

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
 U N)
_____)

OAH No. 14-2224-MDS
Division No.

DECISION

I. Introduction

U N submitted a proposed amendment to her Plan of Care (POC), requesting an environmental modification of her home under the Medicaid Home and Community-Based Waiver program. She requested replacement of a vertical platform lift that provides access to the second story living quarters of her residence. The Division of Senior and Disabilities Services (Division) denied her proposed amendment because of regulations that prohibit payment for elevator installation, maintenance and repair.¹ Ms. N requested a hearing.²

Ms. N’s hearing took place on February 11, 2015. Ms. N was represented by her guardian and sister, S S. Angela Ybarra represented the Division. Barbara Rodes and Andy Sandusky testified for the Division.

A vertical platform lift is not an “elevator” within the meaning of 7 AAC 130.300(j)(8). As a result, the Division’s decision is reversed.

II. Facts³

The following facts were established by a preponderance of the evidence.

U N is 57 years old. She has been a recipient of Home and Community-Based Waiver services for many years. Ms. N experiences profound physical disability and global developmental delay as a result of Meckel-Gruber Syndrome, a rare inherited disorder characterized by abnormalities affecting almost all organ systems of the body. Symptoms of the disorder include protrusion of a portion of the brain and its meninges through a defect in the skull leading to fluid volume complications, and complications of the kidneys, liver, bones, lungs and genitourinary tract. She experiences scoliosis, hydrocephaly without shunt intervention (resulting in painful headaches as fluid attempts to balance near her brain), visual loss, tooth

¹ Ex. D.

² Ex. C.

³ These facts are based upon Ex. E, Claimant Exs. A-G, Ex. 1 (24 page fax from S S dated 1/14/15), and the testimonies of Barbara Rodes, Andy Sandusky and S S.

decay, and major loss of communication. Her posterior skull has never fused, so she has no protection to her brain for that area. She requires significant assistance with all activities of daily living, as well as continuous monitoring and intervention for her health and wellness.

Ms. N requires a wheelchair for mobility and transport. She lives with her sister, Ms. S, in a two story home. The living space of the home is on the second floor. The first floor is used for a garage.⁴ To transport Ms. N between levels in the home, the family uses a vertical platform lift. There is conflicting evidence regarding who paid to purchase and install the vertical lift, but there is no disagreement that it is at least 20 years old.⁵

The Plan of Care at issue in this matter covered the time period May 29, 2014 to May 28, 2015.⁶ The Division approved an environmental modification (EMOD) amendment to the plan, effective July 28, 2014, because the vertical platform lift needed repairs.⁷ Alaska Stairlift & Elevator, LLC, was approved to perform the repairs, and it adjusted the stop switch and the downward speed position.⁸

In August 2014, Ms. N's Care Coordinator submitted a proposed amendment to the Plan of Care, requesting an environmental modification to install a new vertical platform lift.⁹ The proposed amendment states that the existing lift is more than 20 years old and often requires maintenance. The manufacturer is no longer in business, and it is becoming more difficult to obtain parts for repairs. The lift is no longer reliable, but it is the only safe means of access in and out of the home. Concern is expressed that the next malfunction could become a health and safety issue if parts are not available to fix the lift, or if they take significant time to locate and ship to City A.¹⁰

Included in the proposed POC amendment package are pictures of vertical platform lifts sold by Bruno Independent Living Aids, Inc. The pictures show lifts that include a platform large enough for a wheelchair, fenced on two parallel sides by approximately 3 foot tall siding. The third side is unfenced but abuts a house wall, and the fourth side has a short self-lowering ramp that appears to be roughly one foot long. At the upper entrance to the platform, there is a waist-high gate; a similar gate appears to be optional at the bottom floor entrance. The platform

⁴ Testimony of S S.

⁵ According to Ms. S, the lift may be more than 30 years old. Claimant Ex. A.

⁶ Ex. E, p.1.

⁷ Ex. E, p.1; Claimant Ex. G.

⁸ Claimant Ex. G, pp. 4-5.

⁹ Ex. E; Claimant Ex. G.

¹⁰ Ex. E, pp. 3-4.

is raised and lowered by hand controls, following rails or tracks on a steel guide post. The Bruno vertical platform lift can rise a maximum of 14 feet.¹¹

On November 3, 2014, the Division denied the proposed amendment.¹² It concluded that the proposed vertical platform lift is an elevator, and 7 AAC 130.300(j)(8) prohibits payment for environmental modifications involving elevator installation.¹³ The Division indicated that it would consider installation of a platform stair lift rather than a vertical platform lift.¹⁴

Ms. N challenges the Division's decision.

III. Discussion

A. Division of Senior & Disability Services regulations

A Plan of Care is developed for every qualifying recipient of Waiver services. The POC outlines the recipient's individualized needs, and it identifies providers that are available to render services as well as family and community supports available to the recipient.¹⁵ The POC may include environmental modification services.¹⁶ Environmental modification services that result in physical adaptations to a recipient's residence will be considered if the service is necessary to: (A) meet the recipient's needs for accessibility identified in the recipient's plan of care; (B) protect the health, safety, and welfare of the recipient; and (C) further the independence of the recipient in the recipient's residence and community.¹⁷ Department of Health and Human Services regulations include a list of environmental modification expenses that are specifically prohibited. Subsection 7 AAC 300.130(j) provides in relevant part: "The department will not pay for the following services under this section: ... (8) elevator installation, repair, or maintenance."

At the hearing, the manager of the Division's Operations and Training unit testified that the ban on expenditures for elevators became part of the regulation around 2004.¹⁸ He indicated that the prohibition was adopted because of the many repair problems the Division faced with

¹¹ Ex. E, pp. 10-15; Claimant Ex. G, pp. 11-16.

¹² Ex. C; Claimant Ex. H.

¹³ The denial letter also asserted that the existing lift adequately meets Ms. N's accessibility needs. The Division did not pursue this basis for decision at hearing. The evidence in the record is that the existing system often requires repairs, and parts are becoming more difficult to obtain. There is also evidence of safety concerns with the present system. *See* Ex. 1 at pp. 3-4 (letter from Alaska Stairlift & Elevator, dated 12/29/14).

¹⁴ Ex. D; Claimant Ex. H.

¹⁵ 7 AAC 130.217(a)(3).

¹⁶ 7 AAC 130.300.

¹⁷ 7 AAC 130.300(b)(2).

¹⁸ Testimony of Andy Sandusky.

elevators, which then translated into cost and liability concerns. He stated that elevators often require specially trained workers for repair and maintenance, and some municipal codes require re-inspection following repairs. For these reasons, the Division prefers stair lifts. Stairway platform or chair lifts are mechanically simpler than elevators, resulting in fewer repairs, less cost, and less resulting liability.

B. Burden of Proof

Ms. N bears the burden to prove by a preponderance of the evidence that the Division erred in denying her request.¹⁹ She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²⁰

C. Elevators, Vertical Platform Lifts and Platform Stair Lifts

The issue in this case is a question of law: is a vertical platform lift an “elevator” within the meaning of 7 AAC 130.300(j)(8)? If it is, the Division must deny the proposed POC amendment, since it has no authority to pay for elevator installation, repair or maintenance.

Department of Health and Social Services regulations do not define what qualifies as an “elevator” for purposes of 7 AAC 130.300(j)(8), and there is no case law interpreting this subsection. In its denial letter, the Division cited to the Miriam-Webster dictionary, which defines “elevator” as “a machine used for carrying people and things to different levels in a building.” This definition is a very broad one and is not particularly helpful on these facts. If applied here, it would preclude the Division from paying for the vertical platform lift that Ms. N has requested *and* the platform stair lift that the Division believes might be the better option. In that broad sense, elevators, vertical platform lifts and platform stair lifts are functional equivalents; they all transport people from one level in a building to another.

The Alaska Department of Labor and the Municipality of Anchorage inspect vertical transportation equipment to the safety codes and standards published by the American Society of Mechanical Engineers (ASME).²¹ ASME codes represent a widely recognized source of authority and technical guidance on vertical transportation equipment including elevators, vertical platform lifts and stair platform lifts. They offer the level of practical, detailed

¹⁹ 7 AAC 49.135.

²⁰ 2 AAC 64.290(a)(2).

²¹ See Claimant Ex. C (email from Municipality of Anchorage Elevator Inspector Curt Burgoyne to Barbara Rodes dated January 29, 2015).

information that is most helpful for answering the question in this case. In light of this expertise, the undersigned takes official notice of the ASME safety codes.

ASME codes make a clear distinction between “elevators” and platform or stair lifts. In fact, ASME addresses the two kinds of devices in separate codes. The one specifically for elevators and escalators is located at A17.1.²² The safety code for platform and stairway lifts is set out at A18.1.²³ The two codes define “elevator” and “vertical platform lift” differently.²⁴ To differentiate the devices even more, the safety standard for platform lifts and stairway lifts specifically excludes elevators.²⁵ ASME A18.1 adds other distinctions between elevators and platform or stair lifts. For instance, platform and stairway lifts are intended exclusively for the transportation of a mobility impaired person. They have limited vertical travel, operating speed, and platform area. The operation must be under continuous control of the user or attendant. They may not travel more than one floor, and a full passenger enclosure on the platform is prohibited.²⁶

Private residence elevators are not similarly limited.²⁷ Elevators are not use-restricted to mobility impaired people. Elevator cars must be fully enclosed on all sides and on the top, with the exception of the entrance opening.²⁸ The cars are suspended by wire ropes or steel chains, and they typically move within a shaft or hoistway.²⁹ They may travel multiple floors, and they do not require constant pressure or continuous control to operate.³⁰

This information supports the conclusion that Ms. N has a vertical platform lift and not an elevator: it is not fully enclosed; it travels a limited distance; its purpose is to transport Ms. N, a mobility impaired person; and it requires constant pressure or continuous control to operate. As such, the prohibition contained in 7 AAC 130.300(j)(8) does not apply. This result is consistent

²² The Safety Standard for Elevators and Escalators, A17.1, can be found at <https://law.resource.org/pub/us/code/ibr/asme.a17.1.2004.pdf>.

²³ The Safety Standard for Platform Lifts and Stairway Lifts, ASME A18.1, can be found at <https://law.resource.org/pub/us/code/ibr/asme.a18.1.2008.pdf>.

²⁴ An “elevator” is defined as “a hoisting and lowering mechanism, equipped with a car, that moves within guides and serves two or more landings....” ASME A17.1 § 1.3. A “vertical platform lift” is defined as “a powered hoisting and lowering mechanism designed to transport mobility-impaired persons on a guided platform that travels vertically.” ASME A18.1 § 1.3; *See also* Claimant Ex. C.

²⁵ ASME A18.1 § 1.1.2 (Equipment Not Covered by This Standard).

²⁶ ASME A18.1 § 1.1 (Scope).

²⁷ *See* ASME A17.1 § 5.3 (Private Residence Elevator requirements); *see also* Ex. 1 at pp. 14-18 (Letter from Bruno Independent Livings Aids, dated September 22, 2014, describing differences with elevators).

²⁸ ASME A17.1 § 5.3.1.8.1

²⁹ ASME A17.1 § 5.3.1.12 (suspension), § 5.3.1.1 (hoistway).

³⁰ ASME A17.1 § 5.3.1.10.3 (rise), § 5.3.1.18.1 (operating devices).

with the Division's past practice with regard to Ms. N's vertical platform lift, since the Division has approved payment to repair the system a number of times.³¹ Payment for such repairs also would have been prohibited by 7 AAC 130.300(j)(8) if the vertical lift was considered to be an elevator.

The hearing testimony offered in favor of the Division's position does not compel a different outcome. The manager of the Operations and Training unit discussed the mechanical complexity, repair problems, cost and liability concerns associated with "elevators"; however, he did not tie those concerns to the Division's experience specifically with vertical platform lifts. Though the Division argued that vertical platform lifts are a type of "elevator," there is insufficient evidence in the record to conclude that such lifts involve the same elaborate and expensive mechanisms as elevator systems, or that vertical platform lift repair costs and inspection requirements are similar to those associated with elevators. There also is not any evidence in the record showing that the elevator prohibition in 7 AAC 130.300(j)(8) is related to the Division's experience with vertical platform lifts.

At hearing, the Division indicated its preference for a platform stair lift to replace Ms. N's vertical lift. It argued that it had not received adequate information to fully assess this option, which might still be viable. It also noted that other potentially viable options, such as remodeling Ms. S's garage into living quarters, had not been adequately explored. The Division's denial letter did not provide notice that its action was based, in part, on lack of adequate information regarding other alternatives.³² The agency therefore may not rely on that argument here.³³

³¹ See Claimant Ex. G, p.3 (noting July 28, 2014 approval for POC amendment to repair of the system); Ex. 1 pp. 19-21 (lift service history). In the July 2014 POC amendment, the service is described as "Environmental Modification (EMOD)," which is instructive even if the billing code may pertain to specialized medical equipment.

³² 7 AAC 49.070 (written notice required giving basis for agency decision).

³³ Similarly, the fact that Ms. S's home is for sale is not cited as a reason to deny the proposed POC amendment, and the Division acknowledged that it is not a basis for decision.

IV. Conclusion

For the reasons discussed above, a vertical platform lift is not an “elevator” for purposes of 7 AAC 130.300(j)(8). The Division’s decision denying the proposed POC amendment on this basis is reversed.

DATED this 22nd day of June, 2015.

Signed _____
Kathryn A. Swiderski
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 4th day of August, 2015.

By: *Signed* _____
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]