



CAROLINE M. WESTERHOLD
CWESTERHOLD@BAYLOREVNEN.COM

SARA M. HUGHES
SHUGHES@BAYLOREVNEN.COM

BAYLOR, EVNEN, CURTISS, GRIMIT & WITT, LLP
WELLS FARGO CENTER
1248 O STREET, SUITE 600
LINCOLN, NEBRASKA 68508
PHONE: 402.475.1075
FAX: 402-475-9515
BAYLOREVNEN.COM



Caroline M. Westerhold



Sara M. Hughes

Workers' Compensation Claimant Awarded Wheelchair-Accessible Van and Compensation for Spouse's "On Call" In-Home Health Care

By: Caroline M. Westerhold & Sara M. Hughes

In July 2014, the Nebraska Supreme Court expanded the definition of “medical, surgical, and hospital services... [and] appliances,” as set out in Neb. Rev. Stat. §48-120(1)(a), to include a new type of appliance: wheelchair-accessible vans. In *Simmons v. Precast Haulers, Inc.*, 288 Neb. 480, __ N.W.2d __ (2014), the Court awarded a wheelchair-accessible van as a result of a workers’ compensation claim in which the employee (Simmons) sustained extensive injuries when he was run over by a fully-loaded tractor-trailer. Although it was noted that Simmons was able to walk approximately 30 yards with use of a cane, he still had significant limitations in his mobility and needed assistance with ambulation. Consequently, his doctors recommended that he receive custom wheelchairs, as well as a wheelchair-accessible van.

Based upon the evidence presented at hearing, the trial court found that Simmons was entitled to various benefits, which included a light-weight wheelchair, a custom-powered wheelchair, and a wheelchair-accessible van pursuant to Neb. Rev. Stat. §48-120(1)(a). Section 48-120(1)(a) states in part: “The employer is liable for all

reasonable medical, surgical, and hospital services... appliances, supplies, prosthetic devices, 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." Precast Haulers (Precast) appealed the trial court decision, arguing that the van was not a "medical service" which would relieve [Simmons'] pain or hasten his restoration to health and employment." Precast also argued that Simmons did not want a wheelchair-accessible van and that he would not be able to drive it. In addition, Precast pointed to other available transportation options.

The Nebraska Supreme Court rejected all of Precast's arguments, finding that the evidence in the record indicated that a wheelchair-accessible van would hasten Simmons' restoration to health and employment. In reaching its conclusion, the Court rationalized that it would assist in his outpatient recovery and rehabilitation. The Court further cited to overwhelming testimony demonstrating that Simmons wished to gain independence by having a wheelchair-accessible van and noted that there was no evidence from Simmons' doctors that he could not or should not drive. Additionally, the Court pointed to the award by the trial court of a powered wheelchair and found that Precast's argument "ignores that a wheelchair accessible van is necessary to allow [Simmons] and his family to transport his new powered wheelchair." The Court acknowledged the argument by Precast that other transportation services were available to Simmons, but remarked that the services previously offered were for only medical appointments and did not address his personal needs. Ultimately, the Court concluded that the wheelchair accessible van qualified as an 'appliance' that would help restore Simmons' health, and affirmed the trial court's award.

The trial court also awarded compensation for Simmons' wife's provision of "on call" in-home health care. After the accident, Simmons was no longer able to care for himself without assistance. When he returned home from the hospital, his wife, who worked a full-time job during the week, cared for him at night and on the weekends, and a certified nursing assistant came to their home to care for him during the weekdays. The trial court found that Simmons' wife provided care for Simmons a total of 108 hours per week. Simmons' physicians stated that if his wife was not available to provide assistance, he would require additional in-home nursing services in order to continue his outpatient recovery and rehabilitation.

Precast appealed the award of compensation and argued that the evidence was not sufficient to support an award of compensation for the provision of 108 hours of "on call" in-home health care each week, stating that "many of the hours spent by [Simmons' wife] 'on-call' were spent sleeping, completing ordinary household duties, and caring for herself, which hours should be considered noncompensable." The Nebraska Supreme Court noted that pursuant to §48-120, an employee may be reimbursed for nursing care in the employee's home or at a nursing home, when such care is necessitated by a work-

related injury, so long as the cost of the care is fair and reasonable. The Court further cited prior case law that had “repeatedly stated that it is not essential that the service be furnished by a doctor, nurse, or other medical person. With this understanding, we have allowed payments to spouses and unrelated persons who provide the care.”

The Court reviewed the three “basic requirements” previously set forth by the Court that must be met before compensation may be rendered for care to an injured employee by the spouse in the home: (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 spouse must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse. The Court clarified that the person providing care need not be actively performing a “strictly medical task at each and every moment of the day” in order to be compensated for his or her continuous attendance. The Court likened the situation to a night nurse who watches over a sleeping patient, noting that “the fact that the patient sleeps through the night does not support an argument that the nurse should not be paid for the night. [The nurse] must be present and available to meet the patient’s needs, not according to some preestablished timetable, but as the patient experiences them.” The Court therefore affirmed the trial court’s award of compensation in the amount of 180 hours per week at \$10 per hour.

Also at issue on appeal in the case was an award by the trial court of attorney fees and expenses in the total amount of \$36,555.00. Precast argued that the award was unreasonable as the legal skill required was minimal, the amount of bills paid late was only a small amount, and the fees awarded should be directly attributed to collection of the unpaid bills. As part of its argument, the employer called attention to the fact that the amount of the unpaid bills was minimal in comparison to the issues of first impression as to whether a van is an appliance for purposes of §48-120. To the contrary, Simmons filed a cross-appeal and argued for an increase in the award stating that it should not have been limited to only the hours worked by the attorney because the employer would be rewarded by delaying payment.

Given the obvious complexities involved in the case, the Court found the argument by Precast that opposing counsel did minimal skilled work to be wholly without merit. The Court also rejected Precast’s argument that only a small amount of bills were paid late and noted that at the time the Petition was filed over one million dollars in compensable expenses remained unpaid. Last, the Court confirmed that it had discretion to determine what constituted a reasonable attorney fee on a case-by-case basis and rejected the argument that the statute specifically limited fees to only those directly attributable to the collection of unpaid medical bills.

The Court also rejected the argument by Simmons on cross-appeal for an increased fee. In doing so, the Court did not make a specific finding as to whether a trial court could, as a matter of law, award a fee greater than the hours billed and expenses incurred, and rather noted that the trial judge in *Simmons* had awarded the entire amount requested with no indication that any request or issue had been raised at trial as to a higher amount. Consequently, the Court concluded that the issue of an increased amount had not been presented to the trial court and was thus not an appropriate issue on appeal.

Simmons v. Precast Haulers is noteworthy as it establishes that wheelchair-accessible vans qualify as “appliances” under Neb. Rev. Stat. §48-120. In addition, it provides guidance as to the potential entitlement to compensation for family that provides care to an injured employee. It is also a daunting reminder of the penalty provisions in place that can significantly impact the value of a claim if timely and comprehensive action is not taken to address claims for benefits. For more information regarding the *Simmons v. Precast Haulers* decision, please feel free to contact Caroline Westerhold or Sara Hughes at (402) 475-1075.