

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

MONTE CARL MCINTIRE)	
Claimant)	
)	
VS.)	
)	
MASTER AIR CONTROL)	
Respondent)	Docket No. 179,977
)	
AND)	
)	
FEDERATED MUTUAL INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the February 2, 2005 post- award Order¹ by Administrative Law Judge (ALJ) Thomas Klein. The Board placed this matter on its summary docket and it was deemed submitted effective March 17, 2005.

APPEARANCES

Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the transcript from the post- award hearing as well as the exhibits attached thereto, along with the parties' briefs to the Board.

ISSUES

The ALJ succinctly set forth the issues to be determined as follows:

[W]hether or not respondent is responsible for some expert testimony [expenses] that was provided during a post-award conflict and whether or not the claimant's - and what, if any, are the appropriate amount of claimant's attorney's fees that should be assessed.²

¹ Although the ALJ's Order indicates the matter came before him as a preliminary hearing, it is clear from the transcript and the briefs that this was a post- award matter and not a preliminary hearing.

² P.A.H. Trans. at 3.

After hearing statements from counsel and accepting claimant's counsel's affidavits regarding time spent in connection with this post- award matter, the ALJ denied claimant's request for an Order compelling respondent to pay the claimant's expert witness fee, but granted claimant \$1,662.50 in attorney's fees.

The claimant requests review of both aspects of the ALJ's decision. Claimant first alleges the ALJ erred in failing to grant him an Order directing respondent to reimburse the \$350 paid to his expert in connection with his post- award claim for additional benefits. Second, claimant contends the ALJ erred in awarding a post- award attorney fee at the hourly rate of \$125 rather than the requested \$150 per hour. Claimant's counsel also requests the Board award additional attorney's fees to reflect the 4 hours spent in the preparation and pursuit of this appeal, again at the \$150 rate.

Respondent argues that the applicable statutes and case law prohibit the ALJ from compelling respondent to pay for claimant's expert witness costs. Accordingly, that portion of the ALJ's Order should be affirmed. Respondent further contends that while it concedes it is responsible for a reasonable attorney's fee in association with this post- award matter, the rate claimant's counsel requests along with the number of hours associated with the individual tasks are suspect. Respondent urges the Board to closely scrutinize the entries and when reasonably reviewed and reduced, believes the Board should compensate claimant's counsel at the rate of \$115 per hour.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The facts surrounding this dispute are simple. Claimant sought a post- award order for payments to his wife for her ongoing services in caring for him as he is unable to do so for himself as a result of his work-related injury. When the parties could not agree upon the value of these services, a post- award hearing was requested. In connection with this request, claimant sought expert testimony from Jerry Hardin, for the purpose of establishing a reasonable, market rate for such services. Mr. Hardin was deposed on November 9, 2004 and was paid \$350 for his time.

Thereafter, the parties appeared to have come to some sort of resolution, although the issue of attorney's fees and expenses to be paid under K.S.A. 44-536 was left undecided. Claimant's counsel submitted a bill to respondent for both his legal services as well as the \$350 expense associated with Mr. Hardin's testimony. Claimant's counsel requested payment and when that was not tendered, a hearing was held.

Claimant argues that in spite of case law to the contrary, the doctrine of fairness and equity should allow for a claimant to recover the cost of proving his or her post- award

entitlement to benefits through expert testimony. To hold otherwise has a chilling effect on the injured employee's right to seek benefits. Claimant believes that respondents will use such a rule against claimants, making it cost prohibitive to assert post-award requests.

Additionally, claimant believes the Board's reliance on K.S.A. 44-553 is misplaced given the context of a workers compensation proceeding. Claimant asserts that K.S.A. 44-553 relates to lay witnesses and not to expert witnesses, such as Mr. Hardin. Thus, claimant should be able to recover the expense of Mr. Hardin's testimony under K.S.A. 44-510k(c), the statute that authorizes the recovery of expenses.

Respondent maintains this issue is governed by the Board's analysis in *Deming*³ and that the ALJ was correct in rejecting claimant's attempt to assess the \$350 cost for Mr. Hardin's testimony against respondent.

The Board has been faced with this precise issue before and has rejected claimant's arguments. K.S.A. 44-510k(c) allows for an award of costs when post-award litigation occurs on a claimant's behalf. "Costs" as described by that statute are defined as including,

[B]ut are not limited to, witness fees, mileage allowances, any costs associated with the 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.

The language of K.S.A. 44-510k(c) indicates that the list is not all inclusive. Items contained in the statute are noted as being "not limited to." As such, the Board has found that attorney fees, mileage expenses and telephone expenses may be recoverable.⁴ This statute says nothing about expert fees.

The claimant in *Deming* sought reimbursement for the expenses associated with obtaining the testimony of Bernard Abrams, M.D., his expert in a post-award matter. The Board declined to award his fee as a "cost". The Board reasoned that K.S.A. 44-553 (Furse 1993) allows witness fees for witnesses who appear *in response to a subpoena*. Because that physician was not subpoenaed to give his testimony, but rather was hired as an expert, that statute would not apply. Additionally, the Board noted that even under the Code of Civil Procedure, fees charged by treating physicians for appearance and testimony at trial are generally not assessed against the losing party as costs.⁵

³ *Deming v. National Coop Refinery*, No. 201,932, 2003 WL 22704135 (Kan. WCAB Oct. 31, 2003).

⁴ *Id.*

⁵ *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.2d 723 (1996).

The Board is not persuaded by claimant’s suggestion that the fee paid to an expert witness should be taxed as a cost to the respondent. The Board finds no statutory basis to assess this cost against respondent and declines to read into the statute the view espoused by claimant’s counsel. The Board finds its rationale in *Deming* to apply and affirms the ALJ’s denial of the \$350 expert fee as an expense or cost.

The Board also affirms the ALJ’s award of attorney’s fees. The \$1,662.50 reflects an hourly rate of \$125 per hour for 13.3 hours, accepting at face value the time spent by claimant’s counsel in connection with this matter. The Board believes the hourly rate assessed by the ALJ was fair and reasonable under the circumstances as was the number of hours expended in connection with the hotly contested issue. Thus, the ALJ’s finding on the issue of attorneys fees is affirmed.

Although claimant’s counsel submitted an affidavit along with his brief to the Board suggesting that he spent an additional 4 hours in the preparation of his appeal materials, the Board refuses to consider that affidavit. The Board can only consider those issues and evidence submitted to the ALJ. The affidavit presented by claimant’s counsel came after the close of evidence and has not been considered by the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the post- award Order Administrative Law Judge Thomas Klein dated February 2, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Robert R. Lee, Attorney for Claimant
- Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
- Thomas Klein, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director