

THE OLYMPIAN

## Home care aides deserve back pay, high court told

BRAD SHANNON | Staff writer • Published May 15, 2013

The Washington Supreme Court heard arguments Tuesday in a class-action case brought by live-in home care aides against the state Department of Social and Health Services that could cost taxpayers \$95 million or more.

The 22,000 workers in the suit assist disabled clients and saw their work hours cut by an average of 15 percent during 2003-07 under a “shared living” rule adopted by the state agency for caregivers living with the people they cared for.

The department reasoned that if the caregivers lived at the home, then some amount of the work the caregivers performed – cooking, for example – would benefit the caregiver, who shouldn’t be paid for it. The rule was jettisoned after the state Supreme Court invalidated it in 2007.

“The bottom line is DSHS shortchanged these people,” Kirkland-based lawyer John J. White Jr. said after the arguments.

The federal-state program provides low-income Medicaid clients with assistance that includes help with washing, laundry, cooking, shopping and medicines. The in-home help lets the clients remain in their own homes and saves the public money, but the caregivers contend they ended up working unpaid hours. The state refused to pay up, even after the Supreme Court ruled it was inconsistent with federal Medicaid rules.

In a December 2010 ruling, a Thurston County Superior Court jury awarded \$57 million to the workers, who belong to Service Employees International Union 775 Northwest. Judge Thomas McPhee awarded another \$38 million in prejudgment interest.

But in court Tuesday, Deputy Solicitor General Jay Geck of the attorney general’s office argued that the lower court judgment was in error and that there was no breach of contract because workers agreed to accept whatever hours were authorized for clients under Medicaid. Geck said the court had given misleading and incorrect jury instructions.

Geck also said the claims should have been barred in the first place by Judge McPhee because the claimants had not challenged the department’s rulings within 90 days as required under law.

“People have a right to appeal and they did not. The client class had no excuse for not coming in earlier,” he told the nine justices.

After the court hearing, White said DSHS had actually done away with an appeals process when it adopted its “shared living rule” so administrative judges declined jurisdiction.

The case has implications for state budget writers, and not just because of the costs involved. Letting claimants come back up to six years later to make claims “will hobble public assistance programs,” Geck said.

House Majority Leader Pat Sullivan, D-Covington, said he and other budget writers are aware of the potential liability of this case – but it is one of many financial risks that lurk for the state.

“Depending on where you cut, you face liabilities all the time. Something we do take into consideration when we are making reductions is how likely is it you will be sued,” Sullivan said in an interview. “But more importantly how likely is it that you’ll be sued and lose? There’s a risk to every decision we make.”

The justices did not tip their hand on how they might rule. Any ruling may not come for six to nine months, based on the court’s practice in past cases.

Dmitri Iglitzin, a lawyer for SEIU 775NW, told the court said the state had acted unjustly to reduce paid hours knowing all along that the live-in workers would provide the care without pay. He said it would have been a different story if DSHS had done assessments that looked at the range of help available from relatives to decide case-by-case that fewer hours were merited.

After the 2003 rule was invalidated, DSHS provided those assessments.

In a media briefing provided by the attorney general’s office this week, the state said the jury verdict was unprecedented and would have the effect of giving care workers new contract rights.

*The Associated Press contributed to this report.*