

NC Rulings on Retroactive Compensation for Attendant Care Services by Family Members

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Until recently, there has been no clear answer about whether family members could be paid for providing retroactive attendant care if they were not previously authorized to do so by the defendants or the North Carolina Industrial Commission.

Carriers and employers alike would point to Section 14 of the Medical Fee Schedule, which specifically states that, except in unusual cases where the treating physician certifies it is required, fees for practical nursing services by members of the immediate family of the injured will not be approved unless written authority for the rendition of such services for pay is first obtained from the Industrial Commission.

On the other hand, plaintiffs argued that N.C.G.S. § 97-90(a) was the relevant authority. This statute identified the only situations where pre-approval of medical services is required, none of which involved attendant care services provided by family members.

Interestingly, proponents of both carriers/employers and plaintiffs had recent cases from the North Carolina Court of Appeals that supported their respective positions. In *Mehaffey v. Burger King*, which was decided by the North Carolina Court of Appeals on Dec. 6, 2011, the court specifically held that Section 14 of the Medical Fee Schedule was controlling. Consequently, the court denied an award of attendant care benefits to the claimant's family member because prior authorization for these services had not been received from the carrier or the Industrial Commission.

On Dec. 20, 2011, just two weeks after the *Mehaffey* decision, three separate judges from the North Carolina Court of Appeals issued an apparently conflicting opinion in *Chandler v. Atlantic Scrap & Processing*. In this case, the court expressly rejected the defendants' argument that Section 14 of the Medical Fee Schedule was controlling. Rather, the court found that N.C.G.S. § 97-90(a) was the relevant authority and, as such, a retroactive award of attendant care benefits to plaintiff's family member was appropriate, despite a lack of pre-approval for such services from the carrier or the Industrial Commission. Both *Mehaffey* and *Chandler* were appealed to the North Carolina Supreme Court.

On Nov. 8, 2013, the North Carolina Supreme Court filed a detailed decision in *Mehaffey* that brought resolution to this issue. The court acknowledged Section 14 of the Medical Fee Schedule and its requirement for prior authorization for attendant care services when said services are provided by a claimant's family member. However, the court questioned whether the Industrial Commission exceeded its authority in promulgating such a rule.

Through a rather detailed and complex analysis of N.C.G.S. § 97-26(a), the statutory authority for the Industrial Commission to create the fee schedule, the court ultimately concluded that the Industrial Commission had exceeded its statutory authority in enacting the prior authorization requirement of Section 14 of the Medical Fee Schedule. Consequently, while the court acknowledged that there may be good policy reasons for the preapproval mandates outlined in Section 14 of the Medical Fee Schedule, the court concluded that the fee schedule could not be used to bar an award of retroactive compensation for the attendant care services provided by the claimant's husband.

While the *Mehaffey* court opened the door for an award of retroactive attendant care benefits provided by a family member, the court went on to note that to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider. The court added that if a plaintiff does not seek approval within a reasonable time, he is not entitled to reimbursement.

Because the defendants had raised the reasonableness of the time of plaintiff's request as an issue and because the Opinion and Award of the Full Commission did not contain findings and conclusions on this issue, the court remanded the case back to the Full Commission to make the necessary findings of fact and conclusions of law.

Although the North Carolina Supreme Court's decision in *Mehaffey* was not the preferred decision for carriers and employers, it does provide practical guidance as to how carriers should handle such issues moving forward. For any claim arising on or after June 24, 2011, attendant care must be prescribed by an authorized health care provider.

So, upon receiving a request for retroactive compensation for attendant care benefits provided by a family member, a carrier should first ensure that the attendant care services have been prescribed by a health care provider authorized by the defendants or subsequently by the Industrial Commission. Assuming that an authorized health care provider prescribed the attendant care services, a determination should be made as to whether plaintiff's request for retroactive compensation of attendant care services has been brought within a reasonable time.

Although there is no bright line test as to what constitutes a "reasonable time" and such a determine will need to be made on a case-by-case basis, the reasonableness requirement provides defendants with some ammunition to defend against claims where the request for compensation for attendant care benefits provided by family members has been unjustifiably delayed.

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