

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

<b>BRENDA LEE NAFF</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 204,405
<b>DAVOL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LUMBERMEN'S MUTUAL CASUALTY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appeal from a January 5, 2000 Order for Attorney Fees entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The ALJ granted the full amount of claimant's attorney fees request for services rendered post award in connection with claimant's application for medical treatment. Respondent and insurance carrier contend the assessment of fees is inappropriate, as they fully complied with the Award regarding the request for medical treatment. Furthermore, respondent and carrier contend that if an attorney fee is awarded, it should be a lesser amount than that requested as it is more than three times the fee charged by their counsel. Therefore, the issues for Appeals Board review are:

1. Whether claimant is entitled to an award against respondent for her attorney's fees.
2. Whether the amount of attorney fees requested is reasonable.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

An Award was entered on November 27, 1996 by Special Administrative Law Judge William F. Morrissey finding claimant was entitled to permanent partial disability compensation based upon separate scheduled injuries to each of claimant's arms, with an accident date of October 13, 1994 for the left upper extremity and an accident date of November 6, 1995 for the right upper extremity. Future medical treatment was awarded as follows:

"Continuing conservative medical care, as needed, is order [sic] provided by a physician of respondent's choice. Claimant shall file application with the director for approval of more extensive medical care, if indicated."

Also, claimant's attorney fee contract was approved insofar as it was not inconsistent with K.S.A. 44-536.

Approximately one week later, on December 4, 1996, claimant's counsel sent a letter to counsel for the respondent and insurance carrier requesting additional medical treatment. A series of hearings, medical examinations and appeals followed which the parties are familiar with and need not be recited here. What is clear from those post award proceedings, however, is that the medical treatment claimant is seeking is the same treatment recommended by Dr. Lynn D. Ketchum before the Regular Hearing in this matter and before the Award. A review of Dr. Ketchum's office notes is significant because it shows that the medical treatment claimant is seeking post Award, is the same treatment Dr. Ketchum recommended pre Award.

5/9/96

She just got her hinged elbow brace three days ago, so we really don't have a chance to observe any benefit yet, and she is essentially unchanged. . . . we will check her back in six weeks.

6/20/96

She is here at the request of Chris Miller today for a rating of the right upper extremity. She has been rated on the left so that is not an issue. In testing her today, she had very significant tenderness in the right lateral humeral epicondyle. When I extended her elbow which she had difficulty doing because of inflammation in and around the elbow joint and then flexed the wrist it aggravated the pain in her right elbow very significantly. In addition, when I had her extend the middle finger against resistance she had pain over the radial tunnel and had a lot of discomfort with pressure over the radial head.

At this time, my feeling is that she has right radial tunnel syndrome and right lateral humeral epicondylitis. Her grip strength today was 25 on the right and 20 on the left using the rapid alternating technique best of five efforts.

She has been off work for four months and has not improved. She has been using the hinged elbow brace and Zostrix, again with no improvement.

My recommendation is that she have a release of the right radial nerve superficial radial branch and then explore the right lateral humeral epicondyle and release the tendon of the ECRB or repair it, depending upon the findings at the time of surgery.

1/2/97

I have not seen her since June 20, 1996. She is still complaining of a lot of pain in the right lateral humeral epicondyle, as well as in the elbow joint just posterior to it, along with weakness. She still has positive tenderness directly over the lateral humeral epicondyle and the elbow joint. She has positive Cozen's and Will's signs. Her grip strength is also significantly reduced peaking at 18 on the right, 14 on the left. She has had an ample course of conservative management, over a year now, and therefore I recommend going ahead at this time with surgical debridement and lateral epicondylectomy on the right along with a repair of the aponeurosis and possible debridement of the elbow joint as she is symptomatic there.

Following this, she would be in therapy for about six weeks, three times a week. It is anticipated that she would regain her maximum range of motion and strength in eight to ten weeks. She is not working at this time. She could return to a light duty job using the left upper extremity only in two weeks, but regular duty in eight to ten weeks.<sup>1</sup>

Instead of pursuing the medical treatment Dr. Ketchum had recommended in June of 1996, claimant proceeded to regular hearing. In so doing, claimant represented that her condition was at maximum medical improvement and, therefore, the recommended surgery was unnecessary.<sup>2</sup> Nevertheless, on December 4, 1996, which was one week after the Award was entered and approximately one month before she would return to Dr. Ketchum on January 2, 1997, claimant decided to pursue the medical treatment Dr. Ketchum had recommended on June 20, 1996. When asked why she had waited to seek the additional medical treatment, claimant answered that Dr. Ketchum had recommended a trial period with an elbow brace before surgery. After using the elbow brace and being off work and still not getting any better she decided it was time to try something else. But a review of Dr. Ketchum's records shows that it was at the May 9, 1996 office visit that Dr. Ketchum recommended an additional trial period with the elbow brace. Claimant acknowledged that there is no mention in Dr. Ketchum's June 20, 1996 office notes of waiting an additional period of time. To the contrary, Dr. Ketchum's June office notes specifically state that claimant has been off work for four months, using the brace and taking medication with no improvement and, because of this, surgery is recommended. The Appeals Board finds that the claimant's decision to delay seeking the additional medical treatment until after the Regular Hearing and Award was not based upon any recommendation by Dr. Ketchum.

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<sup>1</sup> Claimant's Exhibit 1 to February 21, 1997 Preliminary Hearing Transcript of Proceedings.

<sup>2</sup> See, e.g., Crabtree v. Beech Aircraft Corp., 229 Kan. 440, 443, 625 P.2d 453 (1981).

Respondent and insurance carrier, in their Response to Application for Assessment of Attorney Fees, make the argument this way:

Although the present claim for fees was precipitated by a post award request for medical treatment, an analysis of the surrounding circumstances leads to the inescapable conclusion that the true intent of claimant's counsel was not to secure medical attention for his client, but rather to generate and collect a fee.

In May v. The University of Kansas, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998), the Court held:

It is contrary to public policy to add the burden of attorney fees to a respondent who has conscientiously complied with all provisions of an award. Such a holding would defeat the policy of encouraging timely compliance by respondents.<sup>3</sup>

In this case respondent has complied with all orders of the Court. The disagreement between claimant and respondent/insurance carrier has not been about providing medical treatment. Instead, it has been about which physician should provide that treatment and, specifically, whether claimant should receive the more aggressive treatment recommendations of Dr. Ketchum. As stated, it is significant that Dr. Ketchum also made the same treatment recommendations before regular hearing and claimant chose not to pursue them at that time. Instead, claimant represented that she had reached maximum medical improvement by proceeding to regular hearing and award.

At the February 21, 1997 Preliminary Hearing, claimant admitted her physical condition had not changed since the July 2, 1996 Regular Hearing.

Q. Are those problems today -- when I say today, I mean, oh, during the last two or three weeks, say, the same or better or worse than they were when you testified in July of 1996?

A. The same.<sup>4</sup>

The Appeals Board finds that to order claimant's attorney fees paid by respondent under these circumstances would be inconsistent with the purpose of the post award attorney fee provisions of K.S.A. 44-536(g). That statute is intended to address situations where circumstances have changed. In this case circumstances have not changed. Neither claimant's condition nor the treatment recommendations of the physicians have changed since the entry of the Award. Accordingly, the Appeals Board finds that K.S.A.

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<sup>3</sup> May at Syl. ¶ 5.

<sup>4</sup> Feb. 21, 1997 Preliminary Hearing Transcript at 7.

44-536(g) does not apply and, therefore, an award for claimant's attorney fees against respondent/insurance carrier should be denied.

Because of this ruling, the Appeals Board does not reach the second issue concerning the reasonableness of the fee awarded. It is noted, however, that the parties failed to present any evidence on this issue.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order for Attorney Fees entered by Administrative Law Judge Brad E. Avery dated January 5, 2000, should be, and is hereby, reversed and claimant's application for attorney fees is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2000.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the majority and would hold that claimant's attorney is entitled to receive a reasonable fee for the legal services provided in this post-award request for medical treatment.

For whatever reason, claimant has now decided to pursue Dr. Ketchum's recommended surgery. It is irrelevant if that delay was caused by claimant's interpretation of Dr. Ketchum's recommendation, reluctance or fear to undergo surgery, or even the desire to avoid controversy and additional litigation (which has certainly been the case in this post-award matter). The fact remains that claimant has now decided to seek surgery (which respondent has to date refused to provide) and she should be entitled to present that request to the Division of Workers Compensation knowing that her attorney will receive adequate compensation for the time and effort expended.

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BOARD MEMBER

c: Chris Miller, Lawrence, KS

Mark E. Kolich, Kansas City, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director