Nebraska Law Review

Volume 58 | Issue 2 Article 8

1978

Expanding Liability under the Nebraska Workmen's Compensation Act: *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978)

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Note

Expanding Liability Under The Nebraska Workmen's Compensation Act

Spiker v. John Day Co., 201 Neb. 503, 270 N.W.2d 300 (1978).

I. INTRODUCTION

For many years, the Nebraska Supreme Court has held that an employer, or workmen's compensation insurance carrier, is not liable for further medical expenses after an employee has been adjudged permanently disabled, *i.e.*, it has been determined that any further treatment will not cure or improve the employee's condition.[1] The court has also held that nursing services performed by the spouse of the disabled employee are not compensable[2] under the Workmen's Compensation Act.[3] *Spiker v. John Day Co.*[4] has recently changed both of these rules.

II. THE DECISION

On August 11, 1971, Harold Spiker, while traveling as a salesman for the John Day Co., was involved in a car accident which left him totally and permanently disabled. Mr. Spiker's hospital and medical bills were paid by his employer and insurance carrier through March 3, 1972. After that date, all further compensation for medical expenses was denied even though the employer and insurance carrier were aware that continuous custodial care, either at home or in a nursing home, would be required for the remainder of Mr. Spiker's life. To reduce the expense of this care,

1. Halbert v. United States Fid. & Guar. Co., 185 Neb. 775, 178 N.W.2d 781 (1970); Peek v. Ayres Auto Supply, 155 Neb. 233, 57 N.W.2d 387 (1952); Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N.W.2d 11 (1947); Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N.W. 254 (1938).
2. Claus v. DeVere, 120 Neb. 812, 235 N.W. 450 (1931).
3. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
4. 201 Neb. 503, 270 N.W.2d 300 (1978).

Mrs. Spiker herself provided a great deal of it in their home.[5]

In *Spiker v. John Day Co.*,[6] the Nebraska Supreme Court was asked to determine whether the Nebraska Workmen's Compensation Act requires an employer to provide medical treatments which will not cure or improve a disabled employee.[7] The court held that medical services shall be provided by the employer as they are required by the employee.[8] The dissenting opinion declared that recovery for medical treatment that will not cure or improve the employee was not available under the Workmen's Compensation Act as it existed on the date of Mr. Spiker's accident and was clearly opposed to prior Nebraska case law.[9]

The court was also asked to decide whether, under the Act, compensation could be paid for the medical services which were provided by the employee's wife. The majority overruled the long-standing rule of *Claus v. DeVere*[10] in order to allow recovery for the services provided by Mrs. Spiker.[11] The dissent labeled this action a bit of judicial legislation.[12] It expressed the opinion that a rule which has stood unchallenged for forty-seven years should not be changed by the court; such a change should be a legislative decision.[13]

III. RELIEVE OR CURE?

The automobile accident which permanently disabled the plaintiff, Mr. Spiker,[14] arose out of and in the course of his employment with the defendant, John Day Co.[15] The compensation court found that plaintiff sustained cerebral trauma at the time of the accident which resulted in chronic focal organic brain syndrome with behavioral disorder.[16] On rehearing, the compensation court found that plaintiff was totally and permanently disabled as a result of the brain injury and would require custodial or nursing home care for the remainder of his life.[17] It awarded an amount equivalent to

5. *Id.* at 518, 270 N.W.2d at 308.
6. 201 Neb. 503, 270 N.W.2d 300 (1978).
7. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
8. 201 Neb. at 511, 270 N.W.2d at 305.
9. *Id.* at 524, 270 N.W.2d at 311. (White, C. J., joined by Spencer & Clinton, J. J.).
10. 120 Neb. 812, 235 N.W. 450 (1931).
11. 201 Neb. at 512, 270 N.W.2d at 305.
12. *Id.* at 529, 270 N.W.2d at 313.
13. *Id.*
14. Mrs. Spiker was substituted as the plaintiff after being appointed conservator for Mr. Spiker on March 21, 1977. However, Mr. Spiker will still be referred to as the plaintiff.
15. 201 Neb. at 504, 270 N.W.2d at 302.
16. *Id.* at 504-05, 270 N.W.2d at 302.
17. *Id.* at 505, 270 N.W.2d at 302.

the cost of this care for the time plaintiff was cared for by Mrs. Spiker.[18] The issue presented upon appeal was whether an employee who is totally and permanently disabled as a result of an injury arising out of and in the course of his employment may recover the cost of medical and nursing care which does not lessen or cure the disability.[19]

The employee's sole recovery against his employer in this case, as in any other workmen's compensation case, is that allowed under the Nebraska Workmen's Compensation Act[20] in effect at the time of the injury. The Act, as it existed at the time of plaintiff's injury, specifically provided:

> The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, and in addition to devices necessary for treatment, the first prosthetic devices, subject to the approval of the compensation court, not to exceed the regular charge made for such service in similar cases . . . .
>
> . . . .
>
> The court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished . . . .[21]

The statute did not specify that the services or medicines must cure or improve the condition of the injured employee before the employer would be required to provide them. The statute merely required that they be provided "as and when needed. . . subject to the approval of the compensation court."[22]

Even though Nebraska is catalogued[23] as a state which does not allow medical benefits under workmen's compensation when the treatment will merely maintain rather than cure the employee, a review of Nebraska case law demonstrates that such benefits have been discreetly allowed in some cases.[24] In *Gilmore v. State*,[25] plaintiff was totally disabled as a result of a compensable injury. The court allowed recovery for all accident related medical expenses incurred up to the time of his death.[26] The court determined only that the expenses were accident related, reasonable, and necessary, as a result of the injury.[27] There was no discussion

18. *Id.*
19. *Id.* at 506, 270 N.W.2d at 303.
20. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
21. *Id.*
22. *Id.*
23. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.14 at 10-476 (1976).
24. Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N.W.2d 624 (1971); Gilmore v. State, 146 Neb. 647, 20 N.W.2d 918 (1945).
25. 146 Neb. 647, 20 N.W.2d 918 (1945).
26. *Id.* at 651-52, 20 N.W.2d at 920.
27. *Id.*

regarding whether any of the services or medicines improved the condition of the employee.

In *Shotwell v. Industrial Builders, Inc.*,[28] plaintiff sustained permanent partial injuries as a result of a work-related accident. The court acknowledged that his condition would continue to deteriorate with time and that medical services would be required for the rest of his life.[29] Even though there was no indication that such medical services would improve the condition of the plaintiff, the court held: "The undisputed evidence indicates plaintiff will require medicines, and medical and hospital services in the future as a result of his injuries. If and when such items are required, they shall, subject to approval by the compensation court, be supplied at defendants' expense."[30] Chief Justice White joined in the dissent in *Shotwell*.[31] This dissenting opinion, however, was based upon grounds entirely different than those on which White dissented in *Spiker*.[32] The *Shotwell* dissent did not object on the ground that medical expenses were allowed for treatment which would merely maintain or relieve rather than improve or cure. On the contrary, it was based solely on the fact that plaintiff was held to be only partially disabled rather than totally disabled.[33] Apparently, even White approved payment of medical expenses in this instance. If allowing recovery for medical treatments which merely maintain is judicial legislation, as implied in the *Spiker* dissent,[34] the court has been legislating for quite some time.

The cases cited by the defendant and the dissent in *Spiker* as controlling[35] held that medical treatments which will not necessarily improve the condition of the injured employee, or those from which the possibility of any improvement would be merely conjectural, are not compensable under the Workmen's Compensation Act.[36] However, these cases[37] did not deal with treatments which were necessary to maintain life, as was the case with Mr. Spiker;

28. 187 Neb. 320, 190 N.W.2d 624 (1971).
29. *Id.* at 322, 190 N.W.2d at 626.
30. *Id.* at 323-24, 190 N.W.2d at 627.
31. *Id.* at 324, 190 N.W.2d at 627 (Spencer, J., dissenting).
32. 201 Neb. at 524, 270 N.W.2d at 311 (White, C.J., dissenting).
33. 187 Neb. at 324, 190 N.W.2d at 627.
34. 201 Neb. at 524, 270 N.W.2d at 311.
35. Halbert v. United States Fid. & Guar. Co., 185 Neb. 775, 178 N.W.2d 781 (1970); Peek v. Ayres Auto Supply, 155 Neb. 233, 57 N.W.2d 387 (1952); Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N.W.2d 11 (1947); Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N.W. 254 (1938).
36. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
37. Halbert v. United States Fid. & Guar. Co., 185 Neb. 775, 178 N.W.2d 781 (1970); Peek v. Ayres Auto Supply, 155 Neb. 233, 57 N.W.2d 387 (1952); Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N.W.2d 11 (1947); Wilson v. Brown-McDonald, Co., 134 Neb. 211, 278 N.W. 254 (1938).

rather, they dealt with treatments which were apparently elective, of which the result was uncertain. Even after the court stated that treatment would not be compensable if no improvement was expected, compensation was allowed in some cases.[38] Contrary to the dissent's contention, the court did not take a very big leap in allowing recovery for Mr. Spiker's medical expenses after it was determined that he was permanently and totally disabled.

Since in prior decisions the Nebraska Supreme Court had allowed compensation for accident-related medical treatments of the type required by Mr. Spiker for the remainder of his life,[39] the *Spiker* decision could have rested on those cases alone. Nevertheless, the court went on to review the relevant case law in several other jurisdictions. Most of the cases turned on the interpretation of the words "cure and/or relieve" as taken from either state statute or common law.[40] The court then combined the interpretations of the words "relieve and/or cure" from other jurisdictions with its own determination that the recovery for future medical expenses in *Shotwell* was not dependent upon the hope for a cure and decided that the nursing care required by Mr. Spiker as a direct result of his accident was compensable[41] under the Workmen's Compensation Act.[42]

The majority of other jurisdictions which have faced the question have held that "cure" and "relieve" have separate and distinct meanings.[43] Since both words were used by the legislature or the court, each must be given effect. Therefore, treatment may be compensable even though it only *relieves* the injured employee

38. Halbert v. United States Fid. & Guar. Co., 185 Neb. 775, 178 N.W.2d 781 (1970) (expense of additional surgery was allowed because, although unsuccessful, there was reason to believe it would be effective and plaintiff's doctor felt it was necessary); Peek v. Ayres Auto Supply, 155 Neb. 233, 57 N.W.2d 387 (1952) (defendant required to pay all medical expenses incurred to the time of trial even though treatments did not necessarily help plaintiff's condition and doctors had told plaintiff to return to work earlier).

39. Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N.W.2d 624 (1971); Gilmore v. State, 146 Neb. 647, 20 N.W.2d 918 (1945).

40. W. J. Newman Co. v. Industrial Comm'n, 353 Ill. 190, 187 N.E. 137 (1933); Castle v. City of Stillwater, 235 Minn. 502, 51 N.W.2d 370 (1952); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969); Brollier v. Van Alstine, 236 Mo. App. 1233, 163 S.W.2d 109 (1942); Howard v. Harwood's Restaurant Co., 40 N.J. Super. 564, 123 A.2d 815 (1956), *aff'd*, 25 N.J. 72, 135 A.2d 161 (1957); Orrick Stone Co. v. Jeffries, 488 P.2d 1243 (Okla. 1971).

41. 201 Neb. at 511, 270 N.W.2d at 305.

42. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).

43. W. J. Newman Co. v. Industrial Comm'n, 353 Ill. 190, 187 N.E. 137 (1933); Castle v. City of Stillwater, 235 Minn. 502, 51 N.W.2d 370 (1952); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969); Brollier v. Van Alstine, 236 Mo. App. 1233, 163 S.W.2d 109 (1942); Howard v. Harwood's Restaurant Co., 40 N.J. Super. 564, 123 A.2d 815 (1956), *aff'd*, 25 N.J. 72, 135 A.2d 161 (1957).

from the effects of his or her injury and does not take any step toward a cure.

The requirement that the services or medicines must "relieve or cure" in order to be compensable does not appear in the Workmen's Compensation Act[44] and was apparently added to Nebraska law as an additional hurdle, or stepping stone, for the injured employee in *Newberry v. Youngs*.[45] In *Newberry*, plaintiff claimed payment for a pair of eyeglasses which were broken in the compensable accident. The court held:

> Need for eyeglasses is not the test. The burden placed upon the employer by [the Act] is designed to relieve or cure the physical injuries suffered by the employee. We see no more reason to require the defendant to pay for eyeglasses under the circumstances here than there would be to pay the cost of cleaning or repairing clothing soiled or torn in an accident.[46]

It would appear from this passage that the court intended to limit recovery under the Workmen's Compensation Act[47] to that necessitated because of the "physical injuries suffered by the employee."[48] It did not intend, nor did it anticipate, that the words "relieve or cure" would be taken out of their original context and interpreted either narrowly or broadly to contract or expand the recovery allowed under the Workmen's Compensation Act. In *Spiker*, the court pulled the words "relieve or cure" out of the context in which they had been used in *Newberry*, attributed to them the meaning that other jurisdictions had given them, and arrived at the same result they could have reached through more traditional means.

The result reached by the court also appears to be appropriate under the language of the Workmen's Compensation Act, which specifies: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed . . . ."[49] The language of the statute in no way limits compensable services to those reasonably certain to cure or improve the condition of the injured employee. Chief Justice White claimed in his dissenting opinion, however, "[u]nder no reasonable construction or interpretation of this statute can it be said that the employer is liable for purely custodial care of the injured employee, which will do nothing to improve his injured condition."[50] He concluded his dis-

44. For text of NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978), see text accompanying note 21 *supra*.
45. 163 Neb. 397, 80 N.W.2d 165 (1956).
46. *Id.* at 405, 80 N.W.2d at 170.
47. NEB. REV. STAT. § 48-120 (Issue 1943) (amended 1978).
48. 163 Neb. at 405, 80 N.W.2d at 170.
49. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
50. 201 Neb. at 528, 270 N.W.2d at 313.

sent by stating, "Under the guise of judicial interpretation, the majority opinion has rewritten and liberalized recovery under the workmen's compensation laws. If such a result is desirable, the responsibility for the nature and amount of benefits accorded to the injured employee rests with the Legislature."[51]

Subsequent to Mr. Spiker's accident in 1971 but prior to the release of the supreme court's decision, the legislature amended the Workman's Compensation Act to read:

> The employer shall be liable for all reasonable medical, surgical, and hospital services . . . and medicines as and when needed, *which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment* . . . subject to the approval of and regulation by the compensation court, not to exceed the regular charge made for such service in similar cases.[52]

Although such recovery was not precluded under the former statute, the amendment affirmatively provided for compensation for services and medicines which only maintain or relieve the pain of an injured employee.[53]

IV. NURSING SERVICES PROVIDED BY A SPOUSE

The second major issue faced by the court in *Spiker* was whether an injured employee could recover for nursing services provided by the employee's spouse.[54] The long-standing rule[55] in Nebraska that these services were not compensable was overruled in *Spiker* and the recovery was allowed.[56]

Subsequent to the termination of medical payments by defendant's insurer on March 3, 1972, Mrs. Spiker provided a great deal of her husband's care in their home. She spent a total of 3,371 hours over 171 days taking care of him. The care provided by Mrs. Spiker included turning her husband at least once an hour during the night, administering medication and inserting catheters when

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51. *Id.* at 531, 270 N.W.2d at 314.
52. NEB. REV. STAT. § 48-120 (Cum. Supp. 1978) (emphasis added).
53. Although this amendment is helpful in clarifying that an injured employee will be compensated for his continuing medical needs even if such treatments will not improve his overall condition, its application may raise problems. There may be treatments which will relieve pain but which have not been recommended by the employee's physician or which do not necessarily fall into the definition of "medical services," *e.g.*, backrubs. Are these services which may be compensated under the statute as amended? However, since the statute does specify "medical, surgical and hospital services . . . which are required by the nature of the injury and which will relieve pain," the compensation court should be able to control any possible abuse of this provision.
54. 201 Neb. at 517, 270 N.W.2d at 308.
55. Claus v. DeVere, 120 Neb. 812, 235 N.W. 450 (1931).
56. 201 Neb. at 512, 270 N.W.2d at 305.

necessary, changing bedding after bowel movements and taking care of him completely on nights and weekends. Mrs. Spiker was not a professional nurse. A nurse was employed to carry out these functions during the weekdays. Reduction of cost was the reason stated by Mrs. Spiker for performing these services herself.[57]

The Nebraska Workmen's Compensation Act in effect at the time of Mr. Spiker's accident required that the employer pay for "reasonable medical and hospital services and medicines as and when needed."[58] Although this statute did not specifically state that an employer was liable for nursing services, the court came to the conclusion that these services were covered under the Act: "There is little question that under either the original statute or the subsequent amendment, nursing services, as such, are covered as reasonable medical services."[59] The court pointed out its belief that there should be no difference in effect between those statutes that specify "nursing services" and those that merely refer to "medical services."[60] Therefore, the only remaining question was whether there may be recovery when a wife has provided these services.

Although the jurisdictions are divided on the question of whether compensation should be paid for nursing services provided by a spouse, the modern trend appears to be to allow recovery.[61] For many years, *Claus v. DeVere*[62] has stood as the rule in Nebraska. It held that nursing services performed by a wife are not compensable:

> The rule is that the husband is entitled to the services of the wife. He is not liable to her; nor could she sue and recover from him for any service rendered him as a wife and a member of his household. . . . If defendant's wife had been a professional nurse, carrying on her separate profession, and was called as a nurse to care for her husband in a hospital where she was employed, or from her work in the hospital to care for him in his home, a different question would be presented.[63]

Claus did indicate that a wife's nursing services may be compensable in certain limited circumstances, such as when the wife is a professional nurse and specifically hired to care for her husband.[64]

The most common argument for denying recovery for a wife's nursing services is that the husband is entitled to the services of the wife—they are merely a part of her marital obligation.[65] Other

57. *Id.* at 518, 270 N.W.2d at 308.
58. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
59. 201 Neb. at 516-17, 270 N.W.2d at 308.
60. *Id.* at 517, 270 N.W.2d at 308.
61. 2 A. LARSON, *supra* note 23, § 61.13, at 10-469 to -472.
62. 120 Neb. 812, 235 N.W. 450 (1931).
63. *Id.* at 818, 235 N.W. at 453.
64. *Id.*
65. *See* Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705 (1925) (indi-

courts have phrased the arguments for denying recovery differently. Some have said it is the legal duty of the wife to care for her husband;[66] one court has held that these are services that any conscientious wife would give.[67] Some have stated that since the services of a spouse or another member of the household are generally gratuitous, there must be notice that the services are not being rendered gratuitously before the employer will be required to pay for them.[68] There are even some courts which have spoken of denying recovery on the basis of statutory language which requires the employer to pay only the "expense" of medical services.[69] The husband is not liable to his wife for the services rendered; accordingly, there is no expense.

The *Spiker* majority cited several cases from this jurisdiction and others for the proposition that the services of a spouse were not compensable because "the care rendered was *not* so unusual or extraordinary from normal household duties as to be compensable."[70] This is a reason used in some jurisdictions when denying recovery in a particular instance.[71] This reason is only used, though, after the court has determined that the *nursing services* of

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cating that recovery would have been allowed if the services provided by the wife would otherwise have required a professional nurse, but assumed no further professional care was required after the husband was released from the hospital; therefore, the services performed by the wife were assumed to be those normally imposed by the marital obligation). *See also* Claus v. DeVere, 120 Neb. 812, 818, 235 N.W. 450, 453 (1931).

66. Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705 (1925), held that the possible legal duty to care for an injured spouse is not applicable when the employer has a statutory duty to pay medical expenses. *See also* A.G. Crunkleton Elec. Co. v. Barkdoll, 227 Md. 364, 177 A.2d 252 (1962); Collins v. Reed-Harlin Grocery Co., 230 S.W.2d 880 (Mo. App. 1950); Transport Ins. Co. v. Polk, 400 S.W.2d 881 (Tex. 1966).

67. Kushay v. Sexton Dairy Co., 394 Mich. 69, 228 N.W.2d 205 (1975), held that the fact that a conscientious wife would perform nursing services does not relieve the employer of his duty to provide such services.

68. California Cas. Indem. Exch. v. Industrial Accident Comm'n, 84 Cal. App. 2d 417, 190 P.2d 990 (1948); Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705 (1925).

69. Dunaj v. Harry Becker Co., 52 Mich. App. 354, 217 N.W.2d 397 (1974); Graf v. Montgomery Ward & Co., 234 Minn. 485, 49 N.W.2d 797 (1951); Transport Ins. Co. v. Polk, 400 S.W.2d 881 (Tex. 1966); Western Alliance, Inc. v. Tubbs, 400 S.W.2d 850 (Tex. Civ. App. 1965).

70. 201 Neb. at 522-23, 270 N.W.2d at 310.

71. Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705 (1925) (court assumed that since husband sent home from hospital, no extraordinary care required); South Coast Constr. Co. v. Chizauskas, 172 So. 2d 442 (Fla. 1965). *Cf.* Pan Am. World Airways, Inc. v. Weaver, 226 So. 2d 801 (Fla. 1969) (recovery for hired unlicensed practical nurse reduced by one-half upon determination that approximately one-half of her time was spent on normal household duties).

the spouse would be compensable, but that in this particular instance no nursing services were rendered.

Just as there are a variety of arguments for denying compensation for nursing services provided by a spouse, there are also a variety of reasons for granting such recovery. The concurring opinion in *Spiker*[72] reviewed the many reasons and based its holding allowing recovery for the nursing services provided by Mrs. Spiker on a combination of them. Several cases which have allowed compensation for services provided by a spouse have considered the fact that the employer knew that such services were required and failed to otherwise provide them.[73] In this way, the employer is sometimes said to have waived its statutory right to designate who is to perform the services.[74]

It has also been held that, rather than waiving the right to designate who is to perform the services, the employer and insurer have actually employed the spouse.[75] The doctor who asked the spouse to provide the services and gave the necessary instruction was held to be the agent of the employer and insurer. This would appear to be a fiction which, as long as the employer knows of the need and fails to fulfill it, is not necessary. Since it is the employer's duty to provide all medical services necessary as a result of the compensable accident, if a spouse performs the services, recovery should be allowed.

Another primary consideration cited by many courts when allowing compensation for services performed by a spouse is that such services were extraordinary—they were above and beyond the services normally provided or contemplated in a marriage.[76] This consideration seems to serve a two-fold purpose. It is first stated as a reason for granting recovery for nursing services provided by a spouse.[77] Second, it is used to limit the recovery actu-

72. 201 Neb. at 515, 270 N.W.2d 307 (Brodkey, J., concurring).
73. California Cas. Indem. Exch. v. Industrial Accident Comm'n, 84 Cal. App. 2d 417, 190 P.2d 990 (1948); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969); Collins v. Reed-Harlin Grocery Co., 230 S.W.2d 880 (Mo. App. 1950); Transport Ins. Co. v. Polk, 400 S.W.2d 881 (Tex. 1966).
74. Balsamo v. Fisher Body Div.-Gen. Motors Corp., 481 S.W.2d 536 (Mo. App. 1972).
75. California Cas. Indem. Exch. v. Industrial Accident Comm'n, 84 Cal. App. 2d 417, 190 P.2d 990 (1948).
76. California Cas. Indem. Exch. v. Industrial Accident Comm'n, 84 Cal. App. 2d 417, 190 P.2d 990 (1948); Oolite Rock Co. v. Deese, 134 So. 2d 241 (Fla. 1961); A.G. Crunkleton Elec. Co. v. Barkdoll, 227 Md. 364, 177 A.2d 252 (1962); Kushay v. Sexton Dairy Co., 394 Mich. 69, 228 N.W.2d 205 (1975); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969); Balsamo v. Fisher Body Div.-Gen. Motors Corp., 481 S.W.2d 536 (Mo. App. 1972); Groce v. Pyle, 315 S.W.2d 482 (Mo. App. 1958); Transport Ins. Co. v. Polk, 400 S.W.2d 881 (Tex. 1966).
77. California Cas. Indem. Exch. v. Industrial Accident Comm'n, 84 Cal. App. 2d

ally given to that which compensates for the services which were extraordinary.[78] Housekeeping duties, even though a greater burden because of the special needs of the disabled employee, are in this manner eliminated from the recovery.[79]

Many courts consider whether a spouse gave up other employment in order to be available to provide the required nursing services for the disabled employee.[80] This factor does not appear to be determinative. Other courts look merely at employability,[81] and some do not even reach the subject. It is odd that this factor is ever considered when the reason for the compensation is not because of need or wages lost to the family, but rather, because of the employer's statutory duty to provide the necessary medical services.

The fact that the applicable statute focuses upon the nature of the services provided rather than upon the status of the provider of such services is also a consideration in some jurisdictions.[82] The

417, 190 P.2d 990 (1948); Oolite Rock Co. v. Deese, 134 So. 2d 241 (Fla. 1961); A.G. Crunkleton Elec. Co. v. Barkdoll, 227 Md. 364, 177 A.2d 252 (1962); Kushay v. Sexton Dairy Co., 394 Mich. 69, 228 N.W.2d 205 (1975); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969); Balsamo v. Fisher Body Div.-Gen. Motors Corp., 481 S.W.2d 536 (Mo. App. 1972); Groce v. Pyle, 315 S.W.2d 482 (Mo. App. 1958). *But cf.* Klapacs's Case, 355 Mass. 46, 242 N.E.2d 862 (1968) (services of wife were extraordinary but no compensation was allowed because they were not medical services); Graf v. Montgomery Ward & Co., 234 Minn. 485, 49 N.W.2d 797 (1951) (services of wife were extraordinary but no compensation because no showing of expense or of employment given up).

78. South Coast Constr. Co. v. Chizauskas, 172 So. 2d 442 (Fla. 1965). *Cf.* Pan Am. World Airways, Inc. v. Weaver, 226 So. 2d 801 (Fla. 1969) (recovery of compensation for hired, unlicensed practical nurse was reduced by one-half to cover only those services related to nursing). *But cf.* Pacific Elec. Ry. v. Industrial Accident Comm'n, 96 Cal. App. 2d 651, 216 P.2d 135 (1950) (allowed recovery for non-extraordinary duties performed by hired nurse when reason for leaving hospital and hiring nurse was to reduce expense).

79. Pan Am. World Airways, Inc. v. Weaver, 226 So. 2d 801 (Fla 1969); South Coast Constr. Co. v. Chizauskas, 172 So. 2d 442 (Fla. 1965). *But cf.* Pacific Elec. Ry. v. Industrial Accident Comm'n, 96 Cal. App. 2d 651, 216 P.2d 135 (1950) (allowed recovery for housekeeping duties performed by a hired nurse).

80. California Cas. Indem. Exch. v. Industrial Accident Comm'n, 84 Cal. App. 2d 417, 190 P.2d 990 (1948); Oolite Rock Co. v. Deese, 134 So. 2d 241 (Fla. 1961); Graf v. Montgomery Ward & Co., 234 Minn. 485, 49 N.W.2d 797 (1951); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772 (Mo. 1969); Groce v. Pyle, 315 S.W.2d 482 (Mo. App. 1958).

81. A.G. Crunkleton Elec. Co. v. Barkdoll, 227 Md. 364, 177 A.2d 252 (1962). *Cf.* Brinson v. Southeastern Utils. Serv. Co., 72 So. 2d 37 (Fla. 1954) (court determined value of wife's nursing services on basis of what it felt she could earn outside the home).

82. A.G. Crunkleton Elec. Co. v. Barkdoll, 227 Md. 364, 177 A.2d 252 (1962); Kushay v. Sexton Dairy Co., 394 Mich. 69, 228 N.W.2d 205 (1975); Groce v. Pyle, 315 S.W.2d 482 (Mo. App. 1958); Collins v. Reed-Harlin Grocery Co., 230 S.W.2d 880 (Mo. App. 1950); Daugherty v. City of Monett, 238 Mo. App. 924, 192 S.W.2d 51 (1946).

statute merely requires that "medical services" be provided. It does not specify the qualifications of the provider or that the provider must be hired.

After reviewing the reasons for allowing recovery for nursing services provided by a spouse, the majority opinion in *Spiker* combined them into one holding based upon equitable considerations:

> The employer-insurer should not be allowed to profit from the gratuitous care, given out of love, to an injured employee by his spouse, when it was the employer which *forced* the care of the employee upon the spouse.
>
> I conclude from the foregoing authorities that it would be most inequitable not to permit an injured employee, entitled to workmen's compensation benefits under the applicable statute, to recover the value of services rendered him by his spouse or other members of his family.[83]

Spiker also sets out a three-prong test which must be met before compensation for a spouse's services may be recovered. This test had not been previously set out in any of the cases reviewed by the court. It appears to be merely a condensation of some of the factors examined by other courts. Such a test is beneficial, however. The Nebraska Supreme Court is breaking new ground in this state by allowing compensation for nursing services performed by a wife. Setting out a specific test for awarding compensation will greatly facilitate the application of the new rule in future cases.

The court set out the test in the following words:

> [T]here are three basic requirements to be satisfied before compensation will be allowed for the care given an injured employee by the spouse in their home. These requirements are that: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the wife must be extraordinary and beyond normal household duties; and, finally (3) there must be a means of determining the reasonable value of the services rendered by the spouse.[84]

The first requirement of the test, that the employer know of the disability and the need for care, will serve several purposes. It will insure that the employer has had an opportunity to supply the required services in some other manner. It will also provide a check on the system and prevent possible fraud with regard to the services actually required. This requirement may present some problems though, if it is interpreted as an actual test rather than as a factor to be considered. If a test, this requirement may prevent recovery for services performed prior to the time that the employer learns of the disability and the need for care. It may encourage an employer to avoid learning the condition and the needs of the injured employee. Neither of these possible outcomes are desirable.

83. 201 Neb. at 523, 270 N.W.2d at 311 (emphasis in original).
84. *Id.* at 519, 270 N.W.2d at 309.

If the requirement is construed as a factor to be considered, these undesirable outcomes could, to a large extent, be avoided.

The value of the second prong of the test lies primarily in its definition of compensable services performed by the wife. This step will limit recovery to compensation for *nursing services*. Although the first and second prongs of the test will be valuable in the future, the third prong appears to be superfluous. This step of the test requires that there be a means for determining the reasonable value of the wife's services. There will always be such methods available. The court could examine the cost of equivalent care in a hospital or nursing home. It could base the compensation on the cost of the care if provided in the home by a professional nurse or some other medically trained person who had been hired to perform the required services. The inclusion of this portion of the test will add little to the value and effectiveness of the test.[85] Despite its formulation of the test, the court held that "[t]he plaintiff is entitled to an award for the reasonable value of the nursing care furnished to him by Mrs. Spiker while he was cared for at home . . . ."[86] without discussing whether the test's requirements were met.

The dissenting opinion of Chief Justice White[87] objected to the overruling of *Claus v. DeVere*:[88] "[A] rule of such established standing, interpreting the statute, should not be reversed except after a full hearing and examination in the legislative forum."[89] It is probable that the issue has not yet reached the legislative forum because the workmen's compensation insurance carriers, in the interest of reducing expenses, have voluntarily paid compensation for the services provided by a spouse rather than pay the entire expense of continued hospital care, nursing home care or professional nursing care. Any of these options would undoubtedly cost more than it would cost the insurer to reasonably compensate the spouse for services provided. If this payment had not been voluntarily provided for so many years, it is likely that many spouses, rather than providing the services "gratuitously" would hire a trained nurse to perform the same functions. White also commented: "Every wife now becomes a nurse — and a paid one. . . . And the wedding vow 'to care for him, in sickness and health' be-

85. A bill has been introduced in the Nebraska Legislature to limit a spouse's compensation for nursing services to $100 per week. L.B. 447, 86th Leg., 1st Sess. (1979). This limitation would appear inadvisable since it would discourage nursing professionals from providing care for a disabled spouse rather than working outside the home.
86. 201 Neb. at 512, 270 N.W.2d at 305.
87. *Id.* at 524, 270 N.W.2d at 311.
88. 120 Neb. 812, 235 N.W. 450 (1931).
89. 201 Neb. at 529, 270 N.W.2d at 313.

comes in part, an employer's financial burden."[90] However, it is not the burden of the wedding vow which is, by this case, being placed upon the employer. The services performed by Mrs. Spiker were not the type of services normally provided for one spouse by the other. They were not the services normally considered to fall within the obligations of the wedding vow. These services were extraordinary; they were the kind of services generally provided by a trained, professional nurse. The only burden placed upon the employer by *Spiker* is that which was placed on him many years ago by the Workmen's Compensation Act—the duty to provide or pay for all reasonable medical expenses.

V. CONCLUSION

The *Spiker* court correctly decided that medical expenses were to be paid by the employer even when the treatment could not reasonably be expected to cure the disabled employee or send him speedily along the road to recovery. The Act[91] has never been so limited and the time was right for the court to recognize this and give to the disabled employee all that is due. It was also time for the court to give to the employee openly what it had in the past given only very discreetly.[92]

This decision, however, does raise some interesting questions. After *Spiker*, will an employer be required to continue payment for psychiatric treatments when they are said to be necessary to maintain the mental condition of the employee but there is little hope of improvement? If so, is there a standard as to the level at which the mental condition must be maintained? Also, to what limits must an employer go in providing medical treatment if it is apparent that the disabled employee's condition is deteriorating? Must the newest techniques and treatments be provided at all costs? As a result of *Spiker*, these issues will have to be resolved either in future cases or by statute.

The court was also correct in ordering the employer to compensate the disabled employee for the nursing services provided by the employee's wife. The Act clearly has not precluded such compensation. This decision does not transfer a legal or marital obligation from the wife to the employer. It merely compensates the

90. *Id.* at 530, 270 N.W.2d at 314.
91. NEB. REV. STAT. § 48-120 (Reissue 1974) (amended 1978).
92. Shotwell v. Industrial Builders, Inc., 187 Neb. 320, 190 N.W.2d 624 (1971); Gilmore v. State, 146 Neb. 647, 20 N.W.2d 918 (1945).

wife who has been forced to, or because of economic considerations agrees to, fulfill an obligation of the employer—the obligation to provide medical services.

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