

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL  
(Memorandum Web Opinion)**

SIMMONS V. PRECAST HAULERS

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

MICHAEL SIMMONS, APPELLEE,

v.

PRECAST HAULERS, INC., AND CHEROKEE INSURANCE COMPANY, APPELLANTS.

Filed August 4, 2015. No. A-14-1103.

Appeal from the Workers' Compensation Court: LAUREN K. VAN NORMAN, Judge.  
Affirmed.

Patrick Mack and Gregory D. Worth, of McAnany, Van Cleave & Phillips, P.A., for  
appellants.

Travis Allan Spier, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O.,  
for appellee.

MOORE, Chief Judge and PIRTLE and BISHOP, Judges.

MOORE, Chief Judge.

INTRODUCTION

Precast Haulers, Inc. and its workers' compensation insurer appeal from the Workers' Compensation Court's award to Simmons of a \$50,000 attorney fee for Precast's delinquent payment of medical bills. Because the compensation court did not clearly err in awarding the attorney fee, we affirm.

BACKGROUND

In October 2011, while employed by Precast, Simmons sustained severe injuries and extensive medical expenses, the details of which are set forth in *Simmons v. Precast Haulers, Inc.*,

288 Neb. 480, 849 N.W.2d 117 (2014). We do not discuss Simmons' accident and injury further in this opinion as those details are not relevant to our resolution of the present appeal.

In January 2012, Simmons filed a petition seeking benefits in the compensation court. By that time, he had incurred \$1,498,065.68 in compensable medical expenses and Precast's insurance carrier had paid only \$25,021.72 of those expenses. By the time trial was held in May 2013, Simmons' medical bills totaled nearly \$2.2 million and \$426,195.89 remained outstanding.

On August 27, 2013, the compensation court awarded Simmons benefits, including the payment of outstanding medical bills. In ordering the payment of outstanding medical bills, the compensation court adopted the parties' stipulations that Simmons' past medical and mileage expenses as reflected in a particular trial exhibit were reasonable and necessary to treat the injuries caused by his accident and that the dates of services, charges, payments and outstanding balances reflected in the exhibit were accurate. The court ordered Precast to promptly pay the balance of the outstanding medical expenses as shown in exhibit 20, which reflected a balance due of \$426,195.89. The compensation court also awarded Simmons' counsel an attorney fee of \$36,555 based on the billing statement and supporting affidavit from Simmons' counsel received as an exhibit at trial.

Precast appealed, assigning error to various findings of the compensation court, including the award of attorney fees. Precast did not appeal with respect to the trial stipulations or the award for past medical and mileage expenses. On appeal, the Nebraska Supreme Court affirmed the award of benefits to Simmons, including the compensation court's award of \$36,555 in attorney fees. See *Simmons v. Precast Haulers, Inc.*, *supra*. The mandate issued by the Supreme Court in that case shows that Simmons' attorney was awarded an attorney fee of \$6,750 for his work on the appeal.

On July 15, 2014, Simmons filed a motion to compel payment of pretrial medical expenses and a request for attorney fees. Simmons alleged that attorney fees were required pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014) because Precast failed to timely pay \$418,099.45 in compensable outstanding medical expenses within 30 days of the May 2013 trial and because as of the date of his motion, \$253,581.98 in compensable pretrial medical expenses remained unpaid. He also alleged that Precast had not reimbursed him for his mileage expenses presented at trial and that as of the trial date, \$3,760.92 was due to him as a mileage reimbursement for travel to stipulated compensable medical care. Accordingly, Simmons requested an order compelling payment of pretrial medical and mileage expenses and awarding him an attorney fee.

The compensation court heard Simmons' motion on September 10, 2014. At the hearing, the court received documentary exhibits offered by the parties and heard argument from counsel. Simmons' exhibits included an affidavit completed by a representative of one of Simmons' medical providers, who stated that the provider had an outstanding balance of \$173,419.05 for service provided to Simmons in 2011 and that no payments had been received on the account since the bill was generated in May 2013, demand letters and supporting documentation sent to Precast on April 3 and May 27, 2014 with supporting documentation, expense documents, and a copy of a check from Precast's insurer made out to one of the medical providers and dated the day before the hearing. The demand letter exhibits show that Simmons presented documentation of all outstanding pretrial medical expenses to Precast on April 3 and May 27 and that one year post-trial,

\$271,3234.45 of Simmons' outstanding pretrial medical expenses were yet unpaid. Precast presented a check log and emails and an affidavit from their insurer representing that certain of the medical bill balances were incorrect and that some of the bills had zero balances.

On November 13, 2014, the compensation court entered an order granting Simmons' motion. The court found that Precast did not pay the majority of Simmons' outstanding pretrial medical expenses within 30 days of the trial stipulation nor within 30 days of the August 2013 award. The court found that not only had notice been given of the pendency of the medical bills, but also, a stipulation had been entered into at trial wherein Precast agreed that all of the medical bills submitted in a particular trial exhibit were reasonable and necessary to treat the injuries incurred in Simmons' compensable accident. The court noted the evidence presented by Precast alleging that certain medical bills were incorrect or had zero balances. However, the court found that these were the same medical bills which were specifically awarded at trial and were specifically agreed to as being reasonable and necessary by Precast. The court determined that Precast had presented no competent evidence to suggest that the balances were other than as shown in certain exhibits presented by Simmons at the hearing on Simmons' motion to compel. The court stated, "The time for negotiating balances with the medical providers has long since passed. In order to obtain credit for having paid those medical bills, it will be necessary to present more than emails or affidavits asserting that the balances are incorrect."

With respect to Simmons' request for an attorney fee award, the compensation court noted that Simmons' counsel had not submitted an affidavit setting forth the time he and his staff had spent preparing materials for the motion hearing. The court also noted Simmons' argument that a \$100,000 fee was reasonable under the circumstances of this case and necessary to effectuate the purpose of § 48-125. The court found it clear that a great deal of time had been spent organizing and presenting the voluminous evidence in a manner comprehensible to the court and did not find itself "bound to an affidavit to assess a reasonable attorney's fee." The court determined that under the circumstances of this case, a combination of effectuating the purposes of § 48-125 of providing incentive to pay and a deterrence for late payment required an award of a higher than usual fee. Specifically, the court stated:

The Court finds that [Simmons'] attorney has exercised due diligence in continuing to pursue the bills which were awarded and stipulated to at the time of trial nearly a year and a half ago. [Precast and its insurer] ignored not only their own stipulation but this Court's Award [of August 2013]. [Simmons'] counsel has been effective in obtaining payment of a large portion of medical bills on behalf of [Simmons] and it is clear that a good number of hours have been spent in efforts which should not have been required. The previous fee awarded [Simmons'] counsel (\$36,555.00) evidently failed to accomplish the purposes of § 48-125. Therefore, the Court finds in this case that a reasonable attorney's fee is \$50,000.00. The Court arrives at this figure by considering the amount of money in question and the amount of diligence that has been required of behalf of [Simmons] in pursuing the defendants in this regard. As noted by the Supreme Court in [the previous appeal in this case], 'Nonpayment of medical bills can have an extremely deleterious result for an injured worker. Necessary medical care may be delayed for months pending

litigation, which in itself may cause more severe permanent injury.’ Absolutely no reasonable excuse has been presented to the Court for the defendants’ delay.

Precast subsequently perfected the present appeal to this court.

#### ASSIGNMENTS OF ERROR

Precast asserts that the compensation court erred in awarding an attorney fee because (1) Simmons’ attorney failed to submit an affidavit justifying the fee requested and (2) the record lacks sufficient competent evidence that the amount of \$50,000 was reasonable under the circumstances.

#### STANDARD OF REVIEW

A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award. *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015). On appellate review, the factual findings made by the trial judge of the Workers’ Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* In workers’ compensation cases, an appellate court determines questions of law. *Id.*

#### ANALYSIS

Precast asserts that the compensation court erred in awarding an attorney fee because Simmons’ attorney failed to submit an affidavit justifying the fee requested and the record lacks sufficient competent evidence that the amount of \$50,000 was reasonable under the circumstances. Precast does not assign error to the compensation court’s findings with respect to its late payment of Simmons’ substantial outstanding pretrial medical expenses and does not dispute that Simmons is entitled to a reasonable attorney fee pursuant to § 48-125. Rather, Precast argues that an attorney fee cannot be awarded absent submission of a supporting affidavit and that the \$50,000 fee awarded is not otherwise supported by sufficient competent evidence.

Attorney fees in workers’ compensation cases are allowable only pursuant to statutory authorization. *Simmons v. Precast Haulers, Inc.*, 288 Neb. 480, 849 N.W.2d 117 (2014). Section 48-125(2)(a), which provides the relevant statutory authorization, states:

Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days’ notice has been given of the obligation for medical payments, and proceedings are held before the compensation court, a reasonable attorney’s fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. . . .

The determination of an award of attorney fees pursuant to § 48-125 must be calculated on a case-by-case basis. *Simmons v. Precast Haulers, supra*. In making that calculation, the trial court

should consider, as in other attorney fee contexts, the value of legal services rendered by an attorney by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Id.*; *Harmon v. Irby Const. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999). Particular attention should be given to the amount of legal work performed in relation to the amount of the unpaid medical bill and the amount of the unpaid medical bill in relation to the workers' compensation award received. *Id.*

In arguing that the requirement of submitting an affidavit should be applied in the compensation court to justify the reasonableness of an attorney fee, Precast directs us to *Kraft v. Paul Reed Const. & Supply, Inc.*, 239 Neb. 257, 263, 475 N.W.2d 513, 517-18 (1991), wherein the Nebraska Supreme Court stated:

We also hereby establish a rule of practice and direct that in an appeal of any type of case filed after December 31, 1991, in this court or the Court of Appeals, any party who claims entitlement under the law or a uniform course of practice to an attorney fee shall, at the time of filing his, her, or its brief, also file a separate claim for such fees supported by an affidavit which justifies the amount sought.

However, this statement was clearly made in the context of discussing the rule of practice applicable in appellate cases. The Nebraska Supreme Court, in discussing the award of attorney fees in underlying matters, stated that while the best practice is to provide an affidavit or other evidence such as testimony or exhibits regarding attorney fees, it has declined to absolutely require the filing of an affidavit. See *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). Similarly, this court has stated that it is not strictly necessary for an applicant for attorney fees to introduce specific evidence to support an award of attorney fees, but before an award of attorney fees will be affirmed upon appeal, the record must contain the information that shows that the award is within the range of the trial court's discretion. *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000). If the contents of the record, i.e., pleadings, introduced discovery documents, time spent in court as shown by the court record, and doubtless many other items which will support an award of attorney fees, do show the allowed fee not to be unreasonable, then that fee would not be untenable or an abuse of discretion. *Id.*

Precast argues that if Simmons is entitled to an attorney fee, he is only entitled to a reasonable attorney fee commensurate with the work his attorney performed from the last time the court awarded an attorney fee to the point that his attorney attended the motion to compel hearing. Precast notes that Simmons' attorney has already been compensated \$36,555 for the time spent litigating this case from its inception to trial and that he received a fee of \$6,750 for work performed in the initial appeal. Precast argues that without an affidavit there is little to no evidence of the work performed by Simmons' attorney after the trial.

The compensation court did not err in awarding an attorney fee without an affidavit. The compensation court judge presided over both the initial trial and the motion to compel hearing in this case and was in a position to know and analyze the factors necessary to determine a reasonable

attorney fee in this matter. The record supports the compensation court's conclusion that Simmons' attorney spent significant time in organizing and presenting the voluminous evidence at the hearing. While the fee award of \$50,000 is significant, we observe, as did the compensation court judge, in the year and a half period between the trial and the motion to compel hearing, Simmons' counsel diligently pursued the payment of medical bills which were stipulated to at trial and then ignored by Precast, which effort should have been unnecessary given the trial stipulations and the result of the first appeal. While the better practice would have been for Simmons' attorney to have presented an affidavit in support of the request for attorney fees, the time and labor required is but one of the factors to be considered in determining an award of attorney fees pursuant to § 48-125. As noted by the Nebraska Supreme Court in *Simmons v. Precast Haulers, Inc.*, *supra*, the determination of the amount of attorney fees is necessarily a question of fact that requires an analysis of several factors. The compensation court's order clearly discussed and considered the required factors and made a factual determination. In addition, the compensation court correctly considered the purpose of § 48-125 in reaching its award. We find that the compensation court did not clearly err in awarding Simmons a \$50,000 attorney fee.

#### CONCLUSION

For the reasons stated above, we affirm the compensation court's award of a \$50,000 attorney fee.

AFFIRMED.