STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ARIE G. OLDHAM,

Plaintiff,

v.

MEMORANDUM DECISION

Case No. 91 CV 1304

LABOR AND INDUSTRY REVIEW COMMISSION, KLUG AND SMITH COMPANY, and GREAT AMERICAN INSURANCE COMPANY,

Defendants.

Plaintiff, Arie G. Oldham, commenced this action on April 3, 1991, for judicial review under sec. 102.23, Stats., of a Decision and Interlocutory Order of the Labor and Industry Review Commission ("LIRC" or "Commission") dated March 6, 1991 affirming in part and reversing in part the Findings of Fact and Interlocutory Order of the Department of Industry, Labor and Human Relations ("DILHR"), dated August 24, 1989. Oldham asks this court to modify the Commission's Interlocutory Order on the grounds that the Commission acted without or in excess of its powers in issuing its Order, and that the Commission's Findings of Fact are not supported by credible and/or substantial evidence. Sec. 102.23(1)(e), Stats. For the reasons set out below, I will affirm the Order of the Commission in part, reverse in part and remand the matter back to the Commission.

I.

BACKROUND

On August 27, 1968, Oldham was severely injured while working as an ironworker for the defendant Klug & Smith Company. While painting structural steel next to a high voltage power line, Oldham came into contact with the line and fell approximately 35 to 40 feet to the ground. He sustained third and fourth degree burns over 41 percent of his body, amputation of his right leg above the knee, amputation of his left arm below the elbow, and a nonfunctional left leg. It is undisputed that the work injury rendered Oldham permanently and totally disabled.

On February 13, 1973, a Milwaukee County Circuit Court approved a settlement of Oldham's claim arising out of the work injury against a negligent third party.[1] In the settlement, the parties stipulated to a distribution of the settlement proceeds in accordance with sec. 102.29(1), Stats. After deducting the cost of collection, Oldham received one-third of the settlement remainder and Great American Insurance Company ("Great American") was reimbursed for all payments it had made up to the date of the settlement. The balance remaining, referred to as the "cushion" by the parties, was to be offset against any future worker's compensation obligations which Great American would have to

[1]Section 102.29(1), Stats., allows employees, employers and compensation carriers to make a claim or maintain an action against a third party for an injury compensable under the worker's compensation statutes. Klug & Smith and Great American Insurance Company were named in Oldham's suit.

pay under the Worker's Compensation Act. The court ordered payment of the "cushion", totaling $259,772.03, to Oldham. Oldham was expected to use this cushion to pay for his medical expenses and when the cushion was exhausted, worker's compensation coverage would be reinstated. To date, no worker's compensation benefits have been paid since the date of the Circuit Court's order in 1973.

In 1986, Oldham filed an application for a hearing with the Worker's Compensation Division of the Department of Industry, Labor and Human Relations. In his application, Oldham claimed that the entire cushion had been exhausted and that he was entitled to begin receiving benefits from his former employer and its worker's compensation carrier, Great American.

Four worker's compensation hearings were held from April 8, 1987 through July 26, 1988. At these hearings, medical records and expenses covering a fifteen year period were examined to determine whether or not each expense was compensable and properly applied against the settlement cushion. A primary issue at the hearings concerned the home health care provided by Mr. Oldham's wife, Annette from 1973 through 1988. There was a legal dispute as to whether this type of care was compensable and a factual dispute as to the number of compensable hours per day and the appropriate rate of compensation for these hours. On August 24, 1989, a DILHR Worker's Compensation Division Administrative Law Judge (ALJ) issued Findings of Fact and an Interlocutory Order concluding

that $114,574.03 remained of the cushion, to be offset against future claims for worker's compensation benefits. The ALJ also concluded that defendants were not entitled to an interest credit on the amount paid to Oldham as a cushion against future benefits.

The Department's Order was appealed by both parties to the Labor and Industry Review Commission. LIRC ruled that three hours per day of home health care provided by Mrs. Oldham were compensable, at a certain rate per hour. LIRC also reversed the ALJ's conclusion on the interest credit issue and concluded that defendants are entitled to an interest credit on the lump sum paid to Oldham. Aside from these two issues, no other findings or conclusions made by the Commission in its order of March 6, 1991 are at issue.

II.

INTEREST CREDIT

A. STANDARD OF REVIEW

> One of the most troublesome issues in administrative law is determining whether...the application of a statutory concept to a concrete fact situation, should be treated as a question of fact or of law for the purposes of judicial review. In many cases we have said that the determination of whether the facts fulfill a particular legal standard is a question of law.
>
> Nevertheless, merely labeling the question as a question of law and labeling the commission's determination as a conclusion of law does not mean that the court should disregard the commission's determination. [The application of a statutory concept to a concrete fact situation] calls for a value judgment, and judicial review of such a value judgment, though a question of law, requires the court to decide in each case the extent to which it should substitute its evaluation for that of the administrative agency. We have recognized that when the expertise of the administrative agency is significant to the value

> judgment (to the determination of a legal question), the agency's decision, although not controlling, should be given weight.

Nottleson v. DILHR, 94 Wis. 2d 106, 114-117, 287 N.W.2d 763, 767-68 (1980). See, DILHR v. LIRC, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990). The interpretation of a statute is a question of law which we review without deference to the Commission. Brown v. Thomas, 127 Wis. 2d 318, 323, 379 N.W.2d 868 (Ct. App. 1985); West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 418, 342 N.W.2d 415 (1984).

In its Decision, the Commission concluded that, contrary to Richtman v. Honkamp, 245 Wis. 68, 13 N.W.2d 597 (1944), the Circuit Court erroneously ordered payment of the lump sum directly to Oldham rather than to a trust for disbursement as future claims accrued. LIRC observed that under sec. 102.29, Stats.,

> None of the cushion amount belongs to the employe until and unless he/she becomes entitled to payment of accrued compensation...or until it can be foreseen that the cushion amount will not be needed for future employer/insurer obligations....since the statute requires that future claims be reimbursed to the employer/insurer out of the cushion amount, it follows that interest generated by the cushion should remain in trust to be available for payment of those future claims...In the applicant's case, the claims subsequent to February 13, 1973 are substantial and ongoing, and could easily exhaust the entire cushion amount.

The Commission construed the lump sum payment to Oldham as an advance payment of unaccrued compensation, within the meaning of sec. 102.32(6), Stats. It stated that the statutory interest rate in sec. 102.32(6), Stats., should be applied against the cushion balance which would have remained in the trust on a daily basis, taking into account the amounts which

would have been paid out of the trust on a daily basis to cover the applicant's allowable claims. LIRC's conclusion cannot be sustained for several reasons.

First, in reaching its conclusion that the applicant was not entitled to receive a lump sum payment of the cushion under sec. 102.29(1), Stats., LIRC relied on Richtman v. Honkamp, 245 Wis. 68, 13 N.W.2d 597 (1944). LIRC, however, misreads Richtman. In Richtman, the plaintiff sustained a compensable work-related injury and asserted that his injuries were caused by the negligence of a third party. A settlement agreement was reached between the plaintiff and the negligent third-party and the proceeds were distributed in accordance with the third-party statute. After the cost of collection had been paid, the insurer was reimbursed for its payments to the date of the trial, and Richtman received his statutory one-third distributive share, there remained a balance of $2,220.77 in the hands of the clerk of court.

Aproximately nine months later, a separate hearing was conducted by the industrial commission regarding worker's compensation. The commission ordered payment of permanent partial disability over a period of 712 weeks on an instalment basis. Upon petition, the trial court then ordered payment of the cushion amount left over from the third party settlement directly over to the applicant in a lump sum. The insurer appealed the court's order.

The Wisconsin supreme court held that the fruits of the judgment of the third-party action could only be enjoyed in a

manner consistent with the industrial commission's award. The court stated,

> Had the industrial commission, in its discretion, made an award in a lump sum to the employee, there would be no issue raised as to the necessity of the amount passing through other hands before being received by the respondent. However, no order has been made by the commission under sec. 102.32(7), Stats., granting payment in a lump sum. The statute providing for payments for permanent disability on an instalment [sic]basis is a welfare measure and was enacted for a practical purpose. In cases where an employee has maintained an action against a third person and has also applied for compensation, the disbursement of the proceeds must be under and according to the statute. The court cannot exercise administrative powers. Those powers are placed in the commission.

Richtman, 245 Wis. at 72. Thus, contrary to LIRC's interpretation, the Richtman court did not hold that a lump sum payment to an applicant is inappropriate in all cases. The court simply stated that a lump payment is inappropriate when the applicant is also receiving permanent disability payments under sec. 102.32(7). If the plaintiff is also receiving compensation under sec. 102.32(7), Stats., distribution of the proceeds of a third-party action must be in accordance with the requirements of sec. 102.32(7), Stats. Section 102.37(7), Stats., states that lump sums shall not be allowed in any case of permanent total disability except upon consent of all parties, after a hearing and finding by the department that the interests of the injured employee will be conserved. Therefore, if the employee was entitled to payment of his worker's compensation benefits, which were to come out of the cushion amount, he can receive them only in

accordance with the commission's order that they be paid out over 712 weeks.

The court also addressed the contention of the employee that his rights to the entire balance of the proceeds of the judgment might be jeopardized should the industrial commission subsequently accelerate the payments because then a discount might be allowed the insurer. The court found that this contention was not well grounded. It stated,

> The respondent can be adequately protected by payment of this fund to the insurer in trust for its own reimbursement as it makes future payments to plaintiff, or by letting it remain in trust with the clerk of court to be repaid to the insurer as fast as the insurer pays compensation payments to the respondent.

Richtman, 245 Wis. at 73.

Significantly, however. the court did not state with whom the responsibity to put the settlement proceeds in a trust is placed. In addition, the court's solution was prospective in nature and did not address the circumstance in which the cushion had not been placed in a trust and several years later one party claims an interest credit.

The second reason why the Commission's conclusion cannot be sustained is that sec. 102.29, Stats., plainly does not provide for an interest credit. Section 102.29, Stats., provides, in part:

> **102.29 Third party liability**
> (1) The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employe shall not affect the right of an employe, the employe's personal representative, or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd

> party....[T]he proceeds of such claim shall be divided as follows: After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employe or the employe's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future...Any balance remaining shall be paid to the employe or the employe's personal representative or other person entitled to bring action(emphasis added).

All that sec. 102.29, Stats., requires is that, after deducting the reasonable costs of collection, one-third of the remainder shall be paid to Oldham and that out of the balance remaining, the employer or insurance carrier shall be reimbursed for all payments it has already made or which it will be obligated to make in the future. It does not provide that "the balance remaining" must be placed in an interest bearing trust account or that the balance cannot be distributed in a lump sum. In fact, the statute does not expressly state where or with whom the cushion should be placed at all. It is well established that when the meaning of a statute is plain, the court should not imply terms to give the statutory language any construction beyond its literal meaning. Guyette v. West Bend Mut. Ins. Co., 102 Wis. 2d 496, 500, 307 N.W.2d 311 (Ct. App. 1981). As Justice Holmes stated in United States v. Wurzbach, 280 U.S. 390 (1930), "there is no warrant for seeking refined arguments to show that the statute does not mean what it says."

The legislature has shown itself capable of requiring such an interest credit to be applied to the benefit of

defendants in other situations, such as when the defendants themselves pay future benefits for total disability in gross. See, sec. 102.32(6), Stats. The legislature has not done so in sec. 102.29, Stats., and this court refuses to read such a provision into the statute.

Finally, the cases cited by defendants only stand for the proposition that when the proceeds of a settlement are being distributed in accordance with the statute, the well accepted course of action is to place the "cushion" in an interest bearing account. The cases do not establish that the proceeds of a third-party action *must* be placed in an interest bearing account. In Sutton v. Kaarakka, 168 Wis. 2d 160 (Ct. App. 1992), for example, a trial court had approved a medical malpractice settlement in favor of the plaintiff. Pursuant to sec. 102.29, Stats, the court deducted the reasonable costs of collection and one-third of the remainder which was paid to plaintiff. The court directed the balance of the settlement to be paid into interest-bearing accounts to be administered by a trust company to guarantee future payment of future worker's compensation obligations. This portion of the settlement was referred to as a "cushion" fund.

The dispute in Sutton centered on which party was entitled to the interest generated by the "cushion" fund. The court first acknowledged that sec. 102.29(1), Stats., does not expressly address how interest earned on a cushion fund should be distributed. However, it indicated that the

clear purpose of the cushion fund is to *reimburse* the employer and that the employee has no direct or immediate claim to a cushion fund. The court then stated that "it is axiomatic that moneys held in such a 'cushion' account will earn interest....we see the principal and interest as a unitary fund, existing to serve the purpose of the statute--reimbursement to the employer for those worker's compensation payments the employer has made in the past or must make in the future." Id., at 166-67. The court concluded by awarding interest to the employer and stating that "the fact remains that the supreme court held that sec. 102.29(1), Stats., envisions the payment of interest on money targeted for reimbursement to an employer who is obligated to its employee for future worker's compensation benefits." Id., at 165.

In deciding Sutton, the court concluded that their decision was governed by the Wisconsin Supreme Court's decision in Hauboldt v. Union Carbide Corp., 160 Wis. 2d 662, 467 N.W.2d 508 (1991). In Hauboldt, a firefighter filed a products liability action against Union Carbide, the manufacturer of acetylene tanks, for injuries he sustained while fighting a fire with one of the tanks. The jury found Union Carbide causally negligent and assessed damages against it for $1,011,000 for injuries to plaintiff and $25,000 for loss of consortium for his wife.

In its judgment, the circuit court affirmed the jury's holding and divided the award according to the formula in

sec. 102.29(1), Stats. In addition to the reimbursement due the insurance company ($104,017.66), the court awarded the insurance company post-judgment interest on this amount at the rate of 12 percent. The party obligated to pay the interest in this case was Union Carbide, the negligent third-party, not the injured employee. The parties appealed this holding and the court of appeals certified the case to the supreme court for review and determination pursuant to sec. 809.61, Stats.

At the supreme court, one of the primary issues centered on which party, the employee or the insurance company, was the proper recipient of the 12 percent interest to be paid by Union Carbide, the negligent tortfeasor. The Court first observed that,

> "the language of sec. 102.29(1), Stats., does not independently provide for interest payment, so the interest was awarded pursuant to the general statutes on interest."

Hauboldt, 160 Wis. 2d at 685. The Court then concluded that the insurance company was the proper recipient of the interest because, but for the negligence of Union Carbide, the insurance company would have had this money to use for other purposes. Specfically, the Court stated,

> Interest is not a penalty for the wrong, but is instead simply the value of the use of the money. Nelson v. Travelers Ins. Co., 102 Wis. 2d 159, 306 N.W.2d 71 (1981). Hauboldt was not deprived of this money, Employers was. Employers paid the medical expenses and disability compensation after Hauboldt's injury. These were expenses it would not have incurred but for Union Carbide's defective product. Clearly, Union Carbide is obligated to pay 12 percent

> interest, but this interest should go to the party who was deprived of the use of the money. This is not a penalty to Hauboldt. On the contrary, to pay Hauboldt 12 percent on the money due Employers would award him a windfall for interest on money of which he was not deprived.

Hauboldt, 160 Wis. 2d at 686.

Neither Sutton nor Hauboldt are dispositive of the instant case. The primary issue in both of these cases was which party was entitled to the interest either generated by a cushion placed in a trust account or paid by the negligent tortfeasor. This is not the issue in the instant case. In 1973, the parties agreed to a settlement which distributed the proceeds of a third-party action in accordance with sec. 102.29, Stats. As these cases make clear, the preferred method would have been to place the cushion in an interest-bearing account. If the cushion had been placed in such an account, it seems clear from Sutton and Hauboldt that Great American would be entitled to apply the interest generated from the account against worker's compensation benefits paid out by the insurer. However, by agreement of the parties and Circuit Court order, the cushion was not placed in an interest-bearing account, but was instead paid to Oldham in a lump sum. Nevertheless, some fifteen years after the cushion was paid in a lump sum to Oldham, respondents claim an interest credit *as if* the cushion had been placed in an interest-bearing account. In effect, respondents want Oldham to bear the brunt of an oversight or a poorly drafted settlement agreement to which *both* parties are signatories. Obviously, Great American wishes Oldhman had voluntarily

placed the cushion in an interest-bearing account but Oldham was under no obligation to do so and none of the cases cited by respondents suggest that he was. Great American cannot shift the burden of its own poor foresight to Oldham when it voluntarily agreed to a settlement making no provision that the cushion amount must earn interest.

III.

SECTION 102.32(6), STATS.

It is unclear why LIRC construed the cushion lump sum as an advance payment within the meaning of sec. 102.32(6), Stats. Section 102.32(6), Stats., provides as follows:

> If compensation is due for permanent disability following an injury or if death benefits are payable, payments shall be made to the employe or dependent on a monthly basis. The department may direct an advance on a payment of unaccrued compensation or death benefits if it determines that the advance payment is in the best interest of the injured employe or his or her dependents. In directing the advance, the department shall give the employer or the employer's insurer an interest credit against its liability. The credit shall be computed at 7%.

LIRC's interpretation of the lump sum cushion as an advance payment under sec. 102.32(6) is erroneous because the statute states that the *department* may direct an advance on a payment. Nowhere in the record is there any suggestion that the department directed an advance on a payment. The 1973 action was a third-party action pursued under sec. 102.29, Stats.; the Department was not a party and had no opportunity to direct compensation payments.

IV.

HOME HEALTH CARE

Since Oldham's return from the hospital in 1969, Oldham's wife has attended to many of his home care and therapy needs. LIRC described the condition of Oldham as follows:

> [As a result of the work-related injury, Oldham] sustained third and fourth degree burns over 41 percent of his body, amputation of his right leg above the knee, and amputation of his left arm below the elbow. He underwent extensive surgery. His left foot is not functional and requires stretching exercises in order to keep it from curling into a claw-like deformity. His left leg/foot circulation is poor and he has problems with ulcers, infections and skin breakdowns on the leg and foot. When these conditions occur, periodic soakings and dressing changes are required, especially on the applicant's foot. He requires additional assistance at various times of the day.

LIRC went on to describe a typical day for Oldham.

> On a typical day, Mrs. Oldham assists the applicant in getting into his wheelchair and washing. She places a foot brace on his left foot for two hours, and removes it for relief every 15 minutes during these two hours. She checks his arm and leg for sores or infection which require attention as they occur. The applicant periodically suffers from open sores on his foot, and these require half-hour foot soaks three or four times per day. Mrs. Oldham appies topical medication as needed, and massages and exercises the left foot to prevent the claw-like deformity. She checks the foot for skin problems after the applicant attempts any activity, since he cannot feel any pain in his foot. She assists the applicant in dressing, and in the afternoon again aplies the brace to his foot over a two-hour period. She helps him stretch his leg stump, since he lies on it and without the stretching it "goes out too much." She assists him in bathing. She provides various other assistance to the applicant which is primarily personal rather than medical in nature.

The Administrative Law Judge found that virtually all of this care was "custodial" in nature and that nursing services voluntarily performed by a relative without promise of

expectation of compensation are not compensable, citing Milwaukee v. Miller, 154 Wis. 652, 144 N.W.188 (1913). LIRC reversed this portion of the ALJ's decision, holding that the overwhelming evidence showed that much of the care provided by Mrs. Oldham constituted medical care, rather than "custodial" care.[2]

After determining that much of the care provided by Mrs. Oldhman constituted medical care rather than custodial care, LIRC proceeded to address exactly what amount of time spent for the care of Oldham was "medical" care reasonably required by the effects of the work injury, and at what rate should those services be compensated. The Commission concluded that as of the date of the last hearing on July 26, 1988, the applicant required home medical care on a regular but not full-time basis. It concluded that three hours per day at the hourly rate of a home health aide was appropriate.

A. STANDARD OF REVIEW

The standard of review of the commission's findings of fact is set out in sec. 102.23(6), Stats. This section provides that:

> If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on a finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by

[2]LIRC defined "custodial" care as ordinary household and personal services not specifically required by the effects of the work injury. This definition is not contested by the parties.

credible and substantial evidence.

The burden is on the party seeking to overturn the agency action, not on the agency to justify the action. Racine Education Ass'n v. Com'r of Ins., 158 Wis. 2d 175, 182, 462 N.W.2d 239 (Ct. App. 1990); City of La Crosse v. DNR, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). This court must scan the record to locate credible and substantial evidence which supports the Commission's determination, rather than weighing the evidence opposed thereto. Kimberly-Clark Corp v. LIRC, 138 Wis. 2d 58, 67, 405 N.W.2d 684 (Ct. App. 1987). The Commission's findings must be upheld even if they are against the great weight and clear preponderance of the evidence. Goranson v. DILHR, 94 Wis. 2d 537, 554, 289 N.W.2d 270 (1980). "Sustantial evidence" means that, after considering all the evidence in the record, reasonable minds could arrive at the same conclusion as LIRC did. Racine Education Ass'n, 158 Wis. 2d at 175.

The nature, duration and extent of disability, and reasonable necessity of medical treatment are questions of ultimate fact for the Commission to decide. Manitowoc County v. ILHR Dept., 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). The Commission must resolve inconsistencies in the testimony of doctors, and may accept what appears valid while rejecting the remainder. Id.

The Commission was faced with conflicting testimony from a variety of witnesses. Dr. Hammacher, a plastic surgeon who has participated in Oldham's treatment since the date of

injury, offered the opinion that there are not many things Oldham can do on his own and that, but for his wife's care, he would need to be in a nursing home environment where someone could be present when the need arose 24 hours a day. He added that "when an individual has one arm and one leg and the opposite leg is severely damaged, it's a difficult set of circumstances for that individual to care for himself." (Hammacher at 4, Oct. 13, 1987 DILHR hearing). With respect to transfering, Hammacher stated that "you just aren't physically able to move yourself from one area to another area to another area with one arm and half a leg." (Hammacher at 7, Oct. 13, 1987 DILHR hearing). Hammacher testified that Oldham required assitance with the application of the foot brace, care for breakdowns of ulcers and dispensing of medication.

However, Dr. Hammacher also acknowledged that in many areas Oldham could be more independent. He agreed, for example, that Oldham does not need someone to take care of activities such as cleaning his false teeth and applying cream to the irritated portions of his foot. He also indicated that with an up-to-date prosthesis, Oldham could do things that require two hands such as dressing (Hammacher at 33, 35), and with a properly designed kitchen he could cook a meal (Hammacher at 26).

Oldham also submitted the deposition of Ruth E. Ainsworth, a nurse specializing in home healthcare employed by Upjohn Healthcare Services. Ms. Ainsworth evaluated the

healthcare needs of Oldham on March 3, 1987. Ainsworth testified that, if the services of Upjohn were retained, she would make sure that an LPN would be present 24 hours a day to take care of Oldham's needs. In her total number of required health care hours, however, Ainsworth included custodial care such as management of the household, shopping, and child care.

Oldham finally submitted an assessment of his home care needs made by Sherill Slack, a registered nurse and consultant employed by Certified Rehabilitation Services, Inc. Nurse Slack described Mrs. Oldham's services in detail and concluded that if Mrs. Oldham was unable to perform these services, the applicant would need 24-hour care by a Licensed Practical Nurse (LPN).

On the other hand, at the request of the employer/insurer, Dr. Robert Sievert, a specialist in functional rehabilitation, examined Oldham and offered the opinion that the plaintiff required, on average, a total of two hours per day of home care by a family member who had been instructed in the necessary care needs. Dr. Sievert added that, if there was a problem with an infection, Oldham would require care by an LPN and that, at other times, he would require care by a health aide or nursing assistant. (Sievert at 7, DILHR hearing on April 5, 1988). He acknowledged that when Oldham had open sores, several half-hour foot soaks would be needed each day, and that treatment of infections should be supervised by an LPN. He testified

that application of the foot brace stopped being necessary "many year ago" when there was no more range of motion.

In his evaluation, Dr. Sievert stated that Oldham would need help getting ready in the morning for three-quarters of an hour to a maximum of an hour and getting ready for bed at night for the same amount of time. During these times, someone with a skill level of a nurse's aid would assist Oldham with his bath care needs, shower care needs, body hygiene, toileting and "things that would be involved in what most of us who are not as disabled as this man would like to accomplish every morning when we get out of bed." (Sievert at 14). Sievert admitted that Oldham needed help with many custodial activities such as shopping, but insisted that in terms of medically-related needs Oldham required only two hours per day.

Although a review of the record indicates that there is credible and substantial evidence in the record to support the Commission's determination that three hours a day of home health care is presently appropriate, the Commission's order must nonetheless be set aside in light of Spencer v. ILHR Dept., 55 Wis. 2d 525, 200 N.W.2d 611 (1972).[3]

In Spencer, an employee sustained a knee injury on October 18, 1965 while working for his employer. It was undisputed that the injury was compensable under the Worker's Compensation Act. After consulting with his family

[3]This rule was later modified by statute, but it still applies to all injuries prior to January 1, 1990.

physician, the employee was referred to an orthopedist who surgically removed his kneecap. The orthopedist determined that the employee had suffered permanent disability equivalent to 15 percent at the knee and that he could return to work on April 1, 1967. Employee did not return to work as of April 1, 1967 because of alleged severe pain. On August 11, 1967, the employee began seeing a second physician, and on August 30, 1968, this second physician performed arthrodesis on the knee to alleviate the pain. He estimated the permanent partial disability to be 40 percent and set the date at which the employee could return to work as April 15, 1969.

After a hearing before the department, the department awarded compensation for permanent partial disability equivalent to 15 percent, temporary total disability and medical expenses up to April 1, 1967 and held that medical expenses incurred by the employee for the arthrodesis were not reasonable and necessary.

The circuit court set aside the findings of fact and order of the department and held that, as a matter of law, where an employee, in good faith, accepts the recommendation and treatment of one doctor, with whom another doctor disagrees, the department cannot disregard the consequences of treatment because it finds the treatment was either unnecessary or unreasonable. The supreme court affirmed. It stated,

Assuming [the first physician] was correct, is

> [employee] to be faulted because he chose to follow erroneous medical advice? We do not think so, so long as he did so in good faith.

Spencer, 55 Wis. 2d at 532; See City of Wauwatosa v. LIRC, 110 Wis. 2d 298, 300-01, 328 N.W.2d 882 (Ct. App. 1982).

In the instant case, Mrs. Oldham testified that on the order of Dr. Hammacher, Oldham's plastic surgeon, she twice daily applies a foot brace to Oldham's left leg for two hours and removes it for relief every fifteen minutes during these two hours. This routine is done both in the morning and in the afternoon for a total of four hours a day. Although the Commission was entitled to accept the testimony of Dr. Sievert that this routine was unnecessary "many years ago," it appears that Oldham may have accepted Dr. Hammacher's advice on good faith and should not be faulted for following medical advice that may have been erroneous or at least out-of-date.

I conclude that although the Commission's conclusion, that three hours of home health care is adequate, is presently appropriate, it is an inappropriate measure of the home health care rendered up until LIRC concluded that the foot brace was no longer useful to Oldham, if Dr. Hammacher did indeed order the four hour foot brace regime and Oldham relied on this treatment in good faith. The matter is therefore remanded to the Commission for a determination of whether Dr. Hammacher prescribed the foot brace routine and, if so, for a new determination on the appropriate number of

compensable home health care hours from 1973 until the present.

As a final note, Oldham's argument that the Commission's findings are internally inconsistent is without merit. The Commission did find that stretching exercises are presently necessary but this is not inconsistent with accepting the testimony of Dr. Sievert that the footbrace is no longer of any use and that four hours of footbrace therapy is unnecessary. Mrs. Oldham can still assist Oldham with stretching his left foot within the three hours allocated by the Commission.

For all of the foregoing reasons, the Order of LIRC will be affirmed in part, reversed in part and remanded.

Dated this 11 day of July, 1992.

BY THE COURT

P. Charles Jones
Circuit Court Judge