

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

KAREN SHOATE)	
Claimant)	
VS.)	
)	Docket No. 247,562
GRAPHICS SYSTEMS, INC.)	
Respondent)	
AND)	
)	
FREMONT COMPENSATION)	
Insurance Carrier)	

ORDER

Respondent appealed Administrative Law Judge Jon L. Frobish's Post Award Medical Order dated September 20, 2001. This was a post-award proceeding for medical benefits, penalties and attorney fees. The Board heard oral argument on November 13, 2001.

ISSUE

Whether the Administrative Law Judge erred in awarding claimant post-award attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein together with the briefs and arguments of counsel, the Board makes the following findings of fact and conclusions of law.

As a result of her work related injuries, claimant underwent back surgery with interbody fusion at L2-3 and L3-4 on April 20, 2000. Dr. Bernard T. Poole performed the surgery. Dr. Poole released claimant with restrictions on August 7, 2000. An Award was entered on May 10, 2001, which provided for future medical "upon proper application to and approval by the Court."

After entry of the Award, claimant's symptoms increased. She did not want to return to the physician that had performed the surgery, Dr. Poole. Claimant desired an independent opinion instead.

On June 5, 2001 claimant sent respondent a letter designated as a notice of intent demanding authorization for further medical treatment, noting that an application for preliminary hearing would be filed if benefits were not provided within seven days of receipt of the correspondence.

The administrative file contains an Application for Post Award Medical filed June 19, 2001, requesting "follow-up care and treatment with an orthopedic." A hearing was held on July 12, 2001, before Judge Frobish. By Order dated July 26, 2001, respondent was ordered to provide a list of three physicians from which claimant could choose one.

After this hearing, the parties engaged in numerous negotiations concerning the list of three physicians respondent was ordered to provide claimant. Initially, respondent provided a list containing three physicians, Dr. Philip Mills, Dr. John Estivo and Dr. Robert Eyster, from which the claimant could pick a treating physician.

Claimant did not select one of the three health care providers offered and the matter proceeded to a second post-award hearing on September 20, 2001. At the conclusion of the hearing, the Administrative Law Judge authorized Dr. John Estivo for all treatment, tests, and referrals, except referrals to rehabilitation hospitals. The Administrative Law Judge additionally awarded claimant's attorney fees in the amount of \$1,062.50 for 8.5 hours at \$125.00 per hour.

On review, respondent alleges the Administrative Law Judge erred in awarding attorney fees. Respondent acknowledges that K.S.A. 44-510h mandates that if the Administrative Law Judge finds the services of the health care provider furnished by the respondent are unsatisfactory then the respondent shall submit the names of three health care providers from which the employee may select the authorized treating health care provider. However, respondent contends that it is improper to award attorney fees because respondent complied with the July 26, 2001 Order.¹

Claimant responds that respondent never provided a list of three appropriate physicians. Dr. Eyster had been authorized previously during the early stages of this claim and claimant had not been satisfied with his treatment. Thereafter, another physician was authorized. Dr. Mills was not appropriate because he was not an orthopedic surgeon. Claimant had three back surgeries and, therefore, believed she needed a back surgeon as her authorized physician. At that time claimant was not agreeable to Dr. Estivo either.

Claimant acknowledges that respondent provided the names of additional orthopedic surgeons. Unfortunately, when claimant contacted those physicians none of

¹ See Naff v. Davol, ___ Kan. App. 2d ___, 20 P.3d 738, *rev. denied* ___ Kan. ___ (2001), and May v. University of Kansas, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

the physicians would agree to see a workers compensation claimant as a patient. Respondent also offered a physician in Kansas City, but claimant, who lives in Wichita, did not want to travel that far. When no additional names were offered, claimant requested the second hearing. It was ultimately agreed at that hearing that Dr. Estivo would be the authorized physician.

Respondent contends that it complied with the ALJ's Post Award Medical Order to provide a list of three physicians. The Board disagrees. The statute² contemplates claimant being given a choice of physicians. This would be an empty provision if that choice did not mean three physicians that are both qualified to treat claimant's particular condition and who are willing to accept injured workers as patients. Accordingly, the Board finds that respondent did not fully comply with the ALJ's July 26, 2001 Order and a second hearing became necessary. Claimant's counsel provided a valuable service to his client and is entitled to a reasonable fee for his services.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Post Award Medical Order entered by Administrative Law Judge Jon L. Frobish, dated September 20, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Stephen J. Jones, Attorney for Claimant
- Christopher J. McCurdy, Attorney for Respondent
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director

² See K.S.A. 44-510h(b)(1).