IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 27

WCC No. 2006-1788

LARRY QUICK

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to the Montana Supreme Court July 1, 2008;
Cross-Appeal Filed July 15, 2008
Affirmed May 13, 2009 - 2009 MT 162

Summary: Petitioner petitioned the Court for retroactive and future domiciliary care benefits, a higher rate of pay for domiciliary care provided by Petitioner's wife, Dolly, a 20% penalty, attorney fees, and costs. Petitioner argued that Respondent was placed on notice that Petitioner required domiciliary care at the time of his 1984 accident, and that Dolly has been providing the care since then. Respondent argued that it did not have notice that Petitioner needed domiciliary care until February 1, 2007, the first day a medical opinion was received by it stating that domiciliary care was warranted. Prior to trial, Respondent conceded that Petitioner required 24-hour domiciliary care. Respondent began paying a rate of $7.50 per hour to Dolly, effective February 1, 2007.

Held: Petitioner is not entitled to retroactive domiciliary care prior to February 1, 2007, because Respondent was not put on notice that domiciliary care was warranted until this date. Significantly, Petitioner's attorney in 2005 stated in a letter to Respondent that a claim for domiciliary care benefits had never been made. Respondent's rate of $7.50 per hour is unreasonable. The evidence establishes that similar rates were paid for domiciliary care not provided by a person with RN skills in the late 1980s, and in the present case, the evidence establishes that Petitioner requires his care to be provided by a person with RN skills. The Court finds that, based upon the testimony of a qualified professional, $20.00 per hour is a reasonable rate of pay for Dolly because she is an RN. Further, the Court

finds that Petitioner is entitled to a 20% penalty because Respondent's rate is an unreasonable rate.

Topics:

Benefits: Domiciliary Care. The Court concludes that Respondent was not on notice that Petitioner required domiciliary care benefits where the following events took place: Petitioner returned to work following his 1984 accident for a period of time; a doctor opined to a vocational rehabilitation specialist in 1989 that the position of drafter might be a suitable position for Petitioner if he could use the spray and stretch exercises throughout the day; cognitive testing performed in 1990 revealed that Petitioner's verbal, performance, and full scale IQ were within average range; as recently as 2000, Petitioner drove himself from Tucson, Arizona, to Circle, Montana. Most determinative of the notice issue, however, is the September 2, 2005, letter from Petitioner's counsel at that time, to Respondent's claims examiner, in which he specifically stated that Petitioner "has never made a claim for domiciliary care."

Benefits: Domiciliary Care. Where the evidence establishes that Petitioner requires the skilled care of an registered nurse, and the evidence presented to the Court is that in 2007, Montana hospital RNs earned $20.00 - $23.37 per hour and Montana private care RNs earned $25.00 per hour, the Court concludes that $20.00 per hour for 24-hour care is a reasonable rate of pay for Petitioner's spouse, an RN. The Court adopted the low end of the range as a reasonable rate of pay taking into account the reality that, although Petitioner's spouse may be available to Petitioner 24 hours per day, she maintains a certain amount of discretion regarding the level of Petitioner's day to day supervision that a privately retained nurse would not be afforded.

Penalties. Where two Supreme Court cases upheld domiciliary care benefit rates of $7.00 per hour and $7.50 in 1987 and 1989, respectively, in cases where the claimant did not require the care provided by a registered nurse, this Court concludes that Respondent's domiciliary care benefit rate of $7.50 per hour, to a claimant's spouse providing RN care, is unreasonable and, therefore, Petitioner is entitled to a 20% penalty.

¶ 1 The trial in this matter was held on March 30, 2007, in Great Falls, Montana, and April 5, 2007, in Helena, Montana. Petitioner Larry Quick was present on March 30, 2007, and represented by J. David Slovak throughout the trial. Respondent Montana State Fund was represented by Greg E. Overturf and Thomas E. Martello.

¶ 2 Exhibits: Exhibits 1-10 and 15-75 were admitted without objection. Exhibits 11-14 were attached to various depositions and admitted as well.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Dolly Quick, Dr. Nelson H. de Jesús, Dr. Luis A. Cueva, Jr., Dr. Jennie Ellen, Dr. Jeri B. Hassman, Dr. Ronald M. Peterson, Lora K. White, RN, Dr. Gail Schwartz, and Kertrina Miller, RN, were taken and submitted to the Court. Dolly Quick, Stacie Visser, and Timothy Jacobs were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues of law set forth in the Pretrial Order:

¶ 4a Petitioner's entitlement to retroactive domiciliary care benefits.

¶ 4b Petitioner's entitlement to domiciliary care benefits.

¶ 4c Whether an insurer can pay domiciliary care benefits under a "reservation of rights" under the law controlling this claim.

¶ 4d Whether Respondent's payment of domiciliary care benefits under a "reservation of rights" constitutes an admission of liability for the payment of such benefits.

¶ 4e Whether Petitioner is entitled to a 20% penalty.

¶ 4f Whether Petitioner is entitled to attorney fees and costs.[1]

¶ 5 Prior to trial, Respondent conceded that Petitioner is entitled to 24-hour per day domiciliary care benefits retroactive to February 1, 2007, paid at a rate of $7.50 per hour. Accordingly, the parties stipulated that the remaining issues to be decided by this Court are the rate of pay for domiciliary care benefits, Petitioner's entitlement to retroactive domiciliary care benefits preceding February 1, 2007, and Petitioner's entitlement to a penalty, costs, and attorney fees.[2]

[1] Pretrial Order at 2.

[2] *See* Minute Book Hearing No. 3825; Dr. Peterson Dep. 3:9 - 4:13.

FINDINGS OF FACT

¶ 6 Petitioner was born on July 9, 1949.[3] He was 35 years old at the time of his accident.[4]

¶ 7 On June 15, 1984, Petitioner was injured in the course and scope of his employment with Formicove, Inc. Petitioner was sitting in his vehicle which was stopped at a red light when a pickup truck struck his vehicle from behind.[5]

¶ 8 Petitioner continued to work for Formicove for a period of time after the incident.[6]

¶ 9 At the time of Petitioner's injury, Formicove was enrolled under Plan III of the Workers' Compensation Act and its insurer was Respondent. Respondent accepted liability for Petitioner's claim and paid certain compensation and medical benefits.[7]

Medical and Vocational History

¶ 10 The medical records in this case are extensive. Petitioner has treated with many medical and psychological care providers over the years including medical doctors and psychiatrists, dentists, and chiropractors.

¶ 11 Petitioner was treated for his injury by Lee Hudson, D.C., on June 25, 1984.[8] Petitioner presented to Dr. Hudson with dizziness, a headache, pressure in the upper neck, soreness between the shoulders, and stiffness down his spine.[9] Dr. Hudson diagnosed Petitioner with decreased cervical motion, cervical paraspinal myofibrositis, and anterior

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[3] Ex. 8 at 1.

[4] *Id.*

[5] Pretrial Order at 2; Ex. 8 at 2.

[6] Trial Test.

[7] Pretrial Order at 2.

[8] Ex. 32 at 1.

[9] *Id*.

cervical sympathetic syndrome.[10] On October 8, 1984, Dr. Hudson noted that Petitioner continued to have headaches and pain.[11]

¶ 12 On January 5, 1985, Petitioner was treated by Richard A. Nelson, M.D.[12] The results of a CT scan showed that Petitioner had a minimal bulge at C7-T1.[13] Dr. Nelson diagnosed Petitioner with cervical subluxation and sprain syndrome. He recommended physical therapy with traction, use of a whirlpool, and pain medication to treat Petitioner's condition.[14]

¶ 13 In a May 5, 1987, letter to Petitioner's attorney at that time, William J. Gregoire, Brian V. Earle, M.D., wrote to Gregoire expressing his concern that Petitioner was a suicide risk because of a major depressive illness which required treatment. Dr. Earle opined that Petitioner would be completely disabled for a period of at least three years, at which time "recovery remains a good possibility."[15]

¶ 14 In December 1987, Petitioner was seen for a panel evaluation that was headed by William S. Shaw, M.D. The panel opined that Petitioner's neck, head, and shoulder pain were myofacial in nature, and that his hearing loss was not related to his 1984 accident and injury. Based on its evaluation, the panel opined that additional neurological or orthopedic work-up of Petitioner was not warranted.[16] The panel rendered a 5% impairment rating and stated that Petitioner was at maximum medical improvement (MMI) except for his depression. Organic brain syndrome was noted as a possible source of Petitioner's ongoing problems.[17] The panel specifically recommended that neuropsychologic testing be undertaken to help determine the level of organic brain syndrome.[18]

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[10] Ex. 32 at 5.

[11] *Id*.

[12] Ex. 47.

[13] Ex. 8 at 2.

[14] Ex. 47 at 2-3.

[15] Ex. 19 at 1-2.

[16] Ex. 64 at 30-31.

[17] Ex. 64 at 30-32.

[18] Ex. 64 at 31.

¶ 15 Robert B. LeLieuvre, Ph.D., performed a neuropsychological evaluation of Petitioner on June 6, 1988. Dr. LeLieuvre opined:

> In summary, then, [Petitioner] reveals some signs of decreased neuropsychological functioning beyond what would be expected for his age, his psychometric intellectual level, and his level of education. . . . The functions seemingly most affected are abstraction, concept formation, flexibility of thinking and problem solving, sustained attention and concentration, and the ability to adapt set [sic] and behavior to new learning situations. . . . These mild signs may well be consistent with a past, mild closed head injury of the type he might have sustained in an auto accident. . . .[19]

¶ 16 In February 1989, Petitioner attended an eight-week pain clinic at UCLA Pain Management Center.[20] Petitioner was diagnosed with headaches of musculoskeletal origin, head and neck myofascial pain, severe depression, and multiple perpetuation factors.[21] While attending the pain center program, Petitioner learned various pacing techniques and stretching exercises, including the spray and stretch technique.[22] Petitioner's wife, Dolly, also attended the UCLA pain program part-time and learned various pain management techniques that she utilized to assist Petitioner with his pain.[23]

¶ 17 On November 9, 1989, Luis A. Cueva, D.D.S., sent a letter to Gregoire, outlining his recommendations to Petitioner following his stay at the pain clinic. The recommendations included long term follow-up at the pain center (approximately every six months), a home exercise program, individual psychotherapy sessions with Edward Shubat, Ph.D., to manage Petitioner's chronic depression, the use of a whirlpool bath, night wearing of an intraoral stabilization orthotic splint, and the use of a chair with lumbar support. Petitioner was placed at the light-medium duty level of work.[24]

¶ 18 In an August 3, 1989, letter to Michelle A. Rowe, a rehabilitation counselor working with Petitioner, Dr. Earle opined that the position of a drafter, coordinating with builders,

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[19] Ex. 20 at 3-4.

[20] Ex. 37 at 1.

[21] Ex. 37 at 6.

[22] Ex. 44 at 1.

[23] Trial Test.

[24] Ex. 37 at 31-33.

architects, planners, and inspectors, was suitable for Petitioner if he could use the spray and stretch exercises throughout the day.[25]

¶ 19 Judith McKay, Ph.D. – who was part of the UCLA pain management team treating Petitioner in February, March, and April 1989 – wrote to Respondent's claims specialist, Stacie [Sheldon] Visser, on October 18, 1989. Dr. McKay recommended that Petitioner be involved in a vocational rehabilitation program as soon as possible. Dr. McKay noted in her letter that, "Because of [Petitioner's] perfectionistic and self-critical personality style the incapacitation caused by the accident has represented an unsurmountable failure on his part in his eyes. The sooner he is able to resume some kind of productive endeavors, the more likely it is that his depression will lift."[26]

¶ 20 On April 9, 1990, Petitioner underwent cognitive testing performed by Edward E. Shubat, Ph.D. On the Wechsler Adult Intelligence Scale-Revised, Petitioner earned a verbal IQ score of 97, within the average range and at the 42nd percentile for adults his age. His performance IQ was 106, within the average range at the 66th percentile, and full scale IQ was 100, within the average range at the 50th percentile. Dr. Shubat reported that Petitioner's case was extremely complex and opined that Petitioner would need to seek treatment outside of Montana to properly manage his complex medical issues. He recommended a head injury program that allowed for treatment of Petitioner's cognitive deficits, significant emotional disorder, and pain syndrome.[27]

¶ 21 Petitioner attended the Bear Creek Campus rehabilitation program in Lakewood, Colorado, from November 3, 1990, to December 6, 1990. Dolly attended portions of the program as well.[28]

¶ 22 A vocational evaluation was performed by Janet VanDyke on June 25 and 26, 1990.[29] VanDyke opined that supported employment would be the most feasible employment option for Petitioner. However, she expressed concerns about Petitioner's ability to self-pace, his stamina, ability to use proper body mechanics, and asthma.[30]

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[25] Ex. 74 at 36-37.

[26] Ex. 8 at 127-28.

[27] Ex. 44 at 8-17.

[28] Ex. 75 at 10; Trial Test.

[29] Ex. 8 at 133.

[30] Ex. 8 at 133-35.

Dolly Quick

¶ 23 Dolly was a credible witness and I find her testimony at trial credible.

¶ 24 Petitioner has been married to Dolly since 1972. They currently live together in Tucson, Arizona.[31]

¶ 25 Dolly testified at trial that she has been providing care for her husband since the day of his industrial accident in 1984. Although she did not keep any formal record, at trial Dolly tried to estimate the number of hours she cared for Petitioner from the day of the accident up through the time of trial. The hours ranged from 12 hours per day of providing care to 24 hours of care per day.[32]

¶ 26 Sometime in 1985, Petitioner and Dolly moved to Havre, Montana, and Dolly took a position as an apartment manager for approximately two years.[33] In this job, she was able to help her husband with his activities of daily living and could supervise him the majority of the days because she could work out of their apartment.[34]

¶ 27 In 1987, Dolly became employed at Havre Optometric. She initially worked part-time, but eventually became a full-time employee and worked there until 1991.[35]

¶ 28 Dolly attended nursing school and received a bachelor's degree in nursing in 1995.[36] She testified that she attended nursing school in order to be better equipped to provide appropriate care for her husband and so she could work fewer hours for higher wages.[37] As part of her nursing program, Dolly chose to take classes in pain management so she could better attend to her husband's pain problems.[38] Dolly did not inform Respondent of the reasons she was going back to school. She had no recollection at trial of informing

[31] Trial Test.

[32] Trial Test.

[33] Trial Test.

[34] Trial Test.

[35] Trial Test.

[36] Dolly Quick Dep. 14:1-15.

[37] Trial Test.

[38] Trial Test.

Respondent that she was attending nursing school with the hope that she would be better equipped to care of her husband.[39]

¶ 29 Dolly was employed by Northern Montana Hospital as a registered nurse (RN) from May 1995 to February 1997.[40]

¶ 30 Petitioner and Dolly moved from Havre, Montana, to Tucson, Arizona, in late 1996. They remained in Tucson until approximately 2001, when they returned to Havre. They again moved to Tucson in 2005.[41]

¶ 31 Dolly was employed by Manor Care in Tucson between July 1997 and August 1999.[42] While there, she initially worked one eight-hour shift per week but eventually moved to full-time employment.[43]

¶ 32 Between November 1999 and August 2000, Dolly was employed by Barnett Dulaney Eye Center in Tucson.[44] Her hours varied and ranged between 17 and 30 hours per week.[45]

¶ 33 Between August 2000 and August 2001, Dolly was not employed and she estimates that she cared for Petitioner 24 hours per day during this time period.[46]

¶ 34 Dolly was employed by Northern Montana Care Center in Havre between August 2001 and November 2005.[47] She worked approximately 24 hours per week.[48]

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[39] Trial Test.

[40] Ex. 10 at 1.

[41] Dolly Quick Dep. 5:23 - 7:21.

[42] Ex. 10 at 1.

[43] Trial Test.

[44] Ex. 10 at 1; Trial Test.

[45] Trial Test.

[46] Trial Test.

[47] Ex. 10 at 1.

[48] Trial Test.

¶ 35 Dolly testified that she has been providing care 24 hours per day to Petitioner when not employed since the Quicks relocated to Tucson in 2005.[49] During the months of May and June of 2006, Dolly was employed by Devon Gables Healthcare in Tucson.[50]

¶ 36 There is no question that the Quick family has been through an extremely difficult experience due to Petitioner's injury. At trial, Dolly recalled to the Court the emotional and financial stresses her family has endured as a result of her husband's accident.[51]

¶ 37 An October 6, 1987, letter, written to Petitioner's attorney at that time, summarizes the Quick family's ordeal approximately three years after the accident.[52] The letter details the many ups and downs the Quicks experienced. Dolly writes, "Larry became a full-time student in the spring quarter. School was fine and he was doing well considering his headaches. That fall he was hired as the men's assistant basketball coach at the college."[53] Later in the letter Dolly writes, "One morning the first week of May after a particularly bad night Larry wouldn't get up. He completely broke down and had to be taken to the emergency room of the hospital and admitted. . . . All in all Larry has seen something like 17 doctors in trying to find help for his problems. . . . On August 10, 1987, Larry told me he couldn't go on like this any longer."[54] Petitioner's children did not want to be around him because they felt like they were "walking on eggshells."[55] The letter closes as follows:

> To date I feel Larry's improvement has been dramatic!! He has completely quit the norpramine and dalmane . . . . He still has difficulty getting to sleep at night and he does still have [headaches – dizziness – and nausea] but they have been lessened to such a degree that he said 'if this were the worst they would be, I could live with it.' . . . This is the best he has felt since the moment of the accident. His whole personality is coming back around full circle to his old self. . . . If he can improve so much in six weeks, I know that

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[49] Trial Test.

[50] Trial Test.; Ex. 10 at 1.

[51] Trial Test.

[52] Ex. 8 at 51-53; Trial Test.

[53] Ex. 8 at 51.

[54] Ex. 8 at 52.

[55] Ex. 8 at 51.

with time we will get his health back to where he was before the accident.[56]

¶ 38 Dolly testified that at times she has to intervene and manage Petitioner's behavior because it is inappropriate. At trial, Dolly recalled a time when Petitioner had parked their car at a movie theater and a bystander said something to Petitioner about his parking job. According to Dolly, Petitioner exploded and would have initiated a fight had it not been for her intervention.[57]

¶ 39 Dolly testified that she constantly assists Petitioner with pain management, often reminding him to use correct posture and relaxation techniques, and she also performs the spray and stretch technique on Petitioner.[58] Dolly learned the spray and stretch technique from Dr. Gorder in Billings, Montana, and at the UCLA Pain Management Clinic.[59] Dolly attended the UCLA Pain Management Program once a week for six weeks and the Bear Creek facility in Colorado for a week, to learn how to help her husband better cope with his medical issues, specifically his pain.[60]

¶ 40 Dolly testified that her informal training at the UCLA Pain Management Clinic and the Bear Creek facility, along with her formal training as an RN, enables her to provide better care for her husband than she would be able to provide without this training.[61] She is able to understand how his traumatic brain injury affects his moods, ability to pace himself, memory deficits, and impaired judgment. She also diffuses situations that present themselves and may upset Petitioner or cause him stress.[62] Dolly monitors his safety and provides a calming presence for him. She cares for Petitioner's depression by getting him up and out of the house first thing in the morning and helping him pace himself throughout the day. If Petitioner fails to pace himself, his pain dramatically increases that night and the following day, and his general coping skills diminish.[63] Dolly keeps track of Petitioner's

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[56] Ex. 8 at 52-53.

[57] Trial Test.

[58] Trial Test.

[59] Trial Test.

[60] Trial Test.

[61] Trial Test.

[62] Trial Test.

[63] Trial Test.

many medical appointments and monitors his medication schedule, reminding him to take his medications at the appropriate times.[64]

¶ 41 In 2000, when the Quicks were living in Arizona, Petitioner was invited to coach the girls' basketball team in Circle, Montana. Dolly testified that she tried to dissuade Petitioner from accepting the coaching position but that he would not listen.[65] Petitioner disregarded Dolly's advice and moved to Circle so that he could coach the team and be supported by family members, including his sister, who he lived with in Circle. Petitioner drove himself from Tucson to Circle after discussing an appropriate route and plan with Dolly. A week or so later, Dolly joined Petitioner in Circle and stayed with him for the rest of the basketball season.[66]

¶ 42 A June 19, 2006, letter to Petitioner from Nanette Preszler at the State Fund authorized reimbursement of $5,950.90 to Dolly for wage loss she incurred while traveling with Petitioner between Arizona and Montana. This amount was based on a pay rate of $29.00 per hour.[67]

¶ 43 Dolly testified at trial that she did not ask any of her medical providers to write to Respondent requesting further help with the Quick's situation. Instead, Dolly recalled at trial that she often called Respondent to see if there was anything more they could do for the Quicks. [68] Furthermore, she testified that she never inquired of her attorney if more benefits were available from Respondent.[69]

Stacie Visser

¶ 44 Stacie Visser is a claims specialist for Respondent. She has been employed by Respondent since 1988. She worked on Petitioner's claim file starting in January 1989 through December 1994, then from October 1998 through December 2003, and again from September 2006 up to the date of trial.[70]

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[64] Trial Test.

[65] Trial Test.

[66] Trial Test.

[67] Ex. 8 at 35.

[68] Trial Test.

[69] Trial Test.

[70] Trial Test.

¶ 45 Visser was a credible witness and I find her testimony at trial to be credible.

¶ 46 Visser testified that the medical specialists treating Petitioner's medical condition have confirmed that Petitioner requires 24-hour domiciliary care.[71]

¶ 47 According to Visser, Dolly was often the one who contacted her regarding the Quicks' needs. She testified that Dolly was actively involved in Petitioner's case from the time of the accident in 1984.[72]

¶ 48 On August 1, 1990, Dr. Shubat wrote to Respondent verifying the need for Dolly to drive Petitioner from Havre to Missoula because, in Dr. Shubat's opinion, Petitioner "lacks the endurance necessary for a sustained bus trip."[73] Visser testified that she has other claims that she handles where a doctor requests a spouse to drive an injured employee to the doctor's appointment, and this request does not trigger her to believe domiciliary care benefits are necessary.[74]

¶ 49 On August 27, 1999, Visser approved the purchase of a hot tub for Petitioner based on a physician's order.[75]

¶ 50 In a November 29, 1999, phone call to Visser, Dr. Nelson H. de Jesús stated that Petitioner was doing well, but that Dolly was "burnt out." He informed Visser that Dolly was suffering from depression as a result of her experience in dealing with her husband's medical problems related to his accident. Dr. de Jesús stated to Visser that if Dolly crumbled, the whole family would crumble.[76]

¶ 51 In a February 16, 2001, letter to Visser, Dr. de Jesús stated:

> [Petitioner's] marital problems continue to ebb and flow; he is married to a woman who has the patience of a saint. However, even she gets worn down by the constant battle with [Petitioner's] mood swings, irritability and illogical thought processes at times. Most spouses of brain-damaged individuals

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[71] Trial Test.

[72] Trial Test.

[73] Ex. 8 at 154.

[74] Trial Test.

[75] Ex. 8 at 5.

[76] Ex. 8 at 24.

wind up divorcing them; however, she is, and continues to be, a source of great support and strength for [Petitioner].[77]

¶ 52 On February 16, 2001, Visser noted that Petitioner was moving back to Montana, and Dr. de Jesús had requested that Petitioner call him every other week for a few weeks, then on an as-needed basis. In addition, Dr. de Jesús requested that Petitioner make quarterly trips to Arizona to see his team of doctors, including Drs. Cueva, de Jesús, Katz, and Hassman. Visser agreed to the quarterly visits for one year.[78]

¶ 53 On May 16, 2001, Dr. de Jesús advised Visser that Dolly would need to accompany Petitioner to his appointments in Tucson because Petitioner was unable to accurately report on his functioning and mental status without her.[79] Also, Dr. de Jesús reported that Dolly was Petitioner's constant and primary support system.[80]

¶ 54 In her May 14, 2002, file note, Visser recorded that the Quicks inquired whether Respondent could do anything more to help Petitioner move back to Arizona or pay him some kind of monthly income.[81] Visser informed the Quicks that Petitioner's compensation was closed due to a settlement and that Respondent could do nothing as far as wages or moving expenses were concerned.[82]

¶ 55 In her August 15, 2002, file note, Visser recorded that Dolly was having a difficult time dealing with Petitioner and his head injury.[83]

¶ 56 At trial, Visser recalled that in 2002, she authorized the payment of psychological care for Dolly. She testified that paying the bill for a claimant's spouse's psychological care was something she had never authorized in her career as a claims specialist.[84]

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[77] Ex. 8 at 60.

[78] Ex. 8 at 9.

[79] Ex. 8 at 54.

[80] *Id*.

[81] Ex. 8 at 21.

[82] *Id*.

[83] Ex. 8 at 20.

[84] Trial Test.

¶ 57 On November 20, 2003, Visser performed a file review of Petitioner's case file. She noted significant medical records and events that took place on Petitioner's claim.[85] Visser testified at trial that, at the time she conducted this file review, she was unaware that Petitioner was in need of any domiciliary care.[86]

¶ 58 In her December 12, 2003, claim note, Visser stated that, based upon Dr. de Jesús' request, she approved Dolly's travel with Petitioner from Montana to Arizona for medical treatment.[87]

Timothy Jacobs

¶ 59 Timothy Jacobs is a claims examiner for Respondent. He handled Petitioner's claim file between January 2004 and October 31, 2006. [88]

¶ 60 Jacobs was a credible witness and I find his testimony at trial to be credible.

¶ 61 Jacobs, along with Respondent's counsel, was involved in settlement discussions with Petitioner's former attorney, Michael L. Rausch, in August, September, and October 2005.[89] In an August 30, 2005, letter to Rausch, Respondent offered to settle Petitioner's claim for a specific dollar amount and included terms requiring a release of any future obligation to pay domiciliary care.[90] Rausch responded to Respondent on September 2, 2005, and rejected the dollar amount being offered. With regard to domiciliary care benefits, Rausch stated, "We are not willing to release any future claim for domiciliary care and note that [Petitioner] has never made a claim for domiciliary care."[91]

¶ 62 Jacobs testified that he was not concerned that Respondent was exposed for past or present domiciliary care benefits at the time of the negotiations with Rausch. His only concern was for payment of future domiciliary care benefits.[92]

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[85] Ex. 8 at 7-11.

[86] Trial Test.

[87] Ex. 8 at 3.

[88] Trial Test.; Ex. 7 at 1-2.

[89] Trial Test.; Ex. 8 at 91-95.

[90] Ex. 8 at 91.

[91] Ex. 8 at 92.

[92] Trial Test.

Nelson H. de Jesús, Ph.D.

¶ 63 Dr. de Jesús is a licensed psychologist specializing in pain management.[93] He has treated Petitioner for the chronic pain associated with his traumatic brain injury.

¶ 64 On August 11, 2005, Dr. de Jesús sent a letter "To Whom It May Concern" that was received by Respondent regarding travel to Arizona. In the letter, he stated that Petitioner should stay in a hotel that had a spa available, and that Petitioner would require 24-hour supervision and assistance, particularly because of Petitioner's heavy sedation at night.[94]

¶ 65 A February 1, 2007, letter from Dr. de Jesús documents Petitioner's medical status.[95] The letter states that Petitioner has a well-documented history of treatment for chronic pain, TMJ dysfunction, depression, anxiety, and closed head injury.[96] Dr. de Jesús explains that Petitioner appears and presents himself at times as being more functional than he actually is. Dr. de Jesús opines that this can be a characteristic of brain injury patients. Furthermore, he notes that Petitioner's prognosis is essentially unchangeable barring some new medical developments in the future and, in fact, his condition will most likely worsen as Petitioner ages.[97]

¶ 66 In a separate February 1, 2007, letter to Visser, Dr. de Jesús opined that Petitioner was in need of domiciliary care.[98] Dr. de Jesús stated that Petitioner is sometimes incapable of bathing himself because of his trouble with coordination, equilibrium, and confusion issues due to his use of narcotic and psychotropic medications. Eating also presents difficulties because of a lack of appetite secondary to depression, and Petitioner's memory and judgment issues impact his ability to properly store foods and present a fire hazard by leaving the stove on.[99]

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[93] de Jesús Dep. 4:16-23.

[94] Ex. 8 at 86-87.

[95] Ex. 1 at 1.

[96] Ex. 1 at 1-2.

[97] *Id*.

[98] Ex. 2 at 1-3.

[99] *Id*.

¶ 67 Dr. de Jesús opined that Petitioner is capable of performing simple math calculations on good days, and on other days, he is not capable of performing such calculations.[100] Neither can Petitioner manage his own money due to his impulsiveness, impaired judgment, and comprehension.[101]

¶ 68 At his deposition, Dr. de Jesús' testified that Dolly's knowledge of nursing is invaluable to her ability to properly care for Petitioner.[102]

Jeri B. Hassman, M.D.

¶ 69 Dr. Jeri B. Hassman is a physical medicine and rehabilitation specialist who treats patients with brain injuries and musculoskeletal/neurological injuries. Dr. Hassman has treated Petitioner since approximately 1997.[103]

¶ 70 On August 10, 2005, Dr. Hassman opined that Petitioner needed to be accompanied by an LPN or RN for his trips from Montana to Arizona because the person traveling with Petitioner would need adequate training/experience dealing with patients suffering from head traumas.[104]

¶ 71 In a treatment note from January 30, 2006, Dr. Hassman opined that Petitioner's physical exam showed that he was in no acute distress and no obvious pain with ambulation. Petitioner admitted to Dr. Hassman that he was very moody and depressed and continued to suffer from decreased memory and concentration.[105]

¶ 72 Dr. Hassman listed Petitioner's current medications as of February 19, 2007, as follows:

> Nexium 40 mg once per day, Claritin D 1 tab once per day, Hydroxyzine 25 mg 2 tabs in the morning and 1 tab before bed, Singulair 10 mg 1 tab in the morning, Flonase nasal spray in the morning and before bed, Albuterol inhaler 1 puff four times a day for shortness of breath, Pulmicort inhaler 1 puff

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[100] *Id*.

[101] *Id*.

[102] de Jesús Dep. 44:1-2.

[103] Ex. 3 at 1-2.

[104] Ex. 8 at 88.

[105] Ex. 8 at 103.

> in the morning and before bed for shortness of breath, Gabitrol 4 mg 2 tabs before bed for sleep, Remeron 1 mg before bed, Requip 0.25 mg 1 tab before bed for restless legs syndrome, Carafate 1 gm, 1 tab before meals and 1 tab before bed and acetaminophen 500 mg 2 tabs q6h PRN pain.[106]

¶ 73 In a February 19, 2007, letter to Petitioner's present attorney, J. David Slovak, Dr. Hassman opined that Petitioner required domiciliary care for the following reasons:

> Even though [Petitioner] can *physically* perform his [activities of daily living], his mental, psychological and cognitive deficits result in significant limitations and impair his ability to take care of himself. Compounding the problem, is his emotional lability, which is directly related to his traumatic brain injury. [Petitioner] has permanent deficits, including decreased memory, decreased cognition, decreased concentration and decreased insight and judgment.[107]

Furthermore, Dr. Hassman opined that Petitioner's prognosis for returning to non-domiciliary care status is virtually impossible.[108]

Ronald M. Peterson, M.D.

¶ 74 Dr. Ronald M. Peterson specializes in the practice of occupational and sports medicine.[109] At the request of Respondent, he performed an independent medical exam (IME) on Petitioner on May 10, 2005.[110]

¶ 75 In a February 21, 2007, letter, Dr. Peterson opined that Dolly's assistance with medical matters, including ensuring that Petitioner takes the correct dosage of medication at the proper time, is absolutely necessary. Dr. Peterson agreed that Dolly's ability to physically and mentally prepare Petitioner for his medical appointments, and ability to facilitate the medical treatment plans was absolutely essential to Petitioner's medical care.[111]

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[106] Ex. 3 at 1-2.

[107] *Id*.

[108] *Id*.

[109] Peterson Dep. 9:2-4.

[110] Peterson Dep. 10:1-3.

[111] Ex. 4 at 1-3.

¶ 76 In terms of psychological care being provided by Dolly to her husband, Dr. Peterson opined that she is instrumental in managing Petitioner's depression, anxiety, and anger. Because of the care she provides, Dr. Peterson opined, Petitioner has been able to remain in outpatient care.[112] He also commended Dolly on her ability to help Petitioner pace himself so as to avoid further pain and fatigue.[113]

¶ 77 Dr. Peterson ultimately opined that Petitioner required 24-hour domiciliary care.[114] He further opined that Petitioner required domiciliary care provided by an RN based on his experience working with RNs, LPNs, and CNAs. Dr. Peterson stated, "I believe that the bottom line is being able to integrate all of [Petitioner's] problems. I don't think an LPN or a CNA has that ability or that knowledge base to be able to integrate and to assimilate and act on all of [Petitioner's] needs."[115]

Lora K. White, RN

¶ 78 Lora K. White is an RN and medical case manager for Crawford & Company. She was hired by Respondent to obtain a treating physician and to determine an appropriate treatment plan for Petitioner.[116] White has worked as a home care nurse, home care supervisor, life care planner, and workers' compensation case manager.[117] In her March 13, 2006, initial report, White wrote, "[Petitioner's] wife is supportive and very involved in his medical care and treatment."[118] White was only retained for a few months and filed a closure report on October 24, 2006.[119]

¶ 79 White testified at her deposition that she contacted a private-duty nursing agency in the Tucson area to determine the hourly rate for private duty nursing services. She

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[112] Ex. 4 at 2.

[113] *Id*.

[114] Ex. 4 at 3.

[115] Peterson Dep. 27:19-23.

[116] Ex. 6 at 1-2.

[117] White Dep. 5:12-16.

[118] Ex. 6 at 1-2.

[119] Ex. 7 at 1-2.

testified that the hourly rate for an RN in Tucson who is not required to provide high-tech services is $36 per hour on weekdays and $38 per hour on weekends.[120]

Kertrina Miller, RN

¶ 80 Miller is an RN and works as a life care planner and legal nurse consultant in Montana. [121]

¶ 81 Miller was retained by Petitioner to determine domiciliary care rates for RNs and Certified Nurse Aides (CNA).[122] Miller researched RN and CNA rates for domiciliary care in Montana. She consulted with Raymond Berg, a union representative and employee of the Montana Nurse's Association.[123] Both Berg and Miller reviewed each of the nurse union contracts at Northern Montana Hospital in Havre from 1995 through 2007 for RN hourly rates.[124] Also, Miller researched specific sites on the Internet and called several facilities in Tucson to find out what the hourly rate of pay for RNs was in Arizona.[125]

¶ 82 For the year 2007, Miller testified at her deposition that the beginning wage being paid to RNs at Northern Montana Hospital was $20.00 - $23.37 per hour.[126] Miller also interviewed an employee at A-Plus Healthcare in Montana and learned that a private duty RN working for that organization is paid a wage of $25.00 per hour and the insurer is billed $45.00 per hour for the RN's services.[127]

¶ 83 Miller also contacted a home-health agency in Tucson and testified that a home-care RN in Tucson is paid between $40 and $65 per hour with a charge to the insurance company of $100 per hour.[128]

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[120] White Dep. 14:10-22.

[121] Miller Dep. 4:18-20.

[122] Miller Dep. 5:13-16.

[123] Miller Dep. 6:15-21.

[124] Miller Dep. 9:13 - 11:4.

[125] Miller Dep 6:25 - 7:5.

[126] Miller Dep. 11:3-4.

[127] Miller Dep. 11:13-23.

[128] Miller Dep. 11:23 - 12:2.

CONCLUSIONS OF LAW

¶ 84 This case is governed by the 1983 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[129]

¶ 85 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[130]

¶ 86 At the time of Petitioner's injury, no express provision for domiciliary care benefits existed under the Act. However, in 1985, the Montana Supreme Court decided the case of *Carlson v. Cain,*[131] in which the Court held that domiciliary care benefits were payable under § 39-71-704, MCA.[132]

¶ 87 In *Carlson,* the Supreme Court held that domiciliary care benefits were due if the following test was met:

> (1) The employer knows of the employee's need for medical services at home resulting from the industrial injury; (2) the preponderance of credible medical evidence demonstrates that home nursing care is necessary as a result of accident, and describes with a reasonable degree of particularity the nature and extent of duties to be performed by the family members; (3) the services are performed under the direction of a physician; (4) the services rendered are of the type normally rendered by trained attendants and beyond the scope of normal household duties; and (5) there is a means to determine with reasonable certainty the approximate value of the services performed.[133]

¶ 88 The parties do not dispute that the test set forth in *Carlson* is applicable to the present case. Moreover, because Respondent has conceded that 24-hour per day

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[129] *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[130] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[131] *Carlson*, 216 Mont. 129, 700 P.2d 607 (1985).

[132] *Carlson,* 216 Mont. at 139-41, 700 P.2d at 614-615.

[133] *Carlson,* 216 Mont. at 140, 700 P.2d at 614.

domiciliary care benefits were payable as of February 1, 2007, at a rate of $ 7.50 per hour, the only issues remaining for this Court to decide are whether Petitioner is entitled to any domiciliary care benefits preceding February 1, 2007; the appropriate rate to be paid for Petitioner's domiciliary care benefits; and the issues of entitlement to a penalty, attorney fees, and costs.

Petitioner's Entitlement to Domiciliary Care Benefits Preceding February 1, 2007

¶ 89 Petitioner argues that he is entitled to domiciliary care benefits dating back to the date of the accident. Petitioner argues that his medical records demonstrate that Dolly has been providing domiciliary care since the date of the accident and that Respondent has been on at least constructive notice of the need for such benefits for this entire time. In support of his contention that Respondent has been on notice, Petitioner relies upon *Larson v. Squire Shops, Inc.*[134] In *Larson*, the claimant (Larson) was injured in an automobile accident while in the course and scope of his employment.[135] Larson suffered a traumatic blow to the head causing permanent brain damage.[136] Larson's injuries caused him difficulties with his memory, thinking, motivation, vision, and emotional control.[137] The injuries rendered Larson permanently disabled.[138] Upon release from the hospital, Larson went to live with family members and his wife became his primary caregiver.

¶ 90 This Court found that Larson's wife had been providing domiciliary care around the clock and that under Montana law, the insurer was obligated to pay Larson's wife for the care she was providing.[139] The Court found $7 per hour to be a reasonable rate of compensation for the care.[140] Furthermore, the Court held that the payment for care was due retroactive to the date Larson was released from the hospital.[141] Upon rehearing, this Court amended its prior judgment, noting that the issue of domiciliary care had not been

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[134] *Larson*, 228 Mont. 377, 742 P.2d 1003 (1987).

[135] *Larson,* 228 Mont. at 378, 742 P.2d at 1004.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Larson*, 228 Mont. at 379, 742 P.2d at 1004.

[140] *Larson*, 228 Mont. at 379, 742 P.2d at 1004-1005.

[141] *Larson*, 228 Mont. at 379, 742 P.2d at 1005.

raised until the date of this Court's first hearing. Therefore, the Court held that the insurer should not be held liable for payment before the hearing date.[142]

¶ 91 On appeal, the Supreme Court acknowledged it had difficulty with the issue of determining the date on which to begin paying domiciliary care. The Supreme Court held that an employer can be put on notice for the need for domiciliary care because of the severity of the injury in a particular case.[143] It went on to hold that the unquestioned severity of the injury, the degree of medical attention Larson required while in the hospital, and the permanence of the resulting disabilities put the employer on sufficient notice of Larson's need for home nursing services from the date he was released from the hospital.[144]

¶ 92 Unlike the situation in *Larson,* the severity of Petitioner's condition from the time of his injury was not so readily apparent as to put Respondent on notice of Petitioner's need for domiciliary care. Petitioner returned to work at Formicove following his accident for a period of time. In 1989, Dr. Earle opined to a vocational rehabilitation specialist working with Petitioner that the position of drafter might be a suitable position for Petitioner if he could use the spray and stretch exercises throughout the day. Additionally, in 1990, the cognitive testing performed by Dr. Shubat revealed that Petitioner's verbal, performance, and full scale IQ were within the average range. As recently as 2000, Petitioner had accepted a coaching position in Circle, Montana, after which he drove himself from Tucson, Arizona, to Circle, albeit after discussing an appropriate route and plan with Dolly. Despite the care that Dolly had unquestionably been providing to Petitioner before that time, the events set forth above are not necessarily indicative of the need for domiciliary care. Finally, and most determinative of this issue, is the September 2, 2005, letter from Petitioner's counsel at the time, to Respondent's claims examiner, in which he specifically stated that Petitioner "has never made a claim for domiciliary care."[145] I am hard-pressed to find that Respondent should have been on notice that Petitioner was in need of domiciliary care since the time of his 1984 injury when his own attorney was contending in 2005 that he had never made such a claim.

¶ 93 The first medical opinion establishing Petitioner's need for domiciliary care was Dr. de Jesús' letter of February 1, 2007. It was based upon this letter that Respondent conceded Petitioner's entitlement to 24-hour domiciliary care. Respondent initially paid this

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[142] *Id.*

[143] *Larson*, 228 Mont. at 385, 742 P.2d at 1008.

[144] *Id.*

[145] Ex. 8 at 92.

benefit under a reservation of rights and later accepted liability retroactive to this date. Based on the record before me, I conclude that Petitioner's entitlement to domiciliary care benefits commenced on February 1, 2007.

Appropriate Rate for Petitioner's Domiciliary Care Benefits

¶ 94 Respondent has conceded that Dolly is entitled to be compensated for 24-hour domiciliary care. Respondent argues, however, that an appropriate rate for Dolly's care is $7.50 per hour. Petitioner disputes this rate, contending that Petitioner requires his care be provided by a person possessing a certain set of skills and, as a registered nurse, Dolly is entitled to a substantially greater rate.

¶ 95 The evidence before me has conclusively established that Petitioner requires the skills of an RN to provide his domiciliary care. Dr. de Jesús stated that Dolly's nursing skills are "invaluable" to her care. Dr. Hassman required an LPN or RN to accompany Petitioner on his trips to Arizona because of the training and experience necessary to provide proper care for Petitioner while traveling. In Dr. Hassman's letter opining that Petitioner required domiciliary care, he stated that Petitioner's mental, psychological, and cognitive deficits, and emotional lability impair his ability to properly care for himself. Dr. Ronald Peterson, who performed the IME, opined that Petitioner requires the care of an RN. Respondent failed to produce any credible medical opinion to the contrary. Therefore, I must determine a proper hourly rate for domiciliary care provided by Dolly, who possesses the skills of an RN.

¶ 96 The evidence presented to me is that in 2007, hospital RNs in Montana earned $20.00-$23.37 per hour, and private care RNs in Montana earned $25.00 per hour. In Tucson, where Petitioner resides, a private care RN is paid between $40.00 and $65.00 per hour.[146] Also of importance to my consideration of the proper rate is the $29.00 per hour Dolly received from Respondent to compensate her for her travel time with Petitioner in 2005 and 2006.

¶ 97 In *Carlson*, the fifth part of the domiciliary care test set forth by the Supreme Court was that there be "a means to determine with reasonable certainty the approximate value of the services performed."[147] In *Larson,* based on the testimony of a care management

[146] White testified at her deposition that, based on her own experience and anecdotal reports from some of her friends, a private-care RN in Tucson may be paid between $12 and "approximately" $19 per hour "for certain things." (White Dep. 15:5-16:4.) However, White's anecdotal evidence is unsupported and, in fact, contravened by the entire balance of the evidence presented regarding the hourly rate for a private-care RN. I, therefore, do not find it persuasive and I give it no weight.

[147] *Carlson*, 216 Mont. at 140, 700 P.2d at 614.

nurse who assessed disabled patients and determined the breadth and scope of services required by patients at Community Hospital in Missoula, the Supreme Court held that the nurse was well qualified to assess the cost for domiciliary care and upheld this Court's award of $7 per hour.[148] Larson's wife did not possess a nursing degree, however, and there is nothing in the opinion to indicate that Larson's physicians required the level of care provided by an RN. Moreover, irrespective of the level of care that Larson required, the $7 per hour rate was approved by the Supreme Court approximately twenty years ago. I therefore find the rate approved in *Larson* to be of limited use in arriving at my determination of an appropriate rate.

¶ 98 In the present case, Miller works as a life care planner and legal nurse consultant. She researched pay rates for registered nurses in Montana by consulting with a nurse union representative and calling an agency that provides private nursing services. I find that her qualifications and research rise to the level of the case management nurse in *Larson.* Miller's research adequately established the rates paid to RNs in Montana. Therefore, the fifth part of the test in *Carlson* – that there is a means to determine with reasonable certainty the approximate value of the services performed has been met. However, my analysis cannot simply end there. I further must take into account the realities of Dolly's care for Petitioner.

¶ 99 It is not disputed that Petitioner requires 24-hour per day care. Moreover, physicians treating Petitioner, as well as the IME physician in this case, have established that the domiciliary care must be provided by someone with the skills of an RN. However, the reality is that Dolly cannot physically, emotionally, and psychologically provide round-the-clock care for Petitioner, 365 days a year. While it is true that if Dolly were not providing Petitioner's care, Respondent would pay for someone else with comparable skills to provide such care, the issue before me is the appropriate and reasonable rate to compensate Dolly for providing this care.

¶ 100 Based upon the evidence before me in this case, I conclude that $20 per hour is a reasonable rate of pay to compensate Dolly for the domiciliary care benefits she provides to Petitioner. This represents the minimum hourly wage earned by RNs in Montana in 2007. Based on the evidence presented to me, I have no doubt that Respondent would have to pay a higher rate if it were required to retain a private nurse through an agency in Montana or Tucson to care for Petitioner. However, I have adopted the low end of the range as testified to by Miller as a reasonable rate in this case because I must take into consideration the reality that, although Dolly may be available to Petitioner 24 hours per day, she maintains a certain amount of discretion regarding the level of Petitioner's day-to-day supervision that a privately retained nurse would not be afforded. This discretion

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[148] *Larson,* 228 Mont. At 378, 742 P.2d at 1004.

includes a range of daily decisions that would afford her some measure of freedom as opposed to the constant supervision to which a privately retained RN would be obligated. By way of example, Dolly must get some amount of sleep each day while a privately retained nurse would not be allowed to sleep on the job.

Penalty

¶ 101 Petitioner has petitioned this Court for a 20% penalty in this matter. Because I have concluded that the appropriate start date for domiciliary care benefits in this case is February 1, 2007, the date on which Respondent has now conceded that these benefits are due, I base my consideration of whether a penalty is warranted on Respondent's payment of $7.50 per hour for the domiciliary care Dolly is providing.

¶ 102 Section 39-71-2907, MCA, reads, in pertinent part:

> When payment of compensation has been unreasonably delayed or refused by an insurer . . . the full amount of the compensation benefits due a claimant . . . may be increased by the workers' compensation judge by 20%. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge . . . .

¶ 103 As noted above, in *Larson,* the Supreme Court upheld this Court's decision awarding a rate of $7.00 per hour for 24-hour domiciliary care.[149] Similarly, in *Hilbig v. Central Glass Co.*,[150] the claimant suffered a severe head injury and was declared permanently totally disabled.[151] The Supreme Court upheld this Court's decision awarding the claimant 24-hour domiciliary care to be provided by the claimant's spouse at $7.50 per hour.[152] However, *Larson* was issued in 1987 and *Hilbig* was issued in 1989. If I were to consider nothing other than the unquestionable increase in medical care costs since the late 1980s, Respondent's rate of $7.50 per hour effective February 1, 2007, would be unreasonable.[153] However, neither *Larson* nor *Hilbig* involved the necessity of the level of care in the present case, making Respondent's rate of $7.50 per hour all the more unreasonable. Therefore, I find that Petitioner is entitled to a 20% penalty on the difference between the $7.50 per

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[149] *Larson, 228 Mont.* at 384-85, 742 P.2d at 1008.

[150] *Hilbig*, 238 Mont. 375, 777 P.2d 1296 (1989).

[151] *Hilbig*, 238 Mont. at 376, 777 P.2d at 1297.

[152] *Hilbig*, 238 Mont. at 382, 777 P.2d at 1300.

[153] By way of general reference only, utilizing the consumer price index inflation calculator available through the U.S. Department of Labor, Bureau of Labor Statistics web site: $7.50 in 1989 equates to $12.54 in 2007.

hour paid by Respondent effective February 1, 2007, and the $20.00 per hour to which this Court has determined Petitioner is entitled.

Attorney Fees and Costs

¶ 104 Petitioner has prevailed in the present case. Therefore, pursuant to the 1983 version of § 39-71-611, MCA, he is entitled to receive reasonable costs and attorney fees as established by this Court.[154] Petitioner's application for costs and claim for attorney fees shall be submitted to this Court pursuant to ARM 24.5.342 and ARM 24.5.343.

JUDGMENT

¶ 105 Petitioner is not entitled to retroactive domiciliary care benefits.

¶ 106 Petitioner's domiciliary care benefits shall be paid at the rate of $20 per hour, commencing from the date of February 1, 2007.

¶ 107 Petitioner is entitled to a 20% penalty on the difference between the $7.50 per hour paid by Respondent effective February 1, 2007, and the $20.00 per hour to which this Court has determined Petitioner is entitled.

¶ 108 Petitioner is entitled to reasonable costs and attorney fees. Petitioner's application for costs and claim for attorney fees shall be submitted to this Court pursuant to ARM 24.5.342 and ARM 24.5.343.

¶ 109 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 4th day of June, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. David Slovak
Greg E. Overturf
Thomas E. Martello
Submitted: April 24, 2007

[154] § 39-71-611, MCA.