmental interests and is unconstitutional.

Id. At 225 Va. 544, 303 S.E.2d 908.

That ruling by the Virginia Supreme Court may be useful in arguing the unconstitutionality of the so-called "modern rule" adopted by the ***Warren Trucking*** court.

VII. Conclusion

In summary, the law in regards to compensation for spouses for taking care of their injured workers is horribly unfair. Frequently, wives stay home and take care of their injured worker husbands. They do so because they know that they will be providing better care than the injured workers would receive by professional nurses, nursing agencies or in a facility. Too often, Workers' Compensation insurance companies do not voluntarily agree to pay for those services because they know that they can get away with it. This is a great hardship for the injured worker's family and a great savings for the insurance companies. The current law of ***Warren Trucking*** may be the modern rule in this society, but it is terribly outdated. We need to take every opportunity to advise our clients in regards to steps that can be taken to gain compensation by filing claims at the earliest possible time. If done so in the early stages, frequently, Workers' Compensation insurance companies are more likely to agree to the compensation

and contracts can be agreed to at the early stages which are often impossible after the fact.

VTLA FALL FIESTA 2002

Biography of Andrew J. Reinhardt

Member of the State Bars of Washington, D.C., Maryland & Virginia.
Graduate of St. Lawrence University, 1975
Graduate of Syracuse University College of Law, 1979
Partner in law firm of Kerns, Kastenbaum & Reinhardt, PLC
Active Member of the Virginia Trial Lawyers Association, the American Trial Lawyers Association, the Workplace Injury Litigation Group (WILG), the National Organization for Social Security Claimant's Representatives (NOSSCR) and the Richmond Bar Association.
Frequent lecturer on topics related to personal injury, workers' compensation and social security disability

LIST OF EXHIBITS

Exhibit 1: **§65.2-603 of the Virginia Code**

Exhibit 2: ***Homeland Insurance Co. v. Rankin*, 848 P.2d 587 (Okla. Ct. App. 1993); *Ivezaj v. Federal Mogul Corp.*, 197 Mich. App. 462, 495 N.W.2d 800 (1992) *appeal denied*, 442 Mich. 926, 503 N.W.2d 901 (1993)**

Exhibit 3: **§65.2-604 of the Virginia Code**