

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAYMOND E. LOPEZ)	
Claimant)	
)	
VS.)	Docket No. 1,039,530
)	
GENERAL MOTORS CORPORATION)	
Self Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Both claimant and respondent requested review of the January 29, 2009, Preliminary [*sic*] Decision entered by Administrative Law Judge Marcia L. Yates Roberts. James E. Martin, of Overland Park, Kansas, appeared for claimant. Peter J. Chung, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) assessed penalties of \$914 against respondent for failure to pay awarded compensation when due. In addition, the ALJ found that claimant's attorney was entitled to attorney fees in the amount of \$1,365.

The record on appeal consists of the Transcript of Proceedings held January 29, 2009, and the exhibits; the transcript of the Settlement Hearing held November 4, 2008; and the pleadings contained in the administrative file.

ISSUES

Claimant argues that the amount of attorney fees awarded was insufficient when taking into consideration claimant attorney's time and expertise.

Respondent argues that it was error to award penalties in this matter. In the event the Board finds penalties were warranted, respondent claims the ALJ erred in her calculation of the penalty period. Respondent also argues that claimant did not meet his burden of providing an evidentiary basis for an award of attorney fees.

The issues for the Board's review are:

(1) Was claimant entitled to a penalty in this matter? If so, for what period of time was compensation past due?

(2) Did claimant provide a basis for an award of attorney fees? If so, was the amount of attorney fees awarded reasonable?

FINDINGS OF FACT

On November 4, 2008, a settlement hearing was held in which respondent and claimant agreed to settle claimant's workers compensation claim for injuries to his right and left upper extremities. Special Administrative Law Judge Mark E. Kolich found the proposed settlement to be reasonable and in claimant's best interests. He entered an award in the amount of \$22,558.58, which amount was due and owing as of the date of the settlement hearing. It was agreed that payment would not be made at the hearing but would, instead, be completed by mail. On November 5, 2008, claimant's attorney sent a Demand for Payment to respondent and respondent's attorney, demanding payment of the award. The Demand for Payment was received by respondent on November 6, 2008, and by respondent's attorney on November 7, 2008. Claimant's attorney filed a Motion for Penalties on December 11, 2008, in which claimant requested penalties because payment of compensation was not made within 20 days of the demand.

A hearing was held on the Motion for Penalties on January 29, 2009. Claimant's attorney argued that payment of compensation was not received by claimant until January 6, 2009, 9.14 weeks after the November 5, 2008, demand letter was sent.¹ Respondent's attorney agreed at the hearing that the dates set forth by claimant's attorney were correct. At the hearing, respondent introduced an exhibit that showed respondent's counsel had requested and a check from the respondent's adjuster was issued on November 26, 2008, and a replacement check was issued on December 24, 2008. In his brief to the Board, respondent's counsel argued that respondent did not act in bad faith as respondent mailed a check in the amount of \$22,558.58 to respondent attorney's office on November 26, 2008. It was to be sent on to claimant's attorney. This was 20 days after respondent's receipt of the Demand for Payment. That check was not received by respondent's attorney until December 18, 2008. In the meantime, a second check in the amount of \$22,558.58 had been requested and after it was received, it was then sent to claimant's attorney, which claimant's attorney eventually received on January 6, 2009.

At the hearing on the Motion for Penalties, claimant's attorney advised the ALJ that he had spent 9.1 hours on this matter and requested attorney fees for that amount of time based on a rate of \$250 per hour. Dennis Horner, an attorney in Kansas City, Kansas, testified that considering overhead and claimant attorney's experience, a fee of \$250 per hour was not unreasonable. Mr. Horner also said that it was his understanding that attorneys representing the defense in workers compensation claims were billing between \$110 and \$150 an hour. Respondent presented no evidence to the contrary. Claimant's attorney did not submit an itemization of his services and time spent. The ALJ awarded attorney fees in the amount of \$1,365, which computes to \$150 per hour for 9.1 hours.

¹ November 5, 2008, to January 6, 2009, is 9 weeks, not 9.14 weeks as was argued by claimant.

PRINCIPLES OF LAW

K.A.R. 51-3-1 states: "Compensable cases shall be determined and terminated by only five procedures under the act: . . . (d) by settlement hearing before an administrative law judge"

K.A.R. 51-18-2(a) states: "The effective date of the administrative law judge's acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge."

An award of penalties under K.S.A. 44-512a is not a preliminary award but, instead, is a final order.² It is subject to de novo review on the record as a final order provided written request for review is filed within ten days from the order's effective date.³

K.S.A. 44-512a states in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . , if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

² *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, Syl. ¶ 1, 861 P.2d 1355 (1993).

³ K.S.A. 2008 Supp. 44-551(i)(1); K.S.A. 2008 Supp. 44-555c(a).

K.S.A. 44-536(g) states:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

ANALYSIS

The ALJ's penalty order should be modified to find compensation was past due for 9, not 9.14 weeks, but should otherwise be affirmed. Compensation was due November 5, 2008, the day following the entry of the award. Respondent did not pay the award within 20 days of the demand. Nine weeks passed before payment was received by claimant. K.S.A. 44-512a permits the ALJ to assess a penalty of up to \$100 per week. Respondent did not present evidence at the hearing before the ALJ to justify its delay in issuing payment or mitigate the amount of the penalty.

The ALJ's attorney fee award should be affirmed. Claimant requested fees for 9.1 hours of services at \$250 per hour. Claimant failed to present an itemized statement for those services, but at the hearing before the ALJ, respondent did not dispute the amount of time claimant's attorney spent. Therefore, the 9.1 total hours is accepted. Respondent apparently did dispute the hourly rate requested, as evidence was offered on that request.

Claimant's expert witness testified that \$250 per hour was "not unreasonable" for an attorney of Mr. Martin's experience and ability. However, Mr. Horner further acknowledged that an attorney representing the defense in a workers compensation claim would typically receive a fee in the range of \$110 to \$150 per hour. The Board believes that an award for attorney fees based upon time spent rather than upon a contingency is no different for claimant's counsel than it is for respondent's. While \$250 per hour may be reasonable for claimant's counsel where payment is uncertain and dependent upon a contingency, that is not the situation here. The ALJ awarded claimant's counsel a fee for

the total amount of time requested and at the top of the range testified to by claimant's own expert witness for respondent attorneys who typically are paid by the hour and not by any contingency.

CONCLUSION

(1) Claimant is entitled to a civil penalty of \$100 per week for 9 weeks. The amount awarded by the ALJ is modified to \$900.

(2) Claimant's attorney is entitled to be paid a fee by respondent for 9.1 hours of service at \$150 per hour. The amount awarded by the ALJ was reasonable.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated January 29, 2009, is modified to assess a penalty of \$900 rather than \$914, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Peter J. Chung, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge