

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: August 18, 2003

RE: RETROACTIVE NURSING AND/OR ATTENDANT CARE
BENEFITS

One of the emerging potential bonanzas for applicants and financial disasters for defendants is the ever increasing demand for retroactive attendant and/or nursing care benefits on serious cases.

This was recently highlighted in the Board's decision in Puckett v. Los Angeles County Metropolitan Transit Authority.¹

In Puckett the Trial Judge awarded the applicant's spouse compensation at the rate of \$23.00 per hour for a 16 hour day as the caregiver of an applicant who was totally disabled and confined to bed or a wheelchair.

At Trial the applicant's wife, Constance Puckett, testified that she gave up her part time occupation as a real estate salesperson to care for the applicant and the Workers' Compensation Judge found that the applicant's wife "had performed services of a reasonable value of \$23 per hour for 16 hours a day."

The editor's note is quite informative, as it was noted that at one time it was argued that nursing services performed by a spouse were part "of the normal conjugal responsibilities." However, the editor's note went on to note that this argument was put to rest by the court in Henson v. WCAB (1972) 27 Cal. App. 3rd 452, 37 CCC 564. In Henson the fact that the applicant's wife did not relinquish other employment was relevant but was not a controlling factor. It was also argued by the defendant in Henson that a lack of demand for payment by the wife was not a defense to retroactive nursing and/or attendant care benefits when the "defendant knew at all times that applicant was in need of nursing services and that his wife was providing them..."

Therefore in those cases in which the applicant's spouse is caring for a totally disabled and/or

¹Cited as 31 CWCR 180.

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wheelchair bound applicant at home, our client may certainly have liability for a claim of retroactive attendant care and/or nursing care benefits. When the demand does come in, it is usually based on 24 hours a day, 7 days a week, and in this case we want to examine certain factors which may mitigate (maybe only slightly) our clients potential liability:

1. In Puckett the Workers' Compensation Judge observed that although Puckett was essentially on call 24 hours a day, that it was assumed that the applicant's wife did take off time to sleep and to attend to personal matters. On the assumption that sleep and personal activities consumed 8 hours a day, the defendant was only found liable for 16 hours per day.
2. We certainly want to explore the work history of the caregiver's spouse on the theory that the spouse certainly cannot be a caregiver during the time she is employed.
3. We want to carefully review the medical record to see when it was first clear that the applicant required attendant care and/or nursing services, and we want to exclude those periods of hospitalization as the applicant clearly did not require his spouse as a caregiver during these periods.

WJP:dab 