

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

<b>GARY D. LANE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,372
<b>BOAN MASONRY COMPANY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>HAWKEYE SECURITY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the Post Award Medical Award of Administrative Law Judge Steven J. Howard dated June 14, 2005. Claimant was awarded ongoing medical care with Frank P. Holladay, M.D., as the authorized treating physician. Additionally, claimant's attorney was awarded attorney fees in the sum of \$1,950, representing 15.6 hours at \$125 per hour, and expenses in the amount of \$49.22.

**APPEARANCES**

Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary R. Terrill of Overland Park, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Post Award Medical Award of the Administrative Law Judge (ALJ). In addition, the Board has considered the transcript of the settlement hearing held February 26, 2004, with attachments; the transcript of motion hearing held July 13, 2004; and the medical reports of Mark Bernhardt, M.D., of the Dickson-Diveley Midwest Orthopaedic Clinic.

**ISSUES**

1. Did the ALJ err in failing to consider the entire record before issuing the Post Award Medical Award?
2. Did the ALJ err in awarding additional medical compensation to claimant and against respondent and its insurance carrier?
3. Did the ALJ err in awarding attorney fees and expenses to counsel for claimant?
4. Did the ALJ err in refusing to award expert witness fees to claimant for reimbursement for the deposition of Frank P. Holladay, M.D.?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant, a bricklayer, had a long history of heavy physical activity associated with his masonry duties. Claimant began developing problems in 1999, when he was diagnosed with spinal stenosis. At that time, neurosurgeon Frank P. Holladay, M.D., recommended surgical intervention, which claimant elected to forgo. Claimant continued having problems and ultimately returned to Dr. Holladay in 2001, again being diagnosed with spinal stenosis at L2-3 and L3-4 and spondylolisthesis at L5-S1, with a herniated disc at L2-3. Dr. Holladay had performed surgery on August 14, 2001, on the spinal stenosis at L3-4 consisting of a laminotomy, which he described as a partial laminectomy. He also performed surgery in March of 2002 for the spondylolisthesis. Claimant has been unable to return to his employment as a bricklayer since that time.

Claimant returned to Dr. Holladay in 2004, again with ongoing worsening difficulties. Claimant testified that he performed no specific activity which caused him to develop additional problems, but that his condition just continued to progressively worsen. Dr. Holladay testified that claimant's back problems are progressive. He testified that spinal stenosis, when it reaches a certain point, simply continues to deteriorate.

Claimant's original litigation was settled by running award on February 26, 2004, at which time claimant was paid a lump sum, with medical treatment being left open for future determination. There was no dispute at that time that claimant had suffered accidental injury arising out of and in the course of his employment with respondent. The present dispute deals with whether claimant's current condition is a result of his labors with respondent or simply the ongoing, long-term degenerative condition that claimant has had for many years. Dr. Holladay testified that claimant's current condition, which he agreed is worsening, is in some part related to claimant's employment as a bricklayer both during the time he worked for respondent and before. He acknowledged that claimant's ongoing

spinal stenosis is the result of a multitude of causes, including claimant's work activities, claimant's general body makeup and the fact that claimant has been a long-term tobacco user.

Claimant was referred for an independent medical examination to board certified orthopedic surgeon Mark Bernhardt, M.D. Dr. Bernhardt examined claimant on August 19, 2003, with a report of that same date provided to Judge Howard. Dr. Bernhardt also provided additional reports to Judge Howard on September 2, 2003, and on November 13, 2003, all dealing with claimant and various issues associated with claimant's litigation for this work-related injury. The ALJ, in listing the record considered, does not mention the reports of Dr. Bernhardt, even though the referral to Dr. Bernhardt pursuant to the Order of Administrative Law Judge Kenneth J. Hursh dated April 8, 2003, does state that the referral was pursuant to K.S.A. 44-510[e]<sup>1</sup> and K.S.A. 44-516, which allow for the consideration of a report generated by an independent medical examiner appointed by the administrative law judge without the doctor's testimony, as is normally required by K.S.A. 44-519. K.S.A. 44-516 states that the Director may employ one or more neutral health care providers to make such examinations of the injured employee as may be directed. K.A.R. 51-9-6 allows that if a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record. K.S.A. 44-516 also allows that the Director may, in the Director's own discretion or upon the request of either party, employ a neutral health care provider to make such examinations of the injured employee as may be directed. The report in that instance "shall be considered by the administrative law judge in making the final determination." The Board finds ample justification in this record for considering the reports of Dr. Bernhardt.

However, in reviewing the reports of Dr. Bernhardt, it is noted that Dr. Bernhardt last examined claimant several months prior to the February 26, 2004 running award. Dr. Bernhardt has not had the opportunity to examine claimant more recently and would, therefore, be unaware of claimant's worsening condition.

Dr. Holladay, on the other hand, has had the opportunity to examine claimant, submitting claimant to additional tests, including a January 10, 2005 lumbar myelogram, indicating claimant's central stenosis at L3-4 had worsened due to what the doctor described as the natural progression of the degeneration. Dr. Holladay went on to note that the surgery that he was proposing is a far less invasive surgery than what could have been proposed, i.e., a possible fusion, and he felt this was the best way to proceed in claimant's case under these circumstances. The Board agrees. Based upon this record, the Board finds that claimant is in need of additional medical care and the

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<sup>1</sup> In the Order, it says "pursuant to K.S.A. 44-516 and/or K.S.A. 44-510." K.S.A. 44-510 is incorrect, and the correct statute is K.S.A. 44-510e.

opinion of Dr. Holladay, the authorized treating physician, is the most persuasive opinion in this record.

K.S.A. 44-536 allows for attorney fees to be awarded if the attorney renders services subsequent to the ultimate disposition of the initial and original claim. In this instance, claimant's attorney has provided significant post-award litigation support for this claimant. Post-award attorney fees to claimant's attorneys serve a significant purpose.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.<sup>2</sup>

Claimant's attorney submitted an affidavit showing 15.6 hours of time spent in the preparation and litigation of this issue. The Board finds the time spent is appropriate. Claimant's attorney requests payment at the rate of \$125 per hour, which the Board has held in the past is a reasonable hourly fee. The Board affirms an award of \$1,950 in attorney fees.

Claimant's attorney further requests \$500 to cover the cost of the expert witness fee paid to Dr. Holladay. The Board has held in the past, and continues to hold, that fees charged by treating physicians for appearance and testimony are generally not assessed to the losing party as costs.<sup>3</sup> K.S.A. 44-553 allows witness fees for witnesses who appear in response to a subpoena. In this instance, Dr. Holladay was not subpoenaed for his testimony. Therefore, that statute would not apply. Additionally, 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.<sup>4</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Post Award Medical Award of Administrative Law Judge Steven J. Howard dated June 14, 2005, should be, and is hereby, affirmed.

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<sup>2</sup> Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

<sup>3</sup> *Deming v. National Coop Refinery*, No. 201,932, 2003 WL 22704135 (Kan. WCAB Oct. 31, 2003); *Grant v. Chappell*, 22 Kan. App. 2d 398, 916 P.2d 723 (1996).

<sup>4</sup> *Grant, supra*.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director