STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
DISTRICT A**REDACTED**@

EMPLOYEE **REDACTED** **REDACTED** **REDACTED**	ATTORNEY FOR CLAIMANT: Avery B. Goodman, Esq. 2519 S. Shields St., #162 Fort Collins, CO 80526
CLAIMANT: Same as employee	CO-COUNSEL FOR CLAIMANT: Ted Starr, Esq. 8181 U.S. 19 N. Pinellas Park, FL 33717
. EMPLOYER **REDACTED** **REDACTED** **REDACTED**	ATTORNEY FOR EMPLOYER/ CARRIER/SERVICING AGENT **Big Shot Ins. Defense Law Firm**, et. al. **Big Shot Defense Lawyer**, Esq. **Address Redacted** St. Petersburg, FL 33731
CARRIER (SERVICING AGENT) **REDACTED** Mutual Insurance Company **REDACTED** **REDACTED** **REDACTED**	CLAIM NUMBER: **REDACTED** DATE OF ACCIDENT: **REDACTED DATE**

TRIAL BRIEF

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1. SUMMARY OF THE CASE AND THE FACTS:

REDACTED, now a 44 year old man, was catastrophically injured, 14 years ago, at the age of 30. On **REDACTED DATE**, while he was working to prepare a hole for construction, a large, extremely heavy, concrete block fell onto the lower half of his body. This crushed the lower portion of his body, causing multiple fractures of both hips, his legs and spine,

several spinal disk herniations, resulting in a an operation on his spine, a total hip replacement, as well as fixation of the various breaks, and repair of the damaged soft tissue.

.Since the accident, **REDACTED** has been in almost constant pain. In 1990, after filing a Petition for Benefits, and after considerable litigation, he was accepted as "permanently totally disabled", and began receiving PTD benefits. Some time later, believing he would be capable of returning to work, **REDACTED** settled the indemnity portion of his case, leaving the medical benefits open. It soon became clear that he would never be able to work again. His medical condition continued to worsen. He developed disseminated traumatic arthritis, now treated with various anti-arthritic drugs, as well as ever increasing levels of pain medicine. Some time in 1997, **REDACTED** became partially unable to take care of himself. After a severe bout of problems that forced a hospitalization, he left the hospital only to move into the home of his brother, and sister-in-law. The sister-in-law, **REDACTED**, became his primary caretaker. Later, because she was having some problems in taking care of him, as well as her responsibilities to the rest of her family, and some resentment at having to care for her brother in law while received no pay in return, he was forced to move to Chipley, Florida, and rely on the generosity of an old friend, **REDACTED**. Toward the end of February, 2002, **REDACTED** left the home of **REDACTED**, and returned to his brother's house, where his sister-in-law, once again, became his primary care provider. In an attempt to simplify the issues for this trial, the compensation to **REDACTED**, and **REDACTED**, for the period prior to March 31, 2002, was settled, and is not at issue here. The issue presented here is the attendant care that **REDACTED** has received since March 1, 2002, and continuing into the future.

REDACTED has been unable to perform most common household chores since somewhat before moving in with his relatives. Because of his physical medical condition, and the level of pain medication he has been taking, it is unsafe for him to use hot ovens and stoves, as he is likely to burn himself, and/or burn down the house in which he is living. It is also unsafe for him to use a washer/dryer, carry wash loads to and from the wash room, or use most other automated appliances. This inability arises from high levels of pain while doing such chores, unsteadiness on his feet as a result of an abnormal gait, and the high likelihood of injury. For example, in all likelihood, partly because of the high levels of medication, and because of his abnormal gait, he is unsteady, and uncoordinated. This means his clothing may get caught, drawing him into the dryer mechanism, or other appliance, or he would tend to burn himself with an iron, as one example. Psychological depression, secondary to the inactivity and post traumatic stress syndrome overlays the physical problems, causing increased disability, and the need for assistance. Due to the fact that his pain/withdrawal responses are numbed by his pain and sleeping medications, it is inadvisable to do these type of tasks. His musculoskeletal disorder also causes him to lose his balance, and fall frequently.

The testimony shows that **REDACTED** badly needs attendant care, and that the insurer, **REDACTED**, has failed to provide it. His doctors support him getting him help in his daily activities. **REDACTED**, the authorized orthopedic surgeon who has treated him since the accident, diagnosed a post-accident condition known as “Duchenne’s Trendelenburg gait” which means that “when he stands on his bad hip, he has to shift his weight over to the right side in order to maintain his balance. So that is a very abnormal swaying type of gait.” (page 10, deposition of **REDACTED**). This is, obviously, one main reason that he falls frequently. Back in December 8, 2000, in response to a questionnaire sent by the E/C in

response to this Petition for Benefits, **Doctor Name Redacted** responded with a recommendation "that home attendant care, at 6-8 hours per day, should be "tried", in order to "get the ball rolling." Concerning **REDACTED**'s pain, he stated, in pertinent part, on page 41 of his deposition, "…I believe he has pain. He certainly has a reason to have it."

Dr. **REDACTED** is **REDACTED**'s authorized pain management doctor. His testimony concurs with that of **REDACTED**, and he stated that, in his opinion, **REDACTED**'s frequent episodes of falling are primarily musculoskeletal in origin. "Because of decreased flexibility of his joints and his physical deconditioning of his lower extremities, …sometimes he gets off of center and can't compensate like someone without his situation. As a result he loses his balance and falls…" (page 20 of Dr. **REDACTED**'s deposition). His "first effort", in October of 2001, was a prescription of 4 hours per day of "unskilled care every other day". By January 30, 2002, however, he had changed his prescription to a home health aide for 12 hours per day, 7 days per week of personal care, relying on an assessment by **NURSE REDACTED**, a registered nurse. He also recommended the alternative of an assisted living facility (ALF) but noted that the only reason he would make that recommendation was because he felt it would be cheaper. (Page 46 of Dr. **REDACTED**'s deposition). He also indicated that he was basing his recommendation of the "cheapest method" in a "managed care world". (page 52 of Dr. **REDACTED**'s deposition). Of course, **REDACTED**'s case predates the worker's compensation managed care statute, and he is not limited by managed care principles. He also testified that if **REDACTED** were not to go to an ALF already designed for disabled people, the carrier would need to modify his home, or build him one. (Page 42 of Dr. **REDACTED**'s deposition). Finally, he testified that a family member could perform the care needed.

Dr. **REDACTED**, one of **REDACTED**'s authorized psychiatrists, diagnosed him with a post-traumatic stress syndrome, anxiety disorder, and depression secondary to the trauma and disabilities caused by the accident in 1988. He has recommended companion care for 24 hours per day, combining attendants for purposes of psychiatric treatment with the need for physical care. He also testified that, in order to treat his psychiatric ailments, **REDACTED** needs an air conditioned, disabled equipped home to live in, and a disabled equipped van to drive in. These things were not prescribed to "improve his quality of life", but, rather, as medically necessary treatments to prevent his anxiety disorder, depression and post traumatic stress syndrome, from worsening. Dr. **REDACTED**, **REDACTED**'s authorized pain doctor, has testified that he needs 10-12 hours per day of nursing care, or an ALF, in order to take care of **REDACTED**'s physical needs, and has admitted that, if he did was not trying to save money for the insurer, 12 hours of home care per day or more would be indicated. None of these recommendations and prescriptions has been acted upon by the E/C, and **REDACTED** has been forced to enter into this litigation. Dr. **REDACTED**, another psychiatrist, in contrast to Dr. **REDACTED**, did not feel that there was a need for additional attendant care, for purposes of psychiatric treatment, beyond the 12 hours per day prescribed by Dr. **REDACTED**.

One of **REDACTED**'s physicians has not given any opinion on the issue of attendant care. This was Dr. Lynn **REDACTED**. An incident occurred during a procedure she performed, known as a "radio-ablation", in which a needle is injected into the spinal cord, supposedly for the purpose of reducing pain. **REDACTED** was temporarily paralyzed, on one side of his body, as a result of the procedure, and soon recovered. She claimed that **REDACTED** was inconsistent in his report of partial paralysis. Allegedly based on this

incident, she asked the employer/carrier to perform surveillance activities on **REDACTED**. The E/C admits to have done video surveillance, but refuses to release the tapes, and has not brought the tapes to the court's attention. Obviously, they found no inconsistencies. Consequently, it appears that this story revolves more around the Dr. **REDACTED**' fear of, and desire to prepare for, a perceived malpractice action, than reality. At any rate, the incident is irrelevant to this Petition for Benefits. She gave no opinion, pro or con, on the issue of attendant care.

REDACTED's need for the items listed on his Petition for Benefits is substantiated by the medical testimony.

II A SUMMARY OF THE LAW GOVERNING THE CASE:

A. THERE ARE CRITICAL DIFFERENCES BETWEEN THE 1988 LAWS AND THE CURRENT WORKER'S COMPENSATION ACTS:

It is quite important to note that this is a 14 year old case, governed by the much more liberal laws that existed in 1988. The basic requirement that the E/C provide necessary attendant care has not changed. However, both the criteria upon which award of attendant care can be made, and the extent to which such care must be provided, has changed drastically. Claimants, with dates of accident, under the laws existing in 1988, are much better off in terms of their entitlement to benefits and their burden of proof.

1. THE BURDEN OF PROOF

The claimant's burden of proof in workers' compensation cases was described in Jones v. Citrus Central, Inc., 537 So.2d 1123, 1125-26 (Fla. 1st DCA 1989), where the 1st DCA quoted from the Florida Supreme Court's in Johnson v. Koffee Kettle Restaurant, 125 So.2d 297, 299 (Fla. 1960). In workers' compensation cases, the claimant must "prove or show a state of facts from which it may be reasonably inferred" that the claimant was injured during the course and

scope of employment. 125 So.2d at 299. Thus, "if the evidence to establish such a state of facts is competent and substantial and comports with reason or from which it may be reasonably inferred," then "it is sufficient." 125 So.2d at 299. The essence of the distinction between this standard and the preponderance of the evidence standard was described by Justice Terrell in Johnson:

> Proof measured by preponderance of the evidence rule or the rule to the exclusion of a reasonable doubt would certainly contemplate the elimination of a degree of uncertainty not contemplated when measured by "reason," "reasonable inference" or that which "comports with reason" or "logic," such factors being the sole guide for measuring proof in many workmen's compensation cases. Johnson v. Koffee Kettle Restaurant, 125 So.2d at 299.

In Uniweld Products, Inc. v. Lopez, 511 So.2d 758, 760 (Fla. 1st DCA 1987), the court explained that when the language of the statute "is susceptible of disparate interpretations, the courts will adopt a construction which is most favorable to the claimant". The court also noted that this obviously does not require all conflicts in evidence to be resolved in favor of the claimant. These decisions indicate that an employee is only required to present, by competent, substantial evidence, a state of facts from which it may be found, consonant with logic and reason. Schafrath, v. Marco Bay Resort, Ltd., 608 So. 2d 97 (Fla. 1st DCA 1992).

2. CHANGES IN PROOF REQUIRED FOR AWARD OF ATTENDANT CARE:

According to the 2000 Florida Code, the E/C must provide appropriate professional or nonprofessional custodial care when medically necessary and *when the care is performed at the direction and under the control of a physician* required by the nature of the injury. F.S. 440.13(2)(b). This stands in sharp contrast to a much more liberal 1988 statute. The 1988 Florida Code, in F.S. 440.13(2)(d), requires only that “the employer shall provide appropriate professional or nonprofessional custodial care ***when the nature of the injury so requires...”***.

The 1988 Workers Compensation Act *did not* require medical testimony, whereas the current law requires a physician to support the need for attendant care. As a practical matter, few attorneys, then or now, would be bold enough to come to court without a doctor's prescription. On occasion, however, extensive attendant care has been awarded in the absence of medical testimony. It is not absolutely necessary that a physician recommend custodial care because such an award is proper even absent a recommendation therefor by a physician. John Barley Memorial v. Gillam, 550 So.2d 1179 (Fla. 1st DCA 1989). In Lopez v. Pennsuco Cement, 401 So.2d 875 (Fla. 1st DCA 1981), a case surprisingly similar to our own, the physicians did not recommend attendant care, but the "overwhelming weight of the evidence" supported it, as the claimant fell frequently, and sometimes could not get out of his bed to take his medicine, go to the bathroom, or eat his lunch. In another case, an award for practical nursing services was held proper on the basis of the nature of the injury, the age of the claimant, and the existence of a note from one of the treating physicians. McMahon v. Huntington, 246 So.2d 743 (Fla. 1st DCA 1971). Thus, even without the testimony of Dr. **REDACTED**, Dr. **REDACTED**, and **REDACTED**, the lay testimony, standing alone, would be sufficient to support everything the claimant is asking for.

Obviously, **REDACTED**'s case is better justified than the 1988 law requires. His claims are supported by authorized physicians, as well as extensive lay testimony. The lay testimony can be used to fill in areas of confusion, to help the court understand the overall situation better, and to resolve conflicts in the medical testimony.

3. RESTRICTIONS ON THE NUMBER OF HOURS FAMILY MEMBERS MAY GIVE ATTENDANT CARE:

Prior to the 1989 amendments, there was no restriction on the number of hours for which attendant care, provided by a family member, could be compensated. In Standard Blasting &

Coating v. Hayman, 476 So.2d 1385 (Fla. 1st DCA 1985), for example, a claimant who required constant monitoring was granted compensation for 24 hour care by his wife because, although she performed ordinary household duties during those hours, she was simultaneously supervising her husband's activities. This is not particularly important, in this case, because sister-in-laws are not statutory family members. It is mentioned only because, at times, the E/C has claimed that she is a family member.

4. IN 1988, THERE WERE NO HOUSEHOLD SERVICES EXCLUSIONS:

Another major difference that has occurred in worker's compensation law over the years, is that, generally, the E/C is no longer required to pay attendant care providers to provide ordinary household services. J. Byrons v. Green, 602 So. 2d 638 (1st DCA 1992). In 1988, however, payment for "ordinary" household services was only denied to family members. Since neither **REDACTED**, nor the prospective nurses that may care for him in the future, are family members, ordinary household duties are compensable, the claimant has a right to an attendant to perform such duties, and the caretakers have a right to be paid for their time. This is because, prior to the enactment of the 1990 amendments, attendant care services performed by non-family members were compensable, ***even if those services include ordinary household chores***. DeLong v. 3015 West Corporation, 491 So.2d 1306 (Fla. 1st DCA 1986) (emphasis added). Furthermore, even in the case of a family member providing attendant care, household services were only considered "gratuitous" when a family member routinely provided such services, and did not substantially depart from his usual daily routine in providing them. Walt Disney World. v. Harrison, 1983.FL.12 (http://www.versuslaw.com). Thus, even when a family member performs normal household chores, if those chores were not a part of his or her daily routine prior to the accident, the time in performing them is compensable. The undisputed

evidence, in our case, is that **REDACTED** did not live with his sister-in-law prior to the accident. Therefore, even if she were a statutory family member, she would be entitled to be compensated, because the services she performs for **REDACTED** could never have been part of her regular routine. This is because, prior to the accident, he didn't even live in her house.

B. **REDACTED IS NOT A "FAMILY MEMBER"**

As noted, **REDACTED** is **REDACTED**'s primary caretaker, and is not a statutory family member. The E/C has claimed, in a few prior discussions with the claimant's attorney, that **REDACTED** is **REDACTED**'s sister-in-law and, therefore, a "family member". It is unlikely that it will take this position at trial, or that the court would seriously entertain this ridiculous claim. However, in order to cover all bases, it should be noted that FLA. STAT. Section 440.13(2)(H) specifically defines "family member" as including a spouse, father, mother, brother, sister, child, grandchild, father-in-law, mother-in-law, aunt or uncle. This definition does not include a "sister-in-law."

C. THE COMPENSATION RATE:

Pursuant to the 1988 Worker's Compensation Act, each caretaker must be compensated at the prevailing market rate for similar services. The testimony of a market services provider is expected to show that the rates for the type of services received and needed by *REDACTED** is about $16.00 per hour. The 1st DCA, in the case of Hardrives v. Stimely, 1996.FL.42710 http://www.versuslaw.com 1 Fla. Law W. D 531 (1996), uses the term"market rate" and "agency rate" interchangeably. There is no doubt that they are one and the same.

The E/C may argue that the testimony of Kathleen Spooner, the expert from Kelly Home Care Services, indicates that some of the services might have been done by a $13.00 per hour

health assistant. The fact is, however, that those tasks that require a $16.00 per hour nurse's aide are intertwined together with the other tasks, so that the mixture cannot be separated by time or space. Thus, the person assigned must be paid a market rate of $16.00. It is also possible that they may argue that, if extensive advertisements are run in newspapers, and people interviewed, eventually someone might be found at a lower rate per hour. This argument also has no merit. The fortuitous circumstance of finding someone at a rate, cheaper than the market rate, is not the legal criteria for setting the rate at which attendants will be paid. Furthermore, even if, perhaps, someone could be found who would accept $11.00 or $12.00 per hour, for example, their background would need to be checked, they would need to be monitored, federal withholding payments, social security payments, insurance, vacation time, and other benefits and services would have to be made, and all these services would have to be performed by someone. There is also no guarantee that such a person would be compatible with **REDACTED**, and, given that he must be in intimate contact with that person, compatibility is critical. With an agency, or with **REDACTED**, compatibility is already assured either by past relationship or by the ability to quickly replace an incompatible person.

At any rate, when all is said and done, and the additional benefits added in, as well as taxes, the rate would likely end up back at about $16.00 per hour, or more, even with a non-agency person. It might be more, because no benefit would be obtained from the efficiencies involved in organizations, such as Kelly Home Care Services, who are set up to handle these secondary services on a regular basis, for a large number of such employees, while still earning a profit.

Finally, the E/C may alternatively argue that **REDACTED** should be paid 8.25 to 10.25 an hour, because that is the amount the expert witness, **NURSING CARE

ADMINISTRATOR NAME REDACTED**, stated that Kelly Home Care actually pays to the people who act as nursing assistants. But, as noted above, the base rate that a services corporation, like Kelly, offers to its own employees is not the "market rate", as defined by statute. Let us analyze this fact. First, we must move away, for the moment, to another type of service, in order to understand what the term "market rate" really means. When a law firm, for example, bills out its associates, the market rate for legal services is not the salary that the law firm pays to the associates. The market rate is the rate at which legal services can be obtained in the open market by people who need legal services. The law firm may pay an associate $60,000.00 per year. But, it may bill his services, at the market rate of $200.00 per hour. The market rate is $200.00 per hour, not the salary the law firm pays the associate. Similarly, a home health care company's base cost of hiring employees, without consideration of any other factor, is not the "market rate". The market rate, obviously, is the rate at which people can obtain home health care providers, readily, in the open market. The proper market rate, therefore, is clearly $16.00 per hour, which, according to the testimony, is the amount that a person has to pay for the type of care that **REDACTED**'s doctors have prescribed.

To illustrate the ridiculous nature of the E/C allegation that an $8.25 rate should be ordered, we can look to some past cases, in which the 1st DCA has commented about the market rate of attendant care services. In the case of Burris v. Reliance Ins. Co., 577 So. 2d 1376; 16 Fla. Law W. D 992 (1991), the First District dealt with a claim for past attendant care, in the period from 1982 through 1985 (almost 20 years ago), the court reversed an award of $4.00 an hour, and commented that testimony, in that case, concerning the rates prevailing in the early 1980's supported a rate of $6.50 to $8.25 per hour. In Pascual v. Pan American, 528 So. 2d 478,

13 Fla. Law W. 1586 (1988) in discussing benefits that were to be awarded for attendant care, the 1st DCA found that the market rate was upwards of $9.50 an hour. That was 14 years ago.

We all know that the cost of medical care has skyrocketed far faster than inflation, and the early 1980's were, as we all know, a period of general hyperinflation, in the USA. Indeed, the U.S. government stated, last year, that the cost of prescription medicines increased by 17%, when the core consumer price index increased only by 2.7%. Even aside from that, it is common knowledge that the prices for medical related services are much higher today. With more and more opportunities for income and employment in offices and other "clean" environments, attracting people to work in the unpleasant medical environment, dealing with sick people, has grown more and more difficult and costly. Today, the market rate for attendant care is $16.00 per hour. That is a fact. Awarding a lower rate, as urged by the E/C, would constitute an abuse of discretion.

The E/C may argue that **REDACTED SISTER-IN-LAW NAME** is not formally licensed by the State of Florida, and, therefore, should be paid at the homemaker rate, cited by **NURSE ADMINISTRATOR NAME REDACTED**, which was $13.00 per hour. This argument also has no merit. Because she is related to **REDACTED** by marriage, Florida law allows **REDACTED** to legally provide the care level of a nurse's aide, without formal certification. Although she is not certified, she will be performing activities, prescribed by the doctors, for which licensed nurse's aide level services would normally be required, if the transaction were with strangers. Thus, she is entitled to be paid at the $16.00 per hour rate, rather than the $13.00 per hour rate for household assistants, because $16.00 per hour is the market rate that would have to be paid for persons who could perform the necessary services. Furthermore, in the future, if **REDACTED** moves from his brother's home, he will be

required to replace **REDACTED** with an unrelated third party, and the market rate will be $16.00 per hour, or more. Consequently, an hourly rate of $16.00 per hour should be awarded.

Finally, the E/C may argue that the amount of care that would qualify for the $13.00 an hour companion rate should be separated out from the type of services that would be payable at the $16.00 rate. However, the testimony will show that **REDACTED** needs both those services. The services Mrs. *NURSE ADMINISTRATOR NAME REDACTED** identified as requiring a nurse's aide as opposed to a homemaker are scattered throughout the day. It is impossible to separate the times that one service will be performed, from the other. Consequently, a nurse's aide, as opposed to a home companion, would need to be available at all times. Hence, the appropriate compensation is at the $16.00 per hour rate for all the time involved.

F. THE NEED FOR 24 HOUR CARE

Similarly, the defense may argue that potential attendants need not pick **REDACTED** up from falling, prevent him from burning himself, getting caught in automatic machinery, and so on, every single minute of the day. They may argue further, that, the award of attendant care should only be for the exact number of hours the attendant is or was involved in performing particular activities. This, however, is an impossibility, given the nature of the case, and the nature of the need for attendant care.

Neither **REDACTED** nor his caretakers know when or where he will fall. He needs breakfast, lunch, dinner, and snacks at various times during the day. He needs to utilize various household appliances at various sporadic times during the day and night. The times cannot be predicted with any accuracy. In addition, according to Dr. **REDACTED**, the psychiatrist, he needs an attendant to interact with him, at sporadic times, 24 hours per day, to treat his

depression, anxiety disorder and post-traumatic stress disorder. He needs to be taken to and from his medical appointments and to and from the pharmacy to pick up his prescriptions. Mills v. Walden-Sparkman, Inc., 493 So.2d 64 (Fla. 1st DCA 1986), the 1st DCA supports the fact that when transportation is needed by a claimant for authorized medically related activity, attendant care benefits should be awarded where an attendant is needed during the transportation. **REDACTED** is unsteady on his feet, is in constant pain, needs to be escorted to and from medical appointments and pharmacies, and is in need of services especially when he is physically challenged, and needs someone to take him to and from other medically related services. **REDACTED** needs what can only be termed "on-call" attendant care.

Even a spouse is entitled to be paid for 24 hour attendant care, though she may be asleep during part of that time, because the spouse is performing two tasks simultaneously, sleeping and being on-call. Williams v. Amax Chemical Corp., 543 So.2d 277 (Fla 1st DCA 1989). **REDACTED** must be "on-duty" 24 hours per day, during the time she cares for **REDACTED**. She could use the assistance of other nurses, from professional services, to assist her in the nighttime hours, even if we only consider **REDACTED**'s physical requirements. Her sleep is constantly in danger of being interrupted, and has been interrupted, by the need to assist **REDACTED** in walking, helping him get up after he falls down, cooking meals, assisting him in laundry, and keeping his psychiatric condition from deteriorating rapidly, by providing companionship. It should be noted that, in the case of a 69 year old paraplegic, it has been held to be proper to award *even his daughter* payment for 24 hour attendant care, ***even*** during the periods of time where the E/C provided a nurse *and* an aide, where the daughter remained in attendance during those times to assist, and to learn new skills to assist her father. Builder's Square v. Drake, 557 So. 2d 115 (Fla. 1st DCA 1990) (emphasis

added). In City of North Miami v. Towers, 557 So.2d 112 (Fla. 1st DCA 1990), it was held to be improper for a JCC to award *less* than 24 hours of attendant care, where, as in **REDACTED**'s case, the claimant required round-the-clock assistance for his injuries.

Dr. **REDACTED** clearly stated, in his deposition, that **REDACTED** needs 24 hour care. It is anticipated that the E/C will argue that another psychiatrist, Dr. **REDACTED**, has stated that **REDACTED**'s psychiatric condition does not impact his need for attendant care. This latter statement is not credible because it defies common sense, and as we will see in the next section, **REDACTED**'s testimony conflicts with all the other evidence in the case. Dr. **REDACTED** has gone so far as to prescribe additional weekly counseling sessions with a clinical psychologist. Given the seriousness of his psychiatric condition, common sense tells us that **REDACTED**'s psychiatric state of mind does have a profound impact upon his need for attendant care, and the extent to which it needs to be provided.

E. COMPENSABILITY OF PSYCHIATRIC ATTENDANT CARE:

The defense will argue that the line of cases typified by Timothy Bowser Constr. Co. v. Kowalski, 605 So.2d 885 (Fla. 1st DCA 1992) protects it from being required to provide the type of attendant care, supported by psychiatric testimony. That, however, is not true. In Kowalski, the claimant's doctor did not prescribe attendant care to treat a specific psychiatric illness. That doctor merely stated that various social activities were necessary to "reintegrate and assist the claimant with socialization in the community". These included visits with friends, trips to buy groceries, to the mall, to the beach, and so on. The 1st District declined to accept "quality of life" activities as being compensable.

The type of attendant care prescribed by Dr. **REDACTED**, however, is not designed to improve **REDACTED**'s "quality of life" by providing social visits with friends. Instead, the care was prescribed to treat a specific illness. **REDACTED** suffers from a multi-factorial psychiatric disorder that is currently being treated by sleeping pills, anti-anxiety medicine, and counseling sessions. Dr. **REDACTED**' prescription of a 24 hour companion is designed to treat specific psychiatric symptoms, which arise out of a medical condition. This type of care constitutes a medical treatment, designed to prevent psychiatric deterioration, where the man already suffering from depression, post traumatic stress disorder, and multiple anxiety disorders. Ideally, care might be best provided by a person trained in psychology, with whom **REDACTED** can form a bond. However, we feel that it is possible for the same type of person(s) to fulfill the need for physical assistance, as prescribed by Dr. **REDACTED**. In essence, Dr. **REDACTED**' psychiatric prescription for 24 hour companion care" is no different than Dr. **REDACTED**'s prescription for physical attendant care. It is intended to provide relief from specific symptoms. The fact that the prescription is of a psychiatric nature does not change its essential nature. In some cases of chronic injury, it is well known and accepted that physical therapy must go on forever, because to stop it, will cause a loss of mobility and function. This can be just as true in treatment of a psychiatric condition, except that, in psychiatry, we are dealing with neurons of the brain, instead of muscle fibers. In Orange County Sheriff v. Perez, 541 So.2d 652 (Fla. 1st DCA 1989) the court affirmed an award of attendant care where the treating physician opined that such care was needed to help the claimant "stay cool" when his condition caused him to become panicked and agitated. Similarly, **REDACTED** should be awarded attendant care to prevent him from lapsing into deeper depression, worse symptoms of post traumatic stress disorder, and anxiety. If both the medical

and lay testimony are consistent in saying that a worker requires round-the-clock attendant care, an award of attendant care *for any time less than 24 hours per day* is not supported by competent substantial evidence. Hunter v. Hernando County, 378 So.2d 798 (1st DCA 1991)(emphasis added).

The testimony of the two psychiatrists conflict. However, the lay evidence shows that, for at least the past two and a half years, **REDACTED** has received "on-call" 24 hour care from either **REDACTED** or **REDACTED**. Thus, the manifest weight of the evidence supports the testimony of psychiatrist, Dr. **REDACTED**, as opposed to psychiatrist, Dr. **REDACTED**. This is bolstered by the fact that it is incredulous for Dr. **REDACTED** to have diagnosed post-traumatic stress disorder and anxiety disorder, prescribed weekly counseling sessions, and so on, while at the same time saying that none of these psychiatric ailments has any effect on **REDACTED**'s need for attendant care. His opinion also conflicts with the observations of **REDACTED**, **REDACTED**'s treating orthopedic surgeon since 1988 who stated, on page 37 of his deposition, that he personally observed a psychological deterioration of **REDACTED**'s outlook on life over the years. Because **REDACTED**'s testimony conflicts with all the other evidence in the case, the court must view it as highly questionable, and cannot rely upon it. Furthermore, under the 1988 worker's compensation statutes, as noted above, conflicts must be resolved in favor of the claimant. Consequently, absent some objective reason not to do so, the conflict between two psychiatrists must be resolved in favor of **REDACTED**. Thus, the court should accept the testimony of Dr. **REDACTED**, as opposed to Dr. **REDACTED**, and it would abuse its discretion it less than 24 hour care were awarded.

F. A DISABLED HOUSE, AIR CONDITIONING AND OTHER SERVICES SHOULD BE AWARDED.

Both Dr. **REDACTED** and Dr. **REDACTED** testified that, absent forcing **REDACTED** into a specially constructed environment of an ALF, he will need a disabled equipped home built or his existing home will need to be modified. This is medically necessary due to the claimant's physical condition, difficult walking, the danger from falls, and chronic pain. **REDACTED** has also requested provision of air conditioning in the home, including system maintenance (to insure adequate climatization), telephone expenses (to insure the availability of a phone for medical emergencies), garbage collection (to insure sanitary conditions), cleaning supplies, lawn service (because of inability to care for the lawn surrounding his disabled housing on his own) and miscellaneous other household expenses arising out of his inability to perform household tasks. In Southern Industries, et al v. Robert Chumney, 613 So. 2d 74 (Fla. 1st DCA 1993), the court held that a claimant is eligible for a variety of benefits which may be deemed "medically necessary," including most of the items currently being requested by **REDACTED**. All of the items are medically necessary because they will treat, support or maintain his physical and/or psychiatric health. At the present time, he is living with his sister-in-law, who is also his caretaker. The lay testimony will show that the house needs to be enlarged to accommodate **REDACTED**. This will cost about $30,000.00. This court should order the E/C to pay for enlarging the house.

G. ENTITLEMENT TO HOME ATTENDANT CARE - NOT AN ALF:

Although, to date, no formal offer of an ALF institution has been made by the E/C, it is anticipated that they may attempt to modify their liability by alleging that they have the right to force **REDACTED** to accepting life in an assisted living facility, in lieu of a home health care attendant. This allegation has no merit.

A worker's compensation claimant, in Florida, is entitled to attendant care. Nothing in the statute authorizes an employer/carrier to force a claimant into an ALF, against his will. Indeed, personal freedoms are curtailed in ALF living situations, where rules and regulations exist to determine when and where the residents can go. In addition, he would be sharing his attendants. The statute provides that the E/C must pay an attendant(s) to take care of the claimant. There is no provision supporting the use of "shared" attendants, as in an ALF.

Furthermore, **REDACTED** does not want to enter such a facility, nor deal with the restrictions of his personal freedom that such institutions generally impose. An E/C cannot force a claimant to endure imprisonment in a facility he does not want to be in, absent a finding by a Circuit Court judge that the claimant lack competence, is a danger to himself or others, or is a criminal. **REDACTED**'s psychiatrist, Dr. **REDACTED**, has specifically testified that, in his particular case, putting him into an ALF, would increase his level of depression and reduce his functioning. The E/C is not entitled to uproot **REDACTED**, and force him into an ALF simply because it is cheaper than to provide home health care in accordance with the statutes. While it is true that Dr. **REDACTED** suggested the ALF alternative, he also admitted that he did so only to save money. He testified that, when the element of cost was taken out of the picture, the best alternative was for him to remain in his home.

The Florida Statutes do not require a claimant to share attendants, endure uncomfortable personal situations, and restrictions of personal movement and freedom, solely for the purpose of reducing the costs of an insurance company, especially when the situation will further injure the claimant psychologically. The E/C does not have the option of forcing **REDACTED** into an ALF.

H. THE CLAIMANT CAN CHOOSE THE ATTENDANT CARE PROVIDER:

The evidence shows that, more than two years ago, **REDACTED** ordered nursing assistance for **REDACTED**. This has also been ordered by Dr. **REDACTED**, and, most recently, by Dr. **REDACTED**. In all that time, the E/C failed to authorize a single provider to supply this care. The E/C is under a duty to "furnish to the employee such medically necessary remedial treatment, care and attendance . . . for such period as the nature of the injury or the process of recovery may require, including medicines, medical supplies, durable medical equipment, orthoses, prostheses, and other medically necessary apparatus." Section(s) 440.13(2)(a), Fla. Stat. (1988). If the employer/carrier fails to provide care then the employee may obtain alternative care at the expense of the employer/carrier subject only to reasonableness and necessity. The employee may obtain a ruling on the reasonableness and necessity in advance or seek the alternative care and obtain such ruling afterwards. Hill v. Beverly Enters, 489 So.2d 118, 121 (Fla. 1st DCA 1986) (orthopedist requested when none authorized); see also Sears, Roebuck and Co. v. Viera, 440 So.2d 49 (Fla. 1st DCA 1983)(holding that, where the employer declined claimant's request for a specific chiropractor "or [that failing] any other chiropractor chosen by the employer," the employee was entitled to retroactive authorization of the chiropractor who provided necessary treatment).

The E/C failed to authorize an attendant care provider, on a timely basis. Consequently, **REDACTED** has an absolute right to choose his own provider. He has done that. He has chosen **REDACTED** as his care provider, and, aside from the prior care issues which were settled between the parties, she has been providing attendant care, since March 1, 2002. We ask that she be retroactively authorized for past and future care.

III. CONCLUSION:

REDACTED should be provided with attendant care, a disabled equipped home or home modification, and the various other, supportive benefits, that have been requested. The court should award 24 hours of past attendant care (from March 1, 2002) at $16.00 per hour, with the same responsibility continuing to the future. Assuming the court awards 24 hours at $16.00 per hour, to the date of the hearing, on April 25, 2002, the E/C owes for 56 days of back benefits since the end-date covered by the existing settlement of some of the past care benefits, or $21,504.00. If the court finds 18 hours per day (compromising between the two psychiatrists to add 6 hours of psychiatric attendant care) the E/C owes $16,128.00. At 12 hours per day, the E/C owes $10,752.00 in back benefits. Future care should be at 24 hours per day, at $16.00 per hour with a COLA based on the ***medical rate of inflation (MRI)***, as reported by the federal government each year. The E/C failed to timely authorize an attendant care provider, and **REDACTED** has the right to choose his own. **SISTER IN LAW NAME REDACTED** is chosen and should be authorized retroactively, as well as authorized for future care.

If, for some reason, an outside agency is authorized to provide the care, **REDACTED** would not be able to remain in **REDACTED**'s home. The insurer will need to supply a house, so that the medically necessary attendant care can take place, and a van will be needed so that **REDACTED** can be taken to his medically necessary appointments, and all the other listed items needed by **REDACTED**, including, but not limited to, gardening, air conditioning, telephone, etc. will also be needed. Assuming **REDACTED** is appointed, however, **REDACTED** will be able to continue staying in her home, and many of these services will be provided as part of her "package". Nevertheless, her house does need modification to increase its size to accommodate **REDACTED** and his attendant care needs.

The cost of modifying the home will be approximately $30,000.00. The court should order the E/C to provide the money to perform this modification.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail, postage prepaid, and by email attachment transmission, to Mr. **Big Shot Defense Lawyer**, Esq., **Big Shot Ins. Defense Law Firm**, **Address Redacted**, St. Petersburg, Florida 33731 on this 22nd day of April, 2002.

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