

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
JACKSONVILLE DISTRICT OFFICE

Lori M. Wilkinson,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 98-016569NPP
Work Impex Trading Corporation, and)	
World Impex Corporation/Sentry Insurance)	Accident Date: 7/8/1998
Company, Sentry Insurance,)	
Employer/ Carrier/ Servicing Agent.)	Judge: Neal P. Pitts
_____)	

FINAL COMPENSATION ORDER

This Cause came on for a merits' hearing before the undersigned Judge of Compensation Claims on April 15, 2010 in Jacksonville, Duval County, Florida, upon petitions for benefits filed with DOAH on September 2, 2009 and September 23, 2009, that were the subject matter of a mediation conference held on January 10, 2010. The claimant was represented by Howard Butler, Esq. The employer, World Impex Corporation, hereinafter referred to as the "Employer," was represented by Timothy F. Stanton, Esq. Testimony was received during the hearing telephonically from the claimant, and in person by her husband, Mark Wilkinson (hereinafter "Husband").

At the time of trial, the parties entered into the following stipulations:

1. The court has jurisdiction of the parties and the subject matter;

2. Venue properly lies in Duval County, Florida;
3. A compensable accident occurred on July 8, 1998 in Jacksonville, Duval County, Florida;
4. A state mediation was held on January 10, 2010;
5. Timely notice of the final hearing had been given;
6. Petitions For Benefits were filed with DOAH on September 2, 2009 and September 23, 2009;
7. Employer/Employee relationship was in effect on the date of the accident;
8. Workers' compensation coverage was in effect on the date of the accident;
9. The accident or occupational disease was accepted as compensable;
10. Timely notice of the accident, injury, or occupational disease had been given;
11. The AWW is not at issue at this time per agreement of parties;
12. The parties further stipulated that during all times material hereto, including the period of July 9, 2009 through the time of the merits' hearing on April 15, 2010, the claimant was entitled to receive attendant care at the rate of 9 hours per day by a non-professional provider (the Husband) and 3 hours per day for a professional provider; and

13. The parties further stipulated that the Employer has continued to pay the Husband at all times material hereto, including the period of July 9, 2009 through the merits' hearing on April 15, 2010, for 3 hours per day of attendant care at \$16.00 per hour in accordance with the Agreement, and has paid the Husband at the federal minimum wage for the additional 6 hours of attendant care.

The claims at the trial for determination were the following:

1. Adjustment to rate for A/C benefits paid by the E/C for services rendered by Claimant's husband (Mark Wilkinson) and family from 5-8-08 to present and continuing. E/C has incorrectly paid benefits at Federal Minimum Wage (\$6.55/hr) rather than the correct rate of \$16.00/hr per Stipulation/Order up through February, 2009 when husband left his outside employment earning \$20/hr. Thereafter proper rate to be determined based on Stipulated rate (\$16.00/hr) but in no case less than minimum wage in Florida (01-01-09 \$7.21/hr; 07-24-07 \$7.25/hr); and
2. Penalties, interest, costs, and attorney's fees.

The defenses raised by the Employer were the following:

1. Res judicata;
2. Ripeness doctrine;

3. Claim was ripe at time of prior final hearing (6-18-09), but never raised or heard or reserved; therefore it is waived;
4. Attendant care benefits are being paid at the correct rate (from 5-8-08 and forward) per the Joint Stipulation of the parties (dated 6-4-01 and approved 6-7-01) and per section 440.13(2)(b)(1), Fla. Stat.;
5. Attendant care benefits subject to requirement of Statute in effect at time care provided;
6. E/C requests that Petition to Modify Order Dated June 7, 2001 approving Joint Stipulation dated June 4, 2001 be heard contemporaneously at final hearing;
7. Change in circumstances; and
8. PICA not due and owing.

The following documents were admitted into evidence:

Judge's Exhibits:

1. Pretrial Questionnaire completed by the parties;
2. Petition for Benefits filed with DOAH on September 23, 2009;
3. Response to Petition for Benefits filed with DOAH on September 23, 2009; and
4. Stenographically transcribed via audio recording excerpts of final hearing recorded June 18, 2009. Testimony of Lori M. Wilkinson and Mark Wilkinson;
5. Petition for Benefits filed with DOAH on September 2,

2009;

6. E/C's Petition to Modify Order Dated June 7, 2001 Approving Joint Stipulation Dated June 4, 2001;
7. Final Order Awarding Attendant Care Benefits dated July 8, 2009 signed by Judge Ivey C. Harris;
8. Petition for Benefits filed with DOAH on November 14, 2008;
9. Response to Petition for Benefits filed December 15, 2008;
and
10. Uniform PreTrial Stipulation and PreTrial Compliance Questionnaire filed May 5, 2009.

Joint Exhibits:

1. Deposition of Ana Vargas with attachments taken on February 16, 2010;
2. Deposition of Mark Wilkinson taken on March 11, 2010.

Claimant's Exhibit:

1. Claimant's Memorandum and Argument Pursuant to Chapter 60Q-6 rule of Procedure for Workers' Compensation Adjudication, Section 60Q-6.116(7), admitted for purposes of argument only and not as evidence; and
2. Deposition of Michael Milone taken on April 15, 2009;
3. E/C's Notice of Filing and Motion to Admit Exhibits.

Employer's Exhibits:

1. E/C's Trial Memorandum admitted for purposes of argument only and not as evidence;

2. Deposition with attachments of Mark Wilkinson taken on March 2, 2010.

In making my findings of fact, I have carefully considered and weighed all of the evidence presented to me. Although I may not reference each piece of evidence presented by the parties, I have carefully considered all the evidence and the exhibits in making my findings of fact. I have resolved all conflicts in the evidence, both live testimony and by deposition, where they existed. Based upon the evidence, I make the following findings of fact:

1. I have jurisdiction of the parties and the subject matter of these claims.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on April 15, 2010 after which closing arguments were made by the parties.
4. The claimant suffered a compensable accident and injuries on July 8, 1998. Her compensable injuries include Complex Regional Pain Syndrome (RSD) of the right foot, Deep Vein Thrombosis (DVT), pulmonary emboli, depression, and orthopedic injuries to her shoulder, neck and low back. She essentially is wheel chair dependent.

5. Because of the extensive injuries, Dr. Roberts, the claimant's authorized treating physician, recommended that the claimant receive attendant care services. This issue was litigated initially with the filing of a petition for benefits on June 5, 2000.
6. On June 4, 2001, the parties resolved the litigation when they entered into a Joint Stipulation (hereinafter referred to as the "Agreement"). The Agreement was approved by Order dated June 7, 2001 entered by Judge Harris.
7. Pursuant to paragraph 3 of the Agreement, beginning May 28, 2001, the Employer agreed to provide 6 hours of ongoing attendant care services "[a]t the market rate of \$16.00 per hour." Of these 6 hours, 3 were to be provided by a professional attendant and 3 were to be provided by the Husband.
8. The statute in effect on the date of the Agreement, specifically the provisions of §440.13(2)(b)(2), Fla. Stat. (2001), provided that the per hour value of attendant care for a family member who elected to leave employment to provide the attendant care services is equal to the hourly rate of the former employment, but is not to exceed the per-hour value of such care available in the community at large. There is no dispute that when the Agreement was reached, the

Husband's hourly rate at his place of employment was greater than \$16.00. Thus, the "market rate" of \$16.00 per hour was agreed to.

9. On November 12, 2008, litigation was initiated with the filing of a petition for benefits when the authorized physician, Dr. Roberts, had increased the prescription for attendant care from 6 hours per day to 12 hours per day; with the 6 additional hours per day to be provided by a non-professional provider (the Husband). This claim went to a merits' hearing on June 18, 2009.
10. Prior to the commencement of the hearing, the Employer stipulated to pay the Husband an additional six hours per day attendant care services for the period of May 8, 2008 through September 8, 2008. No hourly rate was stipulated to. The parties then tried the issue of the quantum of attendant care services subsequent to September 8, 2008 through the date of the hearing.
11. On July 8, 2009, Judge Harris entered a Final Order Awarding Attendant Care Benefits ("Order"). In this Order, she awarded an increase in attendant care services from 6 hours to 12 hours, with the Husband to be paid "[a]n additional 6 hours from May 8, 2008 to the present at the proper rate." The Order did not specify the proper rate. Nor did the parties litigate

this issue. The Employer contends that issue of the hourly rate was ripe for determination at the June 18, 2009 merits' hearing, and that the doctrine of res judicata precludes the claimant's attempt to relitigate this issue.

12. Following the July 8, 2009 Order, the Employer paid the Husband the additional 6 hours of attendant care benefits at an hourly rate equal to the federal minimum wage. The Employer has continued to pay the claimant's husband the stipulated 3 hours of attendant services at \$16.00 per hour, but now seeks modification of the hourly rate to reflect his current hourly rate and/or the federal minimum wage during the period that he was not employed. There is no dispute that the Husband has provided the agreed upon attendant care services.

13. The Husband testified that he relied upon the stipulated \$16.00 per hour when he made his employment decisions. He admits, however, that he had no conversations with the Employer regarding the \$16.00 hourly rate and therefore no promises were made to him that he would be paid \$16.00 per hour for the additional attendant care. He further concedes that it was his assumption that he would be paid \$16.00 an hour for the additional hours.

14. The Employer presented no evidence with regards to the current market rate for providing attendant care services in the Jacksonville community. The greater weight of the evidence established that the Husband did not elect to leave his employment to provide the attendant care benefits. Additionally, the evidence is uncontroverted that the Husband rendered the additional 6 hours of attendant care services either while unemployed or during hours that he was not engaged in performing his employment duties.
15. There are three (3) distinct time periods during which the additional attendant care benefits were provided by the Husband for which the hourly rate must be established: May 8, 2008 through September 8, 2008 (per stipulation); September 9, 2008 to July 8, 2009 (per Compensation Order); and July 9, 2009 to the present (per stipulation).
16. The law is settled that a claim for additional attendant care benefits, including a claim for a different rate of pay, filed after the entry of a prior order establishing a right to specific attendant care benefits is considered to be a new claim and not a modification action controlled by §440.28, Fla. Stat. See *Caron v. Systematic Air Servs.*, 576 So. 2d 372 (Fla. 1st DCA 1991); *Buena Vida Townhouse Ass'n v.*

Parciak, 603 So. 2d 26 (Fla. 1st DCA 1992); *Saddlebrook Resorts, Inc. v. Heath*, 686 So. 2d 667 (Fla. 1st DCA 1996); *Vickers v. Unity of Lake Worth*, 680 So. 2d 470 (Fla. 1st DCA 1996); and *Boynton Landscape v. Dickinson*, 670 So. 2d 151 (Fla. 1st DCA 1996). Thus, when a prior order does not determine the entire merits of a claimant's rights to attendant care benefits, but rather only those attendant care benefits during a specific period of time, such order has no estoppel effect upon a subsequent claim made for an increase in benefits or the hourly rate. See *Caron v. Systematic Air Servs.*, 576 So. 2d 372 (Fla. 1st DCA 1991).

17. Based upon the above law, the claimant is not estopped from seeking additional attendant care benefits, including an adjustment in the hourly rate for the additional attendant care hours being sought if the market rate had increased, for any period after the June 7, 2001 Order. Concomitantly, the Employer is not estopped from contending that the hourly rate for the additional hours being sought by the claimant subsequent to June 7, 2001 would be controlled by the statute then in effect unless the parties agreed otherwise.

18. I find that the Agreement did not establish an hourly rate of \$16.00 which would be binding upon future modifications of the Agreement. While the Agreement did contemplate that the quantum of care may change in the future, I cannot find any intent in the Agreement that there was a meeting of the minds between the parties that the \$16.00 per hour figure would automatically attach to any increase in the quantum of care. Likewise, I find nothing in the Agreement that if the market value of attendant care services were to increase in the future that the claimant would be estopped from seeking an increase in the \$16.00 per hour rate. Unanticipated by the parties, and to the detriment of the claimant, after the Agreement had been negotiated the law changed such that the hourly rate is determined by different criteria than the statutory provisions in effect when the Agreement had been negotiated.

19. Based upon the above decisional law, I am compelled to find that when the claimant filed her November 12, 2008 petition for benefits seeking an additional 6 hours per day of non-professional attendant care benefits, this constituted a new claim for additional attendant care benefits that was not resolved by the stipulations of the parties based upon the evidence

that existed when the Agreement was signed. Because this is a claim for 6 hours of additional attendant benefits based upon a change in the medical evidence (increase in the number of hours of attendant care benefits being prescribed by Dr. Roberts), the resolution of that claim was not controlled by the terms of the Agreement, including the agreed upon \$16.00 hourly rate.

20. Because the claim for 6 hours of additional non-professional attendant care benefits is a new claim that is not controlled by the Agreement, it is controlled by the applicable statute in effect when the claim was made. See *James W. Windham Builders, Inc., v. Overloop*, 951 So. 2d 40 (Fla. 1st DCA 2007). Specifically, the provisions of §440.13(2)(b)(1), Fla. Stat. (2008) provide that that if the family member is not employed or if the family member is employed and is providing attendant care services during hours that he or she is not engaged in employment, the per-hour value of such care equals the federal minimum wage.

21. There is no dispute that the Husband provided the additional 6 hours of attendant care services during hours that he was not engaged in his separate employment. For that reason, I am compelled to conclude that §440.13(2)(b)(1), Fla. Stat. (2008)

controls rather than §440.13(2)(b)(3), Fla. Stat. (2008).

22. The claimant contends that subsection 3 rather than subsection 1 should control and provide for an hourly rate equal to the Husband's current employment rate. While the distinction between subsection 1 and 3 is difficult to articulate, there is additional language in subsection 1 which provides that "[i]f the family member is employed and is providing attendant care services during hours that he or she is not engaged in employment." Because statutory construction requires that a statute be construed so as to give effect to each statutory provision, and because in the case sub judice the Husband was providing attendant care services either while unemployed or during hours that he was not engaged in (outside) employment, I am compelled to give effect to subsection 1 and find it to be controlling.

23. Based upon the foregoing, I find that the 6 hours of additional non-professional attendant care benefits commencing May 8, 2008 and continuing through the present time is payable at the federal minimum wage. This includes the period of September 9, 2008 through July 8, 2009 under the July 8, 2009 Order entered by Judge Harris because I find that the "proper rate" for

the additional attendant care benefits awarded in such order to be the federal minimum wage.

24. I further find that the initial 3 hours of non-professional attendant care benefits ordered to be paid to the Husband at \$16.00 per hour rate remains controlled by the Agreement. Therefore, I deny the EC's Petition To Modify Order Dated June 7, 2001 Approving Joint Stipulation Dated June 4, 2001.

25. I deny the motion for modification because I find that there is has been no change in condition or because of a mistake in a determination of fact has occurred which would permit a modification pursuant to §440.28, Fla. Stat. This is because the Agreement was based upon the market rate not the Husband's employment rate. There was no testimony regarding a change in the market rate which would arguably justify a modification of the Agreement. Thus, the change in the Husband's employment rate has no bearing on the Agreement to pay him 3 hours of attendant care based upon the \$16.00 per hour market rate.

26. I find that the claimant's attorney has performed a valuable service on behalf of his client and is entitled to a reasonable fee and taxable costs at the expense of the employer for his efforts in defending against the EC's Petition To Modify. I deny the claim

for attorney's fees and costs associated with the claim for an adjustment in the hourly rate being paid to the Husband for the 6 hours of additional attendant care services.

27. Any and all issues raised by way of the petition for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

Wherefore, It Is CONSIDERED, ORDERED, and ADJUDGED as

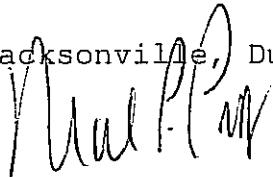
follows:

1. The claim for adjustment of the rate for A/C benefits paid by the E/C for services rendered by Claimant's husband (Mark Wilkinson) and family from 5-8-08 to present and continuing is denied.
2. The claim that the Husband be paid for 6 hours of additional attendant care benefits based upon the \$16.00 hourly rate in the Agreement for the periods from May 8, 2008 to the present is denied.
3. EC's Petition To Modify Order Dated June 7, 2001 Approving Joint Stipulation Dated June 4, 2001 is hereby denied.

4. The EC shall pay a reasonable attorney's fee and taxable costs to the claimant's attorney related solely for the time spent in successfully defending against the EC's Petition To Modify. Jurisdiction is hereby reserved to determine the amount thereof if the parties are unable to amicably resolve this issue.

5. The Petitions For Benefits that were filed with DOAH on September 2, 2009 and September 23, 2009 are hereby dismissed with prejudice.

DONE AND ORDERED in Jacksonville, Duval County, Florida.




Neal P. Pitts

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THIS IS TO CERTIFY that the foregoing Order was entered and that a copy was sent by electronic mail this 6th day of May, 2010, to each of the following.



Secretary to Neal P. Pitts,
Judge of Compensation Claims

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