



PATIENTS' COMPENSATION FUND
OVERSIGHT BOARD
OFFICE OF THE EXECUTIVE DIRECTOR
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MICHAEL LABICHE individually,
and as Curator for the
ESTATE OF RHONDA LABICHE and as
ADMINISTRATOR of the ESTATES OF
THE MINOR CHILDREN, ALICIA LABICHE,
BRANDY LABICHE, CARLEE LABICHE and
BRETT LABICHE

PATIENT'S COMPENSATION FUND
OVERSIGHT BOARD
-and its-
CLAIMS COMMITTEE

NO. 94-002

vs.

DR. DON LEE BRADKE, et al

FINDINGS AND CONCLUSIONS - FINAL DECISION

INTRODUCTION

The Louisiana Patient's Compensation Fund Oversight Board ("the Oversight Board"), acting through its Claims Committee, held its Administrative Hearing ("hearing") in this case on September 1, 1994. The hearing was conducted, as close as practicable, to conform to the Louisiana Supreme Court opinion in Kelty v. Brumfield, No. 93-C-1142 (February 25, 1994) and the Louisiana Administrative Procedure Act. It is the understanding of the Oversight Board and its Claims Committee that this body is vested with original subject matter jurisdiction concerning issues relating to medical care and related benefits, inclusive of custodial care, under La.R.S. 40:1299.41 et seq.

The following parties, their counsel and/or representatives were present and participated in the September 1, 1994 hearing:

Michael Labiche, individually and on behalf of his children, represented by attorneys, **Gregory Gambel** and **Byron Casey**;

The Louisiana Patient's Compensation Fund ("PCF"), as an entity appearing through its representatives, **Margaret Boudreaux**, **Bruce Eichler** and **Lynn Duszynski**;

The Claims Committee which consists of: **Dr. Paul B. Lansing, II**, **Dr. Ben B. Singletary** and **Mr. Robert D. Merkel**. These three individuals are members of the Oversight Board and they constitute the Claims Committee. Dr. Lansing is a practicing physician from New Orleans; Dr. Singletary is a practicing physician from Shreveport; and Mr. Merkel is the President of the Louisiana Hospital Association from Baton Rouge.

Also present, and participating in the hearing as legal counsel for the Claims Committee, was **Larry M. Roedel**, attorney from Baton Rouge.

On January 5, 1995, a second Administrative Hearing was held, given the Request For Reconsideration filed by counsel for claimants, Michael Labiche, et al. The following parties, their counsel and/or representatives were present and participated in the January 5, 1995 hearing.

Michael Labiche, did not appear personally, but was represented by his attorney, **Byron Casey**.

The Louisiana Patient's Compensation Fund ("PCF"), as an entity appearing through its representatives, **Margaret Boudreaux**, **Bruce Eichler**, **Lynn Dyszynski** and its attorney, **John N. Kennedy**;

The **Claims Committee** which, for the second Administrative Hearing, included **Dr. Paul B. Lansing, II**, **Mr. Robert D. Merkel** and **Dr. Ben B. Singletary** (who was absent, but who has received the transcript and exhibits from the January 5, 1995 hearing).

Also present, and participating in the second hearing was legal counsel for the Claims Committee, was **Larry M. Roedel**.

Witnesses were placed under oath prior to giving testimony. All parties were afforded a reasonable opportunity to offer documentary evidence, witness testimony, and oral argument concerning their positions. Attorneys for Mr. Labiche and the PCF each filed copies of documents, which were marked as exhibits, and which have become part of the record in this proceeding. A court reporter was present and a transcript was made of the hearing. A copy of both transcripts have been made available to each party upon payment of the court reporter charges.

Following completion of the hearing, the Claims Committee met and reached the following Findings and Conclusions for recommendation to the full Oversight Board for its consideration and implementation, subject to review by the appropriate court.

A. Status of Rhonda Labiche

By stipulation of the parties, and supported by the evidence, Rhonda Labiche is in need of custodial care on a permanent, or at least an indefinite basis. The care is presently in the form of 24-hour services. By agreement of the parties, all prior care to Rhonda Labiche has been satisfactory, has been paid in full by the PCF, and there is no dispute between the parties, other than the issue of past custodial care as addressed below.

B. The Issue Before the Claims Committee

Prior to May 6, 1992, Rhonda Labiche received in-patient services at the Montelepre Long-Term Care facility in New Orleans. The cost for that care was paid by the PCF. On May 6, 1992, Mr. Labiche transferred his wife from Montelepre to their home because he believed that in-home care would be equal to or better than what his wife had received at Montelepre.

As of May 6, 1992, Mr. Labiche left his place of employment and began taking care of his wife at home. According to Mr. Labiche, he provided full-time custodial care to his wife from May 6, 1992 through November 1, 1993, which is 544 days in duration. Therefore, Mr. Labiche makes a claim for past custodial care services for 544 days. He seeks compensation at a \$25.00-per-hour rate for 18 hours each day and at a \$12.50-per-hour rate for 6 hours per day.

According to the evidence presented at the hearing, there was a prior Receipt and Release entered into by the parties on July 22, 1993. The PCF paid the Labiches a total of \$652,224.76 as consideration for the Receipt and Release. The Receipt and Release purports to:

Release and discharge forever Don Lee Bradke, M. D. and the Office of the Governor, Patient's Compensation Fund, ... of any and all claims, demands, damages, actions, causes of action, suits at law over inequity, or of whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by the said Don Lee Bradke, M. D. and the Patient's Compensation Fund, ... including ... all costs and expenses related thereto past, present, and future; interest, court costs, attorneys fees, and any and all other elements of damage of whatsoever nature, past, present and future, known as well as unknown and unanticipated, received or sustained of Michael Labiche, individually and in my capacities as Curator of the Estate of Rhonda Labiche and a natural Tutor for the minor children ..."

* * *

IT IS FURTHER STIPULATED and agreed that this Release expresses a full, complete and final COMPROMISE AND SETTLEMENT of the liability asserted against Don Lee Bradke, M. D. and the Patient's Compensation Fund in the medical malpractice action filed with the United States District Court for the Eastern District of Louisiana, entitled "Michael Labiche, Individually and as Curator of the Estate of Rhonda Labiche and as Administrator for the Minor Children, Alicia Labiche, Brandy Labiche, Carlee Labiche, and Brett Labiche v. Donald Lee Bradke", bearing Docket No. 93-1950-G-1..."

The PCF contends that the Receipt and Release operates as a release of all claims, including past custodial care claims, that pre-date July 22, 1993, since there was no reservation of rights as to the custodial care claim and, further, since the PCF refused to pay those custodial care benefits at the time the Receipt and Release was entered into. Conversely, Mr. Labiche contends that the Receipt and Release did not operate to release any past custodial care claim because there was no inclusion of the term "custodial care" in the Receipt and Release or in the listing of medical charges attached to the Receipt and Release at the time of its execution.

Therefore, the Claims Committee must first determine whether, and to what extent, there is a custodial care claim in favor of Michael Labiche for the period of time dating between May 6, 1992 and July 22, 1993 (442 days of the 544 days at issue).

Based upon a review of the Receipt and Release, and after considering the respective positions of the PCF and Labiche, the Claims Committee concludes that the past custodial care claim for May 6, 1992 through July 22, 1993 was, more likely than not, encompassed within the \$652,224.76 payment previously made to the Labiches. This conclusion is based principally upon the following factors:

1. The Receipt and Release does not contain any language that attempts to preserve the past custodial care claim for consideration by the parties at a later time or for litigation in the court system at a later time. If such was the intent of the parties, it could have been accomplished by including an additional sentence to that effect in the Receipt and Release;
2. Mr. Labiche testified in the Administrative Hearing that the care for his wife during this period of time was rendered out of love and concern for her condition and without any expectation of payment by the PCF. Thus, it is reasonable for the Claims Committee to conclude that there was no clear intention by Mr. Labiche or his counsel as of July 22, 1993 to reserve past custodial care as a separate item to be litigated at a later time;

3. Neither Mr. Labiche nor the PCF was able to produce any letters or other documents that indicated that the past custodial care claim had been reserved in the Receipt and Release.
4. At the January 5, 1995 hearing, the PCF produced file notes of Margaret Boudreaux, the PCF adjuster on this case, which notes indicate a decision by the PCF, during this settlement negotiations with counsel for Mr. Labiche, that custodial care would not be paid (PCF Exhibits 3A and 3B). Boudreaux's testimony explained these Exhibits and also explained the PCF's position that it would not and did not pay custodial care of the type sought in this case.
5. On balance, the Claims Committee believes that the issue of custodial care was a matter of negotiation between the parties; therefore, the timing of the Kelty decision (February 19, 1994) by the Louisiana Supreme Court, which conferred jurisdiction on this entity to consider this type claim, does not mean that the custodial care claim was reserved by the parties for later litigation.

Accordingly, the Claims Committee concludes that the settlement previously entered into by these parties bars any additional recovery for past custodial care services from May 6, 1992 through July 22, 1993 as having been encompassed within the negotiations, terms and conditions of the Receipt and Release.

C. The Period of Time Between July 22, 1993 and November 1, 1993

Given the above conclusion, the Claims Committee next turns to the period of time between July 22, 1993 and November 1, 1993 (102 days). In analyzing this 102-day period, the Claims Committee takes notice of several important factors as set forth below.

Mr. Labiche takes the position, through evidence presented and argument of counsel, that he performed 24-hour care for his wife through November 1, 1993. While the Claims Committee believes that Mr. Labiche was present in the home and ready to assist his wife on a full-time, 24-hour-a-day basis through November 1, 1993, the evidence presented by the PCF suggests that 24-hour payment to Mr. Labiche for that time period would not be appropriate. This finding is made by the Claims Committee for the following reasons:

1. Evidence presented by the PCF indicates that this entity paid for nursing care services to third parties, other than Mr. Labiche, beginning as early as August 26, 1993 for blocks of time ranging from 8 hours per day up to and including 24 hours per day beginning as early as September 26, 1993. It is not possible to "fully reconcile" Mr. Labiche's position with the proof of PCF payments for third party, nursing care on behalf of Rhonda Labiche. Therefore, the only way to approach a reasonable past custodial care award for the period of time between July 22, 1993 and November 1, 1993 is to award Mr. Labiche compensation for custodial care for that span of time, less and except a credit for amounts paid by the PCF to third parties for nursing care for blocks of hours over that same time span.
2. As a starting point, based on the evidence at the hearing, the Claims Committee believes that Mr. Labiche rendered custodial care services to his wife of at least 16 hours per day until the point in time when third-party nursing services were paid for by the PCF. There were some hours during the day when Rhonda Labiche and/or Mr. Labiche needed to sleep, or that services were rendered to the benefit of Rhonda Labiche by others whose claims are not before the Claims Committee.

3. Mr. Labiche has claimed entitlement to nursing care services at the rates of \$25.00 per hour for an 18-hour day and \$12.50 per hour for 6 hours per day. There was evidence presented by Mr. Labiche that he received training from Montelepre personnel over a six-week period of time to prepare him to deal with his wife's condition. This training included instruction in bathing, medicines, sanitation, feeding, physical therapy and range-of-motion exercises, but did not result in licensure or certification which would qualify Mr. Labiche, for example, as a registered nurse, a licensed therapist, or a certificated dietician. The Claims Committee cannot adopt the rates proposed by Mr. Labiche for the following reasons:

- A. The evidence at the hearing did not support the rates sought by counsel for Mr. Labiche;
- B. In the May 25, 1994 demand letter by counsel for Mr. Labiche, reimbursement was sought at the rate of \$9.00 per hour for custodial care, rather than at the \$25.00 per hour and \$12.50 per hour rates submitted at the hearing.
- C. Despite the excellent and loving care rendered by Mr. Labiche to his wife, Mr. Labiche did not incur expenses at the hourly rate suggested by counsel's argument. The measure of custodial care amounts should not be based on "what could have been incurred".
- D. The Oversight Board rules, adopted under the Administrative Procedure Act, La.R.S. 49:950 et seq, and published in the Louisiana Register, effective December 1993, provide for reimbursement of nursing or sitter care by a member of a patient's family or household at the rate not to exceed \$6.00 per hour. Although these Rules were not in effect between July 22, 1993 and November 1, 1993, these Rules do represent the only current statutory basis available to this entity to reimburse Mr. Labiche for his hours of service. Adjustments, if any, will need to come through further amendments to the Administrative Procedure Act or by Court Order.

For the reasons set forth above, it is the Finding and Conclusion of the Claims Committee that the past custodial care benefits should be reimbursed to Mr. Labiche at the rate of \$6.00 per hour, on a 16-hour per day, dating from July 22, 1993 through November 1, 1993, less and except a credit or reduction for payments by the PCF to third-party nursing care providers for that same time span, as reflected in the Payment Schedule below:

Payment Schedule: 7/22/93 through 11/1/93

	<u>Amt. Owed</u>
7/22/93 - 8/25/93 [35 days] 16 hrs./day @ \$6.00/hr. =	\$3,360.00*
*PCF did not pay third party during this span of time.	
8/26/93 - 9/7/93 [13 days] 16 hrs./day @ \$6.00/hr. =	1,248.00
*PCF paid 8 hrs./day to third party during this span of time.	
9/8/93 - 9/17/93 [11 days] 16 hrs./day @ \$6.00/hr. =	1,056.00**
*PCF did not pay third party during this span of time.	

9/18/93	[1 day] 14.5 hrs./day @ \$6.00/hr.	=	87.00
	*PCF paid 9.5 hrs. this day to third party.		
9/19/93 - 9/22/93	[4 days] 16 hrs./day @ \$6.00/hr.	=	384.00
	*PCF paid 8 hrs./day to third party 9/20 - 9/22; did not pay third party on 9/19.		
9/23/93 - 9/24/93	[2 days] 12 hrs./day @ \$6.00/hr.	=	144.00
	*PCF paid 12 hrs./day to third party.		
9/25/93	[1 day] 1.5 hrs./day @ \$6.00/hr.	=	9.00
	*PCF paid a total of 22.5 hrs. to third party.		
9/26/93	[1 day] Zero payment to Mr. Labiche		0.00
	*PCF paid 24 hours of care to third party.		
9/27/93	[1 day] 1 hr. @ \$6.00/hr.	=	6.00
	*PCF paid 23 hours of care to third party.		
9/28/93	[1 day] Zero payment to Mr. Labiche		0.00
	*PCF paid 24 hours of care to third party.		
9/29/93	[1 day] 1 hr. @ \$6.00/hr.	=	6.00
	*PCF paid 23 hours of care to third party.		
9/30/93	[1 day] Zero payment to Mr. Labiche		0.00
	*PCF paid 25 hours of care to third party.		
10/1/93	[1 day] 11 hrs @ \$6.00/hr.	=	66.00
	*PCF paid 13 hours of care to third party.		
10/2/93 - 10/10/93	[9 days] Zero payment to Mr. Labiche		0.00
	*PCF paid 24 hrs./day to third party.		
10/11/93	[1 day] 13 hrs. @ \$6.00	=	78.00
	*PCF paid 11 hours of care to third party.		
10/12/93	[1 day] 12 hrs. @ \$6.00	=	72.00
	*PCF paid 12 hours of care to third party.		
10/13/93	[1 day] 15 hrs. @ \$6.00	=	90.00
	*PCF paid 9 hours of care to third party.		
10/14/93 - 10/31/93	[18 days] 12 hrs./day @ \$6.00/hr.	=	1,296.00
	*PCF paid 12 hrs./day to third party.		
11/1/93	[1 day] Zero payment to Mr. Labiche	=	0.00
	*PCF paid 24 hours of care to third party.		
<u>ORIGINAL BASE TOTAL OWED TO MR. LABICHE</u>		=	\$7,896.00**

****D. Correction of Base Total**

On April 20, 1995, PCF attorney John N. Kennedy called to the attention of the Claims Committee an error that took place during the September 1, 1994 hearing relating to the September 8, 1993 through September 17, 1993 computation. Contrary to the original determination, the PCF did pay for 233.8 hours of third party care between September 8, 1993 through September 17, 1993, thus reducing the Base Total to \$6,883.00. Counsel for Labiche did not dispute the correction of this prior error.

E. Issue of Legal Interest

An appropriate calculation for "legal interest" presents a difficult task for the Claims Committee. As a general proposition, legal interest is due to the prevailing party from the date

of "judicial demand" or the date that the individual items were incurred. Since the claim of Michael Labiche in this instance is not a claim to recover "out-of-pocket expenses incurred", the Claims Committee must determine when "judicial demand" was made for the past custodial care amounts that the Claims Committee is recognizing should be paid.

According to the evidence submitted by counsel for Mr. Labiche, a certified demand letter was sent on May 25, 1994 to the PCF setting forth the claim for custodial services in this case. Accordingly, May 25, 1994 is treated as the date of "judicial demand" by the Claims Committee in this matter. Although Mr. Labiche initially submitted his Medical Review Panel Complaint on January 9, 1992, that Complaint did not include the same demand for custodial care amounts that are now at issue in this case. Legal interest will be awarded on the total amount of \$6,883.00, beginning May 25, 1994. The per diem rate is \$1.32 per day through December 31, 1994 and \$1.65 per day commencing January 1, 1995 until paid.

Conclusion

Based upon the evidence presented in the two Administrative Hearings, and after due consideration of the positions of both sides, the Claims Committee makes the Findings and Conclusions referenced herein so as to award the sum of \$6,883.00 for past custodial care services to Mr. Labiche, plus legal interest at the rate of \$1.32 per day, commencing May 25, 1994, through December 31, 1994, and \$1.65 per day commencing January 1, 1995. This Final Decision is adopted by the full Oversight Board, but it is subject to further review by an appropriate court.

SIGNED this _____ day of _____, 1995 at Baton Rouge, Louisiana.

BY: _____
CHARLES D. BELLEAU, M.D., CHAIRMAN

BY: _____
SUANNE GROSSKOPF,
EXECUTIVE DIRECTOR

BY: _____
ROBERT D. MERKEL

BY: _____
CHRIS BARNETTE

BY: _____
PAUL B. LANSING, II, M.D.

BY: _____
BEN B. SINGLETARY, M.D.

BY: _____
DENNIS E. SIMON, III

BY: _____
HENRY THREEFOOT, M.D.

BY: _____
GARY DARNELL

BY: _____
MICHAEL MOSS