

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

<b>THOMAS A. HOGE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>CONCRETE SERVICE CO.</b>	)	
Respondent	)	Docket No. 251,937
	)	
AND	)	
	)	
<b>DEPOSITORS INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the August 25, 2006, Post-Award Medical Award entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant demonstrated a need for further evaluation of his low back and granted a change in authorized treating physician. The ALJ further awarded claimant's counsel payment of his fees and expenses incurred in this post-award medical proceeding, except that the fee paid to claimant's medical expert was not ordered reimbursed.

The only issue on appeal is whether the ALJ erred in not ordering respondent to pay claimant's medical expert's fee as part of claimant's counsel's attorney fees and expenses. Claimant acknowledges that the Board has consistently denied requests for payment of expert witness fees in post-award medical proceedings. However, claimant requests that the Board re-evaluate and change that position.

Respondent and its insurance carrier (respondent) asks that the Board reject claimant's request.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented, together with the briefs and arguments of the parties, the Board makes the following findings of fact and conclusions of law:

In this proceeding, claimant requested post-award medical and a change of authorized physician to Dr. Lee Dorey. In presenting evidence in favor of this request, claimant took the evidentiary deposition of Dr. Dorey, for which Dr. Dorey charged a fee of \$400. Claimant's counsel included this \$400 fee in his affidavit setting out his expenses and time spent in representing claimant. The ALJ approved claimant's counsel's request for attorney fees and all expenses, except the \$400 expert witness fee for Dr. Dorey's deposition testimony.

The Board has held that expert witness fees charged by treating or examining physicians for an appearance and deposition testimony are generally not assessed to the losing party as costs.<sup>1</sup> Nonetheless, claimant earnestly argues that the Board's reference to the Code of Civil Procedure invalidates its rationale because

“[t]here simply is nothing even remotely similar in civil practice to the system of requiring a respondent to pay an opponent's attorney in post-award litigation. Since there is no analogous proceeding in civil practice, a better analysis would evaluate the underlying purpose of the fee shifting mechanism of such proceedings.<sup>2</sup>

And because the respondent may be held responsible for claimant's post-award attorney fees and costs, regardless of success or failure, claimant maintains that same rationale should be applied to awarding expert witness fees.<sup>3</sup>

While claimant's argument is logical, it ignores other provisions of the Kansas Workers Compensation Act that do not reflect such an absolute legislative intent to shift the expenses of litigation to the respondent. For example, K.S.A. 44-510h(b)(2) prohibits a claimant from using the unauthorized medical allowance to obtain a functional impairment rating, K.S.A. 44-555 allows the ALJ to assess reporter fees to any party, and K.A.R. 51-9-6 allows the fee for a neutral physician's report to be assessed to any party.

In *Golden*<sup>4</sup>, the Board set forth its reasoning as follows:

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<sup>1</sup> See, e.g., *Hoge v. Concrete Service Co.*, No. 251,937, 2005 WL 3665466 (Kan. WCAB Dec. 16, 2005); *Lane v. Boan Masonry Co., Inc.*, No. 268,372, 2005 WL 3030736 (Kan. WCAB Oct. 14, 2005); *Deming v. National Co-op Refinery*, No. 201,932, 2003 WL 22704135 (Kan. WCAB Oct. 31, 2003).

<sup>2</sup> Claimant's Brief at 3 (filed Sept. 19, 2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Golden v. Conagra Foods, Inc.*, No. 104,145, 2005 WL 1046543 (Kan. WCAB Apr. 12, 2005).

K.S.A. 44-536(g) makes no reference to expenses. However, K.S.A. 44-510k(c) allows for the award of costs when post-award litigation occurs on a claimant's behalf. "Costs" as described in that statute are defined as including:

. . . 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. (Emphasis added.)

The language of K.S.A. 44-510k(c) indicates that the list is not all inclusive and the Board has concluded that such things as attorney travel expenses including mileage, photocopying and telephone expenses may be considered as appropriate "costs." . . . However, the fees charged by physicians and other expert witnesses for consultations in anticipation of their presenting testimony at trial are generally not assessed as costs. [Footnote citing *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.3d 723, *rev. denied* 260 Kan. 992 (1996).]

The Board's decision to deny recovery for expert fees is based upon the statutory language and not based upon a borrowing from the Code of Civil Procedure. The Board's reference to Chapter 60 of the Civil Procedure Code merely illustrated the consistency of its ruling. Moreover, the Board's refusal to shift the expense of a claimant's experts to respondent is consistent with legislative intent. As such, claimant's remedy lies with the legislature.

**WHEREFORE**, it is the finding, decision and order of the Board that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated August 25, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2006.

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

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

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

**DISSENT**

The undersigned Board Member would grant claimant's request to allow him to recover the cost of the expert fees associated with this post-award request. Claimant's counsel makes a compelling argument, in that claimants are continually put to the financial test in establishing their right to benefits, even on a post-award basis. The cost of retaining an expert to establish a claimant's entitlement to further treatment is no less necessary to a post-award request than the medical records are or the presence of one's attorney. Yet, the Board has consistently allowed the recovery of mileage and copy costs, but has refused to allow expert fees. Practically speaking, if the cost of retaining an expert to testify on one's behalf is not considered a recoverable expense, it may deter a claimant from requesting additional medical benefits. For these reasons, this Board Member would grant claimant's request for reimbursement of the \$400.00 in costs and expenses.

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge