

Johnson, Delbert

ATTENDANT SERVICES

Attendant care, as authorized by RCW 51.32.060(14) [RCW 51.32.060(3)], is not limited to "constant" care nor is it restricted to a worker so "physically helpless as to be unable to care for his personal needs" as stated in WAC 296-20-091. A blind worker need not rely on the charity of others to provide the basic necessities of life, nor can payment for those services be denied merely because they are provided by the worker's spouse.***In re Delbert Johnson, BIIA Dec., 89 0398 (1990)*** [*Editor's Note:* The Board's decision was appealed to superior court under Whatcom County Cause No. 90-2-00872-6.]

Scroll down for order.

1 Johnson's son was not paid for these services, but Intalco began compensating Wayne Johnson
2 several months after Mr. Johnson's return from the hospital. Intalco continued to pay for the services,
3 rendered by Mr. Johnson's son, for approximately nine years. The record does not disclose the
4 reason for Intalco's decision to terminate attendant services. Prior to the termination of attendant
5 services Mr. Johnson married Bonnie Johnson on August 27, 1985.
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9 On May 3, 1988 Mr. Johnson requested the services of an attendant pursuant to RCW
10 51.32.060(14) (1986)¹ which states in relevant part:
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12 In case of permanent total disability, if the character of the injury is such as
13 to render the worker so physically helpless as to require the hiring of the
14 services of an attendant, the Department shall make monthly payments to
15 such attendant for such services as long as such requirement continues . .
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17 The attendant care provision for pensioners was added to the statute by Laws of 1917, ch. 28, § 1, p.
18 78. Initially, the statute required that the worker be in need of a "constant attendant". However, by
19 Laws of 1947, ch. 246, § 1, p. 990 the word "constant" was deleted.
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21 Initially, as well, the statute provided for payment of a specified monthly amount to the worker
22 for attendant services, over and above the amount the worker was receiving in pension benefits. By
23 Laws of 1973, ch. 147, § 1, p. 434, the language was changed so that the monthly payment would go
24 directly to the attendant, not the worker. In addition, rather than a set amount of money, the attendant
25 was to receive no more than 40% of the state's average monthly wage. Finally, by Laws of 1975, 1st
26 ex. sess., ch. 224, § 9, p. 738, the legislature entirely deleted any specification of monetary amount to
27 be paid to the attendant.
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30 The deletion of the word "constant", as well as the deletion of a set monetary payment, both
31 evince a legislative intent that attendant services be provided to workers who require such services on
32 a less than 24-hour-a-day basis. The complete flexibility in the fee structure also indicates that the
33 legislature anticipated substantial leeway in the kind, duration, and skill level of attendant services to
34 be provided to permanently totally disabled workers under RCW 51.32.060.
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44 ¹ By Laws of 1988, ch. 161, § 1, p. 683, effective June 9, 1988, subsection 14 of RCW
45 51.32.060 was renumbered subsection 3 but the language remained identical. Indeed, throughout the
46 period since Mr. Johnson's January 28, 1977 industrial injury the statutory language here at issue has
47 remained essentially the same, with minor changes not relevant to this case.

1 The Washington Supreme Court in Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143 (1987)
2 has interpreted the Department WAC 296-20-091 as applying to attendant care services for
3 pensioners. That WAC states:
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5 When the worker's condition is such that he requires special nurses, a
6 private room or intensive care, the attending doctor may order these
7 services, subject to later department or self-insurer approval of the claim
8 without prior authorization. The department or self-insurer should be
9 notified immediately by collect telephone.
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11 RCW 51.32.060 provides attendant care for injured workers on total
12 permanent disability pension when such injured worker is so "physically
13 helpless as to be unable to care for his personal needs." However, prior to
14 total permanent disability determination some other workers, i.e.,
15 paraplegic, quadriplegic, double amputees, multiple fractures, etc. may
16 either temporarily or permanently require special or attendant (home
17 nurse) care.
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19 When the attending doctor has reason to believe such care is needed the
20 following information must be submitted in addition to basic report
21 requirements outlined in WAC 296- 20-035:

22 (1) Description of special/home nurse care required to include estimated
23 time required i.e., catheterization, 3 times per day--30 minutes; bathing, 2
24 times per day--one hour; toilet transfers -as needed; dressing change, 4
25 times per day -two hours.

26 (2) Skill level or special training required to administer care--i.e., RN; LPN;
27 family member who has received special training; no special training
28 required.
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30 (3) If known, name and address of person willing to provide care.

31 (4) Length of time special/home nurse care will be required.
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33 Approval of fees for home nurse/attendant care is negotiable based upon
34 care provided, and level of training of provider.

35 In addition, the department or self-insurer may authorize and pay for
36 visiting nurse care necessary for evaluation or instruction of home health
37 care provider.
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39 From our perusal of the legislative history of RCW 51.32.060, we cannot find the specific language "so
40 physically helpless as to be unable to care for his personal needs" which appears in quotation marks
41 in the Department WAC. It is unclear to us where that quotation comes from, but it does not come
42 from RCW 51.32.060.
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45 The WAC seems to focus primarily on traditional nursing care, despite the broad language of
46 the statute. However, neither the statute nor the WAC preclude an interpretation of RCW 51.32.060
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1 which would include such basic necessities of life as feeding, clothing, and housing oneself. To the
2 contrary, such an inclusive interpretation is supported by RCW 51.12.010, which specifically requires
3 that:
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5 This title shall be liberally construed to the purpose of reducing to a
6 minimum the suffering and economic loss arising from injuries and/or
7 death occurring in the course of employment.
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10 Furthermore, the WAC recognizes that different kinds and skill levels of attendant care are
11 contemplated, in providing for Department determination of the fee it will pay on a "negotiable" basis in
12 light of the "care provided, and level of training of provider."
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14 Mr. Johnson's request for attendant services was supported by Frederick S. Kaiser, M.D., an
15 ophthalmologist, who has treated the claimant for the injuries to his eyes. The industrial appeals judge
16 determined that Dr. Kaiser was not an expert in the needs of blind persons and sustained objections
17 made by the employer to Dr. Kaiser's testimony on this issue. As noted above, we have overruled
18 these objections. The Washington State Supreme Court in Ravsten, supra, specifically held that, in
19 order to establish a need for attendant care, the testimony of the attending physician is required.
20 Given the position of the Supreme Court, the testimony of Dr. Kaiser is not only admissible, but
21 necessary, in order to determine Mr. Johnson's entitlement to attendant care.
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23 Mr. Johnson has numerous restrictions due to his blindness. He cannot read prescription
24 labels, distinguish currency, or shop on his own. He cannot transport himself to areas not serviced by
25 public transportation. Intalco does not argue that these restrictions do not exist but instead contends
26 that these restrictions do not result in Mr. Johnson's being "so physically helpless as to require the
27 services of an attendant".
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29 The employer has presented testimony that there are numerous resources available to the
30 blind and that great strides have been made to provide blind persons with aids to increase their
31 self-sufficiency. While this is true, it is still clear that Mr. Johnson has certain restrictions placed upon
32 him solely due to his blindness. We believe he is entitled to a personal attendant to care for these
33 needs. The hope that Mr. Johnson will be as independent as possible despite his blindness cannot be
34 used to deprive him of benefits to which the statute and the regulation say he is entitled.
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36 The fact that Mr. Johnson presently has a wife who can provide for his needs does not justify
37 the Department's denial of Mr. Johnson's request for a personal attendant. As stated in In re Agnes
38 Knoell, BIIA Dec. 24 242 (1967):
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1 By the statutory language "so physically helpless as to require," the
2 reference of the work "require" is obviously limited to the claimant's
3 physical condition and cannot be construed as referring to either her family
4 situation or her economic circumstances.
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6 Knoell, at 5.
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8 Furthermore, WAC 296-20-091 implicitly recognizes that a "family member" may be an eligible
9 attendant.
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11 Nor is it reasonable to require Mr. Johnson, a statutory pensioner, to rely on the charity of
12 others to provide the basic necessities of life, when it is the industrial injury which has deprived him of
13 his self-sufficiency. While it is clear to us that Mr. Johnson does not need an around-the-clock
14 attendant, it is equally clear that he must have assistance at times to perform such basic tasks as
15 purchasing food, distinguishing currency, reading items such as prescriptions and bills, paying bills,
16 providing essential transportation, etc. We, therefore, remand this matter to the Department with
17 directions to pay for a personal attendant to the extent required to provide him with the basic
18 necessities of life. As previously noted, the amount of the fee for the attendant's services is a
19 negotiable matter based on the level of services provided.
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24 We hereby adopt and incorporate by reference Findings of Fact Nos. 1, and 2 of the Proposed
25 Decision and Order and Conclusion of Law No. 1. We also make the following Findings of Fact and
26 Conclusions of Law:
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28 **FINDINGS OF FACT**
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- 30 3. As a result of the industrial injury of January 28, 1977, claimant is blind.
31 He was placed on the pension rolls pursuant to RCW 51.08.160 as a
32 statutory pensioner, effective November 1, 1987.
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34 4. Because of his blindness, Mr. Johnson required assistance to provide for
35 the basic necessities of life, including but not limited to such tasks as
36 shopping for groceries, paying bills, reading prescriptions, and transporting
37 himself on necessary errands when public transportation was not
38 available, as of December 23, 1988.
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40 5. As of December 23, 1988 the character of the claimant's injury causally
41 related to his industrial injury of January 28, 1977 rendered him so
42 physically helpless as to require the hiring of the services of an attendant
43 on a PART- time basis to assist him with such basic essential activities as
44 those listed in Finding of Fact No. 4.
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CONCLUSIONS OF LAW

2. The Department is required to make monthly payments to an attendant to assist claimant with such basic essential activities as those listed in Finding of Fact No. 4, pursuant to RCW 51.32.060(14) (1986).
3. The Department order of December 23, 1988 which ordered that the request for home attendant care fee on behalf of Ms. Delbert Johnson be denied, is incorrect and is reversed and this claim is remanded to the Department to pay a personal attendant to assist the claimant with the basic necessities of life pursuant to RCW 51.32.060(14) (1986).

It is so ORDERED.

Dated this 15th day of June, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
PHILLIP T. BORK Member