BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TIMOTHY C. BRADLEY Claimant	)	
V.	)	
HAVENS STEEL COMPANY Respondent	)	Docket No. 137,873
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant's counsel requested review of the October 15, 2014, Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Gary L. Jordan of Ottawa, Kansas, appeared for claimant. Stephanie Warmund of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent). This case has been placed on the summary docket for disposition without oral argument.

The ALJ awarded claimant's attorney fees at the rate of $150 per hour for 30.2 hours for services rendered to claimant subsequent to the initial and original claim and in connection with a post-award application for medical benefits.

The Board has considered the record and adopted the stipulations listed in the Order.

ISSUES

Claimant's counsel argues the hours billed and the hourly rate requested are reasonable for 11 months of continuous representation of his client. Claimant's attorney further contends he is entitled to 33.2 hours of work at a rate of $206 per hour, a rate he previously received from an unrelated client for workers compensation services.

Respondent's counsel maintains the ALJ's Order should be affirmed. Respondent's counsel argues the charges claimed exceed what was required to effectively prosecute the claim. Further, respondent's counsel contends the awarded rate of $150 per hour is

correct as claimant's attorney failed to prove reasonable and customary charges in the locality as directed by K.S.A. 2013 Supp. 44-536(g).

The issue for the Board's review is: What is the appropriate amount of attorney fees to be awarded to claimant's counsel for services rendered obtaining post-award medical benefits?

FINDINGS OF FACT

Claimant sustained an injury to the right foot and lower leg on May 26, 1989. As a result, claimant underwent surgery to the right foot, including fusion and insertion of a plate and screws. The claim was settled on May 22, 1991, on the basis of a 21 percent impairment to claimant's right lower extremity as a running award with future medical left open.

Claimant returned to his attorney in September 2013 for assistance in obtaining additional medical treatment related to his right lower extremity. Claimant's counsel argued the difficulty of this case stemmed from the fact the injury was over 24 years old. Mr. Jordan noted:

> The insurance company was out of business. The employer had changed hands and was no longer in business. Therefore, it took some work to find the insurance company and to find the proper parties to get involved in the case.[1]

Mr. Jordan indicated much of his time was spent working with the insurance carrier's claims representative.[2] He wrote:

> The attorney for the insurance carrier authorized the claimant's attorney to deal directly with the claims representative concerning all matters, and subsequent negotiations were held primarily with the claims representative. The insurance carrier had destroyed its file. . . . Claimant's attorney furnished the insurance carrier with a copy of the settlement transcript and medical records regarding the 1989 injury.[3]

Claimant's attorney also itemized time spent researching and scheduling medical providers because claimant's original surgeon, Dr. Olney, was no longer available to perform additional surgery on claimant's right foot.

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[1] M.H. Trans. at 6.

[2] See *Id.*, Cl. Ex. 6 at 1-2.

[3] Claimant's Brief (filed Nov. 25, 2014) at 2.

Claimant's counsel filed an Application for Post-Award Medical on November 12, 2013, as a result of respondent denying claimant's demand for additional medical treatment. In an Order dated December 2, 2013, the ALJ granted claimant additional medical treatment based on evidence his condition was related to the original 1989 injury.

Claimant eventually underwent additional surgery on his right foot. Mr. Jordan noted he continued to provide a variety of services to claimant over the subsequent 8-month period until his release from treatment on August 19, 2014. Claimant's attorney submitted an itemized statement to respondent's counsel for a total of 33.2 hours worked at $206 per hour. Mr. Jordan testified this was the rate he charged one of his workers compensation clients during the same time period. He stated he adjusted his fees by cost-of-living change based on the Social Security website, and the $206 per hour rate reflects annual inflation rates per annum.

Mr. Jordan filed a Motion for Payment of Attorney Fees in the amount of $6,839.20 for services rendered in connection with claimant's application for post-award medical benefits on August 29, 2014. A motion hearing was held on October 14, 2014. Claimant's attorney explained, in addition to noting the time limitations of the post-award claim and lengthy relationship with his client, that he has 46 years of experience in the workers compensation field. Mr. Jordan submitted evidence regarding his reputation and ability.[4]

Respondent's counsel objected to the hourly rate as excessive. Further, Ms. Warmund noted many of the itemized entries were related to administrative work and should not count as attorney fees. Respondent's counsel testified she spent less than five hours total on the post-award preliminary hearing.

The ALJ found:

> It looked like approximately 3 hours of time may have been devoted to items not directly involved in the post award matter. Otherwise, the claimant attorney's time itemization appeared reasonable. A claimant attorney's fee shall be awarded on the basis of 30.2 hours. The claimant's attorney also asked for payment for time spent preparing for this hearing, but the court did not consider that post-award services rendered to the employee.[5]

Regarding the hourly rate, the ALJ wrote:

> The present case was only complex in that it was an old injury from 1989 and the insurance carrier's file had been destroyed. This may have caused the claimant's

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[4] See M.H. Trans., Cl. Ex. 3-5.

[5] ALJ Order (Oct. 15, 2014) at 2.

attorney to devote more time than in a "typical" case, but would not have required peculiar legal skills.

The claimant's attorney is certainly highly skilled and respected. He deserves the maximum reasonable fee. But there have been other cases . . . where very experienced claimant's counsel have requested higher than $150 per hour and been awarded $150 per hour by the appeals board. Following that precedent, the hourly rate in this case shall be $150.[6]

Claimant's counsel filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-510k(c) states:

The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536, and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs

K.S.A. 2013 Supp. 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.

(1) 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.

(2) 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

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[6] *Id*.

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.

(3) If the services rendered herein result in a denial of additional compensation, penalties, or other benefits, and it is determined that the attorney engaged in frivolous prosecution of the claim, the employer and insurance carrier shall not be liable for any portion of the attorney fees incurred for such services.

ANALYSIS

The first case before the Board in which the hourly rate for post-award attorney fees pursuant to K.S.A. 2000 Supp. 44-510k was an issue that occurred in 2001. The Board found $125 per was a reasonable hourly rate for the work performed.[7] In 2002, the Board denied two requests by attorneys representing claimants for a post-award hourly rate in excess of $125 per hour.[8] In 2004, the Board, without comment, affirmed an ALJ award of $150 per hour.[9] Since that time the Board has consistently affirmed ALJ awards for post-award hourly fee rates of $150[10] and denied requests for a fee in excess of $150 per hour.[11]

It has been ten years since the Board has allowed an increase in the rate at which attorneys should be compensated for time spent pursuing post-award benefits for their clients. Claimant's attorney cites the Kansas Court of Appeals in *Hernandez v. Tyson Fresh Meats, Inc.,*[12] in support of his request for $206 per hour. While not specifically addressing the issue, the Court in *Hernandez* noted in dicta a request for $180 per hour, that they did not grant, was a reasonable attorney fee in connection with an appeal before

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[7] See *Bain v. Cormack Enterprises, Inc.*, No. 222,967, 2001 WL 641599 (Kan. WCAB May 31, 2001).

[8] See *Paniagua v. National Beef Packing Co., L.P.,* No. 205,469, 2002 WL 433102(Kan. WCAB Feb. 26, 2002); *George v. Snip N Clip*, No. 256,500, 2002 WL 31602580 (Kan. WCAB Oct. 31, 2002).

[9] See *Horton v. Cadwell's Country Mart*, No. 220,168, 2004 WL 2522317 (Kan. WCAB Oct. 28, 2004).

[10] See *Edwards v. Boeing Company*, No. 1,006,143, 2008 WL 2673158 (Kan. WCAB June 30, 2008); *Stithem v. Cessna Aircraft Co.*, No. 1,012,897, 2008 WL 2673166 (Kan. WCAB June 30, 2008); *Bilbrey v. U.S.D. 443*, No. 1,007,546, 2010 WL 1918565 (Kan. WCAB Apr. 14, 2010).

[11] See *Wallis v. Ideker, Inc.*, No. 1,007,527, 2008 WL 2354911 (Kan. WCAB May 29, 2008); *Lopez v. General Motors Corporation*, No. 1,039,530, 2009 WL 1314329 (Kan. WCAB Apr. 13, 2009); *Mills v. Express Communications,* No. 1,021,634, 2009 WL 1314313 (Kan. WCAB Apr. 24, 2009); *Finney v. Finn's Electric Co., Inc,* No. 216,317, 2010 WL 3489633 (Kan. WCAB Aug. 31, 2010); *Hinson v. Perry-Lecompton Thriftway,* No. 1,041,697, 2013 WL 2455686 (Kan. WCAB May 17, 2013); *Lemmons v. Ryder Integrated Logistics, Inc.,* No. 1,036,335, 2014 WL 517122 (Kan. WCAB Jan. 21, 2014).

[12] *Hernandez v. Tyson Fresh Meats, Inc.,* No. 98,547, 185 P.3d 326 (Kansas Court of Appeals unpublished opinion dated June 13, 2008).

the Court of Appeals. Claimant's attorney argues that since the *Hernandez* decision, the inflation rate justifies his request for $206 per hour.

The Board duly notes claimant attorney's argument that the approved attorney fee rate should be increased due to inflation. Based upon claimant's attorney's experience and reputation, the Board finds a reasonable increase to be $175 per hour.

The ALJ reduced claimant's attorney fee request by three hours because approximately three hours of time may have been devoted to items not directly involved in the post-award matter. The ALJ commented on claimant's attorney's calls and correspondence to the claims representative, talking to claimant about temporary total disability issues, and researching and calling Dr. Olney. The Board finds all of these charges to be reasonable and related to competently representing claimant in his post-award application for medical treatment.

CONCLUSION

Claimant's attorney is entitled to attorney fees for 33.2 hours at the rate of $175 per hour.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 15, 2014, is modified. Claimant's attorney is entitled to an award of attorney fees in the amount of $5,810.00.

IT IS SO ORDERED.

Dated this _____ day of February, 2015.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge