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## OPINION OF TRUSTEES

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### In Re

Complainant: Employee  
Respondent: Employer  
ROD Case No: 84-565 - April 20, 1988

Board of Trustees: Joseph P. Connors, Sr., Chairman; Paul R. Dean, Trustee; William B. Jordan, Trustee; William Miller, Trustee; Donald E. Pierce, Jr., Trustee.

Pursuant to Article IX of the United Mine Workers of America ("UMWA") 1950 Benefit Plan and Trust, and under the authority of an exemption granted by the United States Department of Labor, the Trustees have reviewed the facts and circumstances of this dispute concerning the provision of health benefits for nursing services under the terms of the Employer Benefit Plan.

### Background Facts

In 1980, the Employee's dependent son suffered cardiac arrest during recovery from elective surgery for a cleft palate. The resulting anoxic brain injury left him severely impaired. With the exception of a short period of home care following the injury, he has been institutionalized on a continuous basis. He is currently a resident on the skilled nursing unit of a Medicare-certified skilled nursing facility.

The Employee's son is a quadriplegic. He is unable to express himself verbally. He is incontinent of bowel and bladder and receives all nutrition and medication through a gastrostomy tube, which is changed monthly. The nursing staff provides complete care including bathing, dressing, incontinence care, gastrostomy tube feeding and care, monthly gastrostomy tube changes, intake and output measurement, turning and transfers, application of a brace and restraints and daily passive range of motion exercises. A certified physical therapist supervises the exercise regime. The nursing home administrator said that, on the advice of a physician and the nursing home's medical staff, a nurse's aide has been assigned to the Employee's son during the day and evening shifts to prevent deflection of his head which would cause hypoxia.

The Employer has discontinued payment for the services provided to the Employee's son because they do not constitute skilled care. It maintains that the charges are indicative of custodial care, which is specifically excluded under the Employer Benefit Plan. The Employer states that the child's physician indicated that home care would be feasible for the child if the parents were willing and that benefits for some of the home care (i.e. nursing, physical therapy and physicians visits) are available under the Employer Benefit Plan.

The Employer claims that litigation against the anesthesiologist and the hospital resulted in a substantial settlement which was to be applied towards the Employee's son's medical expenses.

The Employer also refuses to provide any additional benefits for the Employee's son's care because the Employee has refused to execute a subrogation agreement as required under Article III. A. (10)(e) of the Employer Benefit Plan.

### Dispute

Is the Employer responsible for continuing to provide health benefits coverage for the Employee's son's care in the skilled nursing care unit of a Medicare-certified skilled nursing facility?

### Positions of the Parties

Position of the Employee: The Employer is responsible for continuing to provide health benefits coverage for the Employee's son's care because he requires skilled nursing care.

Position of the Respondent: The Employer is not responsible for continuing to provide health benefits coverage for the Employee's son's care because he is receiving custodial care, which is specifically excluded under the terms of the Employer Benefit Plan, and because the Employee refuses to execute a subrogation agreement, as required under the Employer Benefit Plan.

### Pertinent Provisions

Article III. A. (5) (a) and (b) of the Employer Benefit Plan states:

(5) Skilled Nursing Care and Extended Care Units

(a) Skilled Nursing Care Facility

Upon determination by the attending physician that confinement in a licensed skilled nursing care facility\* is medically necessary, to the extent that benefits are not available from Medicare or other State or Federal programs, benefits will be provided for:

1. skilled nursing care provided by or under the supervision of a registered nurse;
2. room and board;
3. physical, occupational, inhalation and speech therapy, either provided or arranged for by the facility;
4. medical social services;

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\* Skilled nursing care facility is limited to a skilled nursing care facility which is licensed and approved by Federal Medicare.

5. drugs, immunizations, supplies, appliances, and equipment ordinarily furnished by the facility for the care and treatment of inpatients;

6. medical services, including services provided by interns or residents in an approved, hospital-run training program, as well as other diagnostic and therapeutic services provided by the hospital; and

7. other health services usually provided by skilled nursing care facilities.

The Plan will not pay for services in a nursing care facility:

1. that is not licensed or approved in accordance with state laws or regulations;
2. unless the service is provided by or under the direct supervision of licensed nursing personnel and under the general direction of a physician in order to achieve the medically desired results.

Exclusions:

Telephone, T.V., radio, visitor's meals, private room or private nursing (unless necessary to preserve life), custodial care, services not usually provided in a skilled nursing facility.

Article III. A. (10)(e) of the Employer Benefit Plan states:

(e) Subrogation

The Plan does not assume primary responsibility for covered medical expenses which another party is obligated to pay or which another insurance policy or other medical plan covers. Where there is a dispute between the carriers, the Plan shall, subject to provisions 1 and 2 immediately below, pay for such covered expenses but only as a convenience to the Beneficiary eligible for benefits under the Plan and only upon receipt of an appropriate indemnification or subrogation agreement; but the primary and ultimate responsibility for payment shall remain with the other party or carrier. Obligations to pay benefits on behalf of any Beneficiary shall be conditioned:

1. upon such Beneficiary taking all steps necessary or desirable to recover the costs thereof from any third party who may be obligated therefore, and
2. upon such Beneficiary executing such documents as are reasonably required by the Plan Administrator, including, but not limited to, an assignment of rights to receive such third party payments, in order to protect and perfect the Plan's right to reimbursement from any such third party.

Discussion

Under Article III. A. (5)(a) of the Employer Benefit Plan, benefits are provided for care in a skilled nursing facility only if the facility is a licensed skilled care facility which is approved under the federal Medicare program, and if skilled nursing care is required by the patient. Benefits for custodial care are specifically excluded. The facility in which the Employee's son is confined is licensed by Medicare as a skilled nursing care facility.

Confinement in a skilled nursing facility is appropriate if it is necessary for a patient to receive skilled services on essentially a daily basis, and if, from a practical standpoint, the services can only be provided during an inpatient stay at a skilled nursing care facility, as opposed to an alternative location. Skilled services are those which must be provided by, or under, the general supervision of professional or technical personnel to assure the safety of the patient and to achieve the medically desired result.

According to the evidence submitted to the Trustees, the Employee's son's nursing care needs consist of bathing, dressing, incontinence care, gastrostomy tube feedings, intake and output measurement, turning and transfers, application of a brace and restraints and daily passive range of motion exercises. The Funds' staff have reviewed the information submitted in this dispute and have advised that the services the Employee's son is receiving do not constitute skilled nursing care. The only service that requires the skill of a licensed nurse is the monthly gastrostomy tube change. The remainder of the nursing services, including gastrostomy tube feedings, are custodial in nature because they are directed toward meeting the activities of daily living and, although they are quite comprehensive and time consuming, do not require the daily attention of trained medical personnel. The staff have also advised that the physical therapy services in this case are at a maintenance, rather than skilled, level of care in that such services are not based on the expectation that the Employee's son's condition will improve materially in a reasonable period of time nor are they directed at designing a safe and effective maintenance program. Inasmuch as the Employee's son neither requires nor receives skilled services on a daily basis, the Employer is not responsible for continuing to provide health benefits for the Employee's son's care rendered in the skilled nursing facility.

Inasmuch as it has been determined that the Employer is not responsible for providing benefits for the Employee's son's care rendered in a skilled nursing facility, it is not necessary to address whether coverage should be denied based on the Employee's failure to execute a subrogation agreement with the Employer under Article III. A. (10)(e) of the Employer Benefit Plan.

#### Opinion of the Trustees

The Employer is not responsible for continuing to provide health benefits coverage for the Employee's son's care in the skilled nursing facility.