

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D201010

HOWARD CARR, EMPLOYEE

CLAIMANT

**COOPER TIRE & RUBBER COMPANY,
EMPLOYER**

RESPONDENT NO. 1

**CENTRAL ADJUSTMENT COMPANY, INC.,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

OPINION FILED JUNE 12, 2023

Hearing held before Administrative Law Judge Chandra L. Black, in Texarkana, Miller County, Arkansas.

Claimant represented by the Honorable Eddie H. Walker, Jr., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the Honorable Karen McKinney, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the Honorable Christy King, Attorney at Law, Little Rock, Arkansas. Ms. King did not take part in the hearing.

STATEMENT OF THE CASE

On March 14, 2023, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A Prehearing Telephone Conference was conducted in this claim on January 11, 2023, from which a Prehearing Order was filed on that same date. The Prehearing Order has been marked as Commission's Exhibit #1 and made a part of the record, without objection.

Stipulations

During the Prehearing Telephone Conference, or during the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within Claim.
2. The employee-employer-insurance carrier relationship existed at all relevant times, including on or about January 4, 1982, at which time the Claimant sustained a compensable injury, which has rendered him permanently and totally disabled.
3. The prior decisions of the Commission are the law of the case.
4. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.
5. This claim for additional benefits has been controverted by Respondents No. 1.

Issues

The parties agreed to litigate the following issues:

1. Whether Respondents No. 1 have failed to comply with the Full Commission opinion issued on March 30, 2023. If so, should they be held on contempt.
2. Whether the Claimant is entitled to twelve hours a day of home health service that was previously provided by Respondents No. 1.
3. Whether the Claimant's attorney is entitled to a controverted attorney's fee.

Contentions

The parties' respective contentions are as outlined below:

Claimant:

- a. The Claimant contends that although Full Commission ordered the Respondents to make modifications regarding the Claimant's home they have failed to do so, and they have also failed to provide the home health assistance ordered by the Commission.

- b. The Claimant contends that the Respondents' lack of compliance with the Full Commission's Order constitutes contempt and that accordingly the Respondents should be fined.

Respondents No. 1:

Respondents No. 1 contend that since the Full Commission opinion became final, they have attempted to secure a contractor to perform the awarded modifications to the Claimant's home. When the scope of the job was discussed, many contractors did not even return our calls or never followed through with the request for a bid. As evidenced by the exhibits attached to Claimant's Prehearing Responses, even after making appointments for a contractor to go to the Claimant's home, the contractor failed to keep the appointment. Respondents finally had to resort to bringing a reputable contractor from Dallas to rural southwest Arkansas. After meeting with the Claimant, this contractor provided a list of home modifications that greatly exceeded the awarded modifications of widening the bedroom and bathroom doors and "modifications of 'grab bars,' a tub transfer bench, an elevated commode" and the "reasonable costs of restructuring the claimant's bathroom floor." Specifically, the contractor planned for a complete bathroom remodel and replacing the flooring and subflooring throughout the Claimant's entire home. Communications with the contractor have been ongoing regarding the scope of the modification project. Progress in reaching an agreement to redo the bathroom floor and subfloor, move the vanity to the area currently used for a linen closet, rotate the commode 90 degrees and replace with an elevated commode, and widen the bedroom and bathroom doors has been made. It is anticipated that a contract will be signed once it has been drawn up by the contractor with an anticipated start date of February 2023. Respondents contend that they have been at the mercy of contractors, the economy, and the unwillingness of local contractors to even undertake this project. Respondents further contend that once the modifications are made, such modifications will have gone above and beyond that ordered by the Commission.

With regard to the claim that Respondents have failed to provide home health assistance as ordered by the Full Commission, Respondents contend that the Full Commission did not find the Claimant proved entitlement to "additional home health care." Respondents have never been ordered

to provide Claimant with home healthcare. However, Respondents have voluntarily provided claimant with "non-medical aide services" of bathing, meal preparation, light housekeeping, and transportation. The Full Commission specifically found that an employer is not obligated to furnish custodial care, lodging, or other non-medical services such as housekeeping. Respondents have continued, with the brief exception of time, the home health care of bathing, transportation to medical appointments related to Claimant's compensable injuries, and other medical aide, but are no longer providing custodial care of meal preparation, housekeeping, laundry, and errand running in accordance with the Full Commission award. With regards to the brief period such home health care was not provided, the provider, Visiting Angels, terminated the Claimant as a client due to his treatment of their aides. Respondents have located a new service provider that is in the process of hiring new staff that will provide health services for Mr. Carr [the Claimant].

Summary of Evidence

The record consists of the hearing transcript of March 14, 2023, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit No. 1 consists of the Commission's Prehearing Order of the January 11, 2023, and the parties' respective responses to the Prehearing Questionnaire. For Claimant's Exhibit 1, the Claimant offered into evidence an Index of Documentary Evidence, consisting of pages fifty-two through seventy-six, which is the Full Commission Opinion of March 30, 2022. The Claimant entered into evidence another packet of Index of Documentary Evidence consisting of twenty-seven pages, which has been marked as Claimant's Exhibit 2.¹ The Claimant admitted into evidence a third packet of Index of Documentary Evidence, which included twenty-nine numbered pages. These were marked as Claimant's Exhibit 3. Respondents offered into evidence ten pages of Non-Medical Records, which have been marked as Respondents' Exhibit 1.

¹ Respondents No. 1's counsel objected to Claimant's Exhibit 2 which consists of communications from Claimant's attorney office to her office because some her responses to the Claimant's attorney office were not included in his exhibit. However, I allowed the exhibit to be admitted over Respondents No. 1's objection and noted that appropriate weight would be given the exhibit.

Witness

Howard Carr, the Claimant, was the only witness to testify during the hearing.

Based on my review of the record as a whole, to include the aforementioned documentary evidence, other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witness and observe his demeanor, I hereby make the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. I hereby accept the aforementioned stipulations as fact.
3. The Claimant failed to prove the Respondents No. 1 have failed to comply with to the Full Commission's opinion of March 30, 2022, in securing a contractor to make modifications to his home.
4. The Claimant failed to prove his entitlement to additional hours of nursing services.
5. The issue relating to a controverted attorney's fee has been rendered moot.

Testimony

The Claimant admitted that he recalled a hearing in his claim a year ago regarding modifications to his home. He agreed that in the Full Commission's opinion of March 30, 2022, they ordered that those modifications be done. The Claimant testified that he was contacted by the insurance carrier regarding actual performance of those modifications in August 2022. He agreed that it took them from March to August, five months to start the process. The Claimant further agreed that Respondents No. 2 have started those modifications. According to the Claimant, they started working on his home in February 2023. He denied doing anything to delay them performing the modifications as ordered by the Full Commission.

Regarding the need for home nursing services, the Claimant testified that before his injury he took a shower every day of the week. He confirmed that he would like to be able to do that now. The Claimant specifically denied that there is any way he can do that now given his current condition without having help. He testified that it actually takes him an hour to take a bath with assistance. The Claimant explained the mechanics of getting out of his wheelchair and getting into and out of the bathtub with his assistance. (Tr. 17-19)

He agreed that being able to bathe is a personal hygiene issue to him. The Claimant testified that before when he had his hearing, he was taking a bath about once a week. According to the Claimant, he was using the other time they were providing to get other things done. The Claimant basically testified that there is no possibility of him taking a bath by himself due to a risk of him falling. He testified that when he had his last mishap, he had a disc to slide up on his brain stem. Therefore, he lost all feeling in his arms, legs, and hands.

The Claimant confirmed that if it were not for the effects of his injury, he would be taking a bath seven days a week. He agreed with medical records showing that since the last hearing he has gotten worse. The Claimant admitted that he has been undergoing physical therapy for his condition to strengthen his legs and upper body. He confirmed with medical records stating that he has had problems controlling his bladder and bowel since the last hearing due to the effects of his injury. The Claimant denied he is able to clean himself up after a loss of control of his bowel or bladder. He confirmed that he would need a caregiver for incidents of that nature to help him clean himself up. The Claimant confirmed that he cannot predict when these episodes will occur because he takes medication for constipation and medicine to urinate when he has swelling in his legs.

The Claimant confirmed that he has been hospitalized. He confirmed that he instances where the nurse had to come in and clean him up. The Claimant was again questioned again about the length of time it takes for him to take a shower. This time, the Claimant maintained that it would be closer to two hours for him to take a bath because of the way he has to get in and out of the bathtub.

He was asked if he has an opinion in regard to whether he needs at least twelve hours of home nursing service to cope with the situation of not being able to take a bath and control his bowel and bladder.

On cross-examination, the Claimant confirmed that since his last hearing in May of 2021, he has not gotten a contractor or any bids or anything of that nature for the work to be done on his house. He confirmed that he has not reached out to any contractor to know their availability and their willingness to come to Texarkana. The Claimant testified that the contractor working on his home is out of Texas. He confirmed that the contractor from out of Dallas has been brought to his home and is being paid for by Cooper Tire to work on his home.

He admitted that he has not tried to find a local contractor to do the work. The Claimant admitted that he did not present Cooper Tire with anything to say, “Here is a contractor I have located for you.” The Claimant maintained that he does not have knowledge of the difficulties of hiring a contractor. He denied that he was not made aware that Cooper Tire had at least one contractor lined up to meet with him, but they never showed up. The Claimant was specifically asked about having a meeting scheduled for August 2, 2022, and contractor not showing. According to the Claimant, the contractor that was scheduled showed up on August 30, 2022.

Under further questioning, the Claimant was asked about a letter at page 16 of his exhibit that his attorney sent regarding a contractor that the Claimant was expecting to meet with on

August 22, but the contractor never showed up. The Claimant finally admitted that there was one contractor who did not show up as scheduled.

Counsel for Respondents No. 1 asked the Claimant what nursing assistance he needs besides bathing. He testified that he needs someone to make his bed, help him with some laundry because he cannot stand and reach into the washer and pick his laundry up because he could have an accident and “pee” or “poop” on himself. The Claimant confirmed that he is asking a caregiver to help with his laundry and cook. Per the Claimant, he has spots all over his body where grease has popped out on himself.

He confirmed that he is requesting twelve hours a week of service with a caregiver. The Claimant was last hospitalized in 2017. However, the Claimant explained that he went to the emergency room for spasms in March of 2022. The Claimant testified that he last had an accident on himself about a month ago. According to the Claimant he sat in his chair until someone came. He denied he was able to maneuver himself into the bathroom to get a washcloth and clean himself up. The Claimant maintained he has to have somebody help to roll him over and clean him.

Per Claimant’s Exhibit No. 3, the Claimant confirmed he has been treating with Dr. Sharp. On page 16 of his exhibit, it reads that in July of 2022, Dr. Sharp stated that on physical examination the Claimant had sensation grossly intact in his hands. The Claimant agreed that this is stated on the report. Dr. Sharp’s report in January 2023 also stated the same about his sensation of the hands. However, the Claimant maintained that the report is incorrect. The Claimant testified that his hands are numb.

The Claimant admitted that he has not undergone a recent nerve conduction study or anything to verify his hands are numb. He admitted that since he has been seeing Dr. Sharp, he has not noted any new neurological deficits for him. The Claimant confirmed that Dr. Sharp has

continued to order physical therapy to help strengthen his legs. He continued to maintain that it takes two hours for him to bathe because he is very careful not to fall. The Claimant testified that he fell taking a bath about a month ago. However, the Claimant admitted that he did not go to the doctor for his fall. He admitted he has no documentation to verify his fall, nor did he injure himself.

He confirmed he testified that he used to bathe seven days a week. The Claimant agreed that at that time, he had a full-time job that required a lot of physical exertion. Therefore, after all the exertion of a full-time job, a bath was necessary. The Claimant confirmed that he is now permanently and totally disabled and does not work a full-time job anymore. He agreed he is not as physically active like he used to be. The Claimant denied that any doctor has stated that he needs to bathe seven days a week.

On redirect-examination, the Claimant confirmed that he has developed sores from not being able to clean himself up. He agreed that he needs twelve hours of care just for someone to bathe and help him clean himself up when he has an accident where he has lost control of his bowel and bladder.

The Claimant testified on re-cross examination that it took twelve hours for someone to help him with taking a bath, cleaning him up, doing his laundry, picking up his medications and taking him to physical therapy.

During the last hearing in 2021, the Claimant confirmed with his attorney that nursing care was provided to him on Mondays and Wednesdays from 12:00 p.m. until 4:00 p.m. He testified that they gave him a bath, cleaned his house, and fixed food to be put in the refrigerator so he could heat it up. The Claimant agreed that they did not come on Tuesdays. He agreed that service was provided on Wednesdays from 2:00 p.m. to 4:00 p.m.

However, the Claimant testified that sometimes he would take a bath Wednesday if he had an accident, but normally Wednesday was not a bath day.

He confirmed he previously had care on Thursdays from 4:00 p.m. to 6:00 p.m., and on Fridays the Claimant had care from 12:00 p.m. to 2:00 p.m. He agreed that he testified that he told his attorney during the hearing that they would straighten up and clean his house on Thursdays. The Claimant testified that that is what they also did on Fridays.

The Claimant testified:

Q So when you had twelve hours of care, say, you took a bath on Monday. Say, you took a bath on Wednesday. Let's use your estimate of two hours for a bath, I think that's a bit long, so that's four hours when you take the two hours on Monday and the two hours on Wednesday to take a bath. That's four hours, correct? All of the eight hours, they weren't bathing you, were they?

A No. But I may have to go pick my medication or go to the doctor.

Q Right. You might need to be driven somewhere?

A Yes, because I don't drive.

Q And if you have to be driven somewhere for a workers' compensation medical appointment, transportation is provided to by the workers' compensation, correct?

A Yes.

He denied ever telling the nurse that he wanted her to stay more than four hours. The Claimant also denied asking her to clean his house. He further denied asking her to clean his house or take him somewhere or fix him a meal. The Claimant denied that he wants someone at his home twenty-four hours a day. The Claimant explained that he wanted this care two years ago because he was in "bad shape" and had just come out of surgery. Counsel pointed out to the Claimant that

his last surgery in 2017 and his hearing was in 2021. However, the Claimant explained that he was still having issues.

The Claimant essentially testified that his condition has changed from 2021 to 2023. He admitted that now he is a little better than he was in 2021. The Claimant agreed that he needed somebody to clean his house, cook his meals, make his bed and change his linens.

On redirect examination, the Claimant agreed that at the last hearing, he asked for eight hours of care a day as recommended by his doctor, and not twenty-four hours a day of care each day. He agreed that he took a bath once a week so that the home health could be freed up to do other things. The Claimant admitted that if he took a bath every time they were there, he would not have time for them to do other things. He agreed that he would like to take a bath every day so he would not have to sit in his own urine and bowel excrements.

The Claimant confirmed that the Respondents are providing him with nursing care an hour and a half, three times a week.

Medical Evidence

On March 31, 2022, the Claimant sought medical treatment from Christus St. Michael Health due to a fall at home and chronic pain. The Claimant was evaluated treated and discharged home because his condition was suitable to do so at that time. However, the claimant was instructed to follow-up with is primary care physician.

Dr. Richard B. Sharp saw the Claimant in follow-up clinic on January 11, 2023, for his compensable 1982 injury, which rendered him to be permanently and totally disabled. His assessment at that time included “chronic pain syndrome, cervicgia, low back pain, unspecified, post- laminectomy, paraplegia, incomplete (G82.22). Dr. Sharp opined that the Claimant remained stable and functional on current medications, which were continued. He specifically noted that

there was no evidence of abuse or misuse of his medications. Dr. Sharp noted that the Claimant was still had continued weakness and was not ambulatory. The Claimant was developing mild contractures of the hip and knees. Therefore, Dr. Sharp referred the Claimant for physical therapy to help with the contractures and loosening of the hips and ankles, to help make his transfers from his wheelchair a bit easier.

The Claimant underwent initial evaluation for physical therapy on February 6, 2023. Here, the therapist noted that the Claimant had bilateral lower extremity weakness and decreased standing balance. The therapist stated that the Claimant would benefit from skilled physical therapy to address strength and balance deficits in order to help improve his ability to pose less of a fall risk. Per these notes, the therapist opined that the Claimant would benefit from additional in-home caregivers in ordered to ensure he is bathing properly in a clean environment and eating properly.

There is documentation of a quote from Levius Medical that the Respondents obtained on December 7, 2022, for modifications to the Claimant’s home totaling \$36, 023.00. On or about March 6, 2023, Levius sent a home modification change order quote to the Respondents, requesting adjustments be made for costs to reinforce the structure under the tub to hold the weight of the tub and the Claimant.

ADJUDICATION

A. Contempt

Issue: Whether Respondents No. 1 have failed to comply with the Full Commission opinion issued on March 30, 2023. If so, should they be held on contempt.

On March 30, 2022, the Full Commission found, in relevant part, “The Claimant proved some modifications to his bedroom and bathroom are reasonably necessary in accordance with Ark. Statute Ann. § 81-1311(Repl. 976), which provides in pertinent part:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee.

The Claimant has asked in a nutshell that Respondents No. 1 be held in contempt for failure to start repairs on his home within thirty days after the Full Commission's award of home modifications in its opinion rendered on March 30, 2022. A full discussion of the Claimant's contentions is set forth in his responsive filing and is outlined above. Respondents No.1's contentions are also set forth above in full detail.

Here, it took the Respondents five months to start this process. However, I am persuaded that Respondents No. 1 had compelling cause for this brief delay, which was clearly due to circumstances beyond their control. The preponderance of the evidence shows that Respondents No. 1 have provided a reasonable basis for their failure to start on the Claimant's home modifications sooner. Here, the evidence demonstrates that Respondents had difficulties in locating a contractor in this rural area of Arkansas to perform the modifications to the Claimant's home as ordered by the Commission. Specifically, Respondents No. 1 were told by a contractor that he would do the work, but the contractor failed to show up to do the work as promised. This failure to show by a contractor was confirmed by the Claimant's own testimony. There is no probative evidence whatsoever demonstrating that Respondents No. 1 was not diligently in seeking to securing a contractor to make the modification to the Claimant's home.

Nevertheless, Respondents No. 1 were able to find a contractor out of Texas who was willing to perform the home modifications. As such, I find that the Respondents made a good faith effort securing a contractor to make the modification to the Claimant's home as awarded by the Full Commission. In fact, at the time of the hearing, the Claimant confirmed Respondents No. 1 had secured a contractor who was making the ordered modifications to his home. As such, in this

regard, I find that Respondents No. 1 have complied with the Full Commission's opinion of March 30, 2020.

B. Nursing Services

Issue: Whether the Claimant is entitled to twelve hours a day of home health service that was previously provided by Respondents No. 1.

Since the Claimant's compensable injury occurred in 1982, it is governed by the provisions of the Arkansas Workers' Compensation Law, as it existed before the enactment of Act 796 of 1993. Again, the applicable statute in 1982 is outlined in Ark. Stat. Ann. § 81-1311 (Repl. 1976). Specifically, it reads:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee.

The Claimant has asked for twelve hours of nursing services. Currently, the Claimant is receiving an hour and a half of nursing care, three days a week. The Claimant gave conflicting testimony regarding the length of time it takes for him to bathe. He initially testified that it takes an hour for the attendant to help him with bathing. Then Claimant changed his testimony and maintained that it takes two hours for him to get a bath with the assistance of a nursing attendant. The Claimant testified that his condition has improved since the last hearing. He is currently in physical therapy to strengthen his legs and upper body. At one point in his testimony, the Claimant maintained that he needed the extra hours because he wanted to take a bath every day of the week as he did before injury. However, the Claimant admitted that currently he takes a bath one day a week and he uses the other hours to free his attendant to do other things. At another point in his testimony the Claimant stated that he has mishaps with his bladder and bowel and therefore he

needs someone to help clean him up because he cannot do this alone. However, on cross-examination the Claimant admitted that he is able to clean himself up.

The Claimant admitted that Respondents No. 1 provide him with transportation for his injury related medical appointments.

The Claimant's request for additional hours of nursing service has been determined by the Full Commission to be primarily related to non-medical services such as housekeeping, laundry, and assistance in meal preparation. The evidence presented establishes this finding.

Therefore, I find that Respondents are providing the Claimant with adequate nursing services at the rate of one and a half hours, three times a week. The statute does not provide for custodial care, lodging, and non-medical services such housekeeping. Here, the Claimant has being enough hours to bathe at least three times a week, but he has chosen to use his hours for other services outside the scope of the statute.

I realize the therapist stated that the Claimant needs additional hours of nursing service for bathing; however, at that time, the Claimant was taking a bath once a week because he was using the hours provided him for other services.

ORDER

This claim for contempt and additional nursing hours is hereby respectfully denied and dismissed in its entirety.

IT IS SO ORDERED.

HON. CHANDRA L. BLACK
Administrative Law Judge