

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MIGUEL PRUDENTE)
Claimant)
V.)
) CS-00-0375-021
PRG REAL ESTATE MANAGEMENT INC.) AP-00-0448-893
Respondent)
AND)
)
TWIN CITY FIRE INS. CO.)
Insurance Carrier)

ORDER

Claimant's attorney requested review of the January 16, 2020, Order by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on May 21, 2020.

APPEARANCES

C. Albert Herdoiza, of Kansas City, Kansas, appeared for Claimant. Shelly Naughtin, of Overland Park, Kansas, appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ denied Claimant's attorney's request for post-award attorney fees, finding the conditions for an award of post-award attorney fees from the Respondent were not met. In so doing, the ALJ found Claimant's attorney's efforts resulted in no award of additional disability compensation, medical compensation, penalties, or other benefits. The parties resolved the post-award medical issues without a hearing and award.

Claimant appeals, arguing the ALJ's Order should be reversed as the conditions for post-award attorney fees have been met. Respondent argues the Order should be affirmed. The issue on appeal is whether the ALJ erred in denying post-award attorney fees as requested by Claimant's attorney.

FINDINGS OF FACT

This claim was settled on a running award on November 27, 2017. Claimant retained all rights available to him under the Kansas Workers Compensation Act, including future medical benefits. Claimant received post-award medical treatment from February through August 2018. On May 2, 2019, Claimant's attorney sent a seven-day demand seeking additional medical treatment. On May 20, 2019, Claimant's attorney was advised an appointment was scheduled for Claimant with the authorized treating physician, Dr. Terrence Pratt on July 24, 2019.

The parties are in disagreement on what transpired following Claimant's appointment with Dr. Pratt on July 24, 2019. Respondent contends Dr. Pratt recommended a surgical consultation, which was approved by Respondent, and declined by Claimant. Claimant denies this occurred. In any event, Claimant received conservative treatment from and after July 24, 2019.

On September 4, 2019, Claimant called his attorney and advised his physical therapy had been completed, he hadn't received any mileage reimbursement and he was still in pain. Claimant inquired if he would be returning to see the physician. Claimant's attorney filed a seven-day demand on September 5, 2019, requesting an appointment with a physician and mileage reimbursement.

On October 22, 2019, Claimant's attorney was advised Claimant was scheduled to see Dr. Pratt on October 29, 2019. Claimant attended this appointment. Dr. Pratt's October 29 report states in pertinent part "I recommended a surgical reassessment at the time of the last visit [7/24/19]. He reports that that has not occurred. He wants to have the reevaluation with his surgical specialist and I do not disagree with that."¹ Claimant advised his attorney that Dr. Pratt had recommended a referral to a shoulder surgeon.

On November 4, 2019, Claimant's attorney filed a seven-day demand requesting a list of two shoulder specialists from which to choose an authorized treating physician. In the body of the seven-day demand, Claimant's attorney quoted the above language from Dr. Pratt's October 29, medical record. On December 4, 2019, Respondent's attorney sent an email to Claimant's attorney advising the referral to a shoulder specialist had been authorized on three different dates – the latest being November 4, 2019. Sometime thereafter, Claimant's attorney was advised that an appointment had been scheduled with a shoulder surgeon on January 2, 2020. Claimant's attorney sent a letter to Claimant on December 23, 2019, with the appointment information. Claimant was seen by the shoulder specialist on January 2, 2020.

¹ Claimant's seven-day demand dated Nov. 4, 2019.

Claimant's attorney requested \$1,541.25 for legal services rendered from July 25, 2018, through January 10, 2020.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2015 Supp. 44-536(g) states:

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

The Board in *Rupp*² set forth the policy reasons for awarding post-award attorney fees where the efforts of Claimant's attorney results in the receipt of additional medical treatment absent a formal hearing.

The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.³ The general purpose of allowing attorney fees in these situations includes the policy reasons that (1) attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved; and (2) statutes allowing an award of attorney fees are not passed to benefit the attorney, but are passed to enable litigants to obtain competent counsel.⁴ Thus, the Workers Compensation Act provides that an attorney who represents an employee is entitled reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. And if those legal services result in an additional award of disability compensation but result in an additional award of medical compensation or other benefits the director shall fix the proper amount of such attorney fees to be paid by the employer.⁵

The ALJ denied Claimant's attorney's request stating "The conditions for an award of attorney fees from the Respondent were not met in this case. The Claimant's attorney's

² *Rupp v. Sysco Foods, Inc.*, 1,003,714, 2009 WL 319375 (Kan. WCAB Sept. 30, 2009).

³ *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

⁴ *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 66 193, 199, 786 P.2d 618 (1990).

⁵ See *supra* n. 2.

motion is therefore denied.” In so doing, the ALJ noted no hearing was conducted and no additional medical benefits were actually awarded due to the efforts of Claimant’s attorney. We disagree.

It is unclear if the ALJ denied Claimant’s attorney’s motion for post-award attorney fees because no hearing was held, no award of additional medical benefits resulted due to his efforts or both. It is undisputed no hearing was held resulting in an additional award of medical benefits to Claimant. The Board ruled In *Stithem*⁶ an actual hearing on the matter was not required to award attorney fees. Providing post-award services was enough.

It is also undisputed Claimant has and continues to receive additional medical treatment following his attorney’s formal, written request mailed to Respondent on May 2, 2019, and filed with the Division of Workers Compensation on May 9, 2019. Respondent complied with and authorized all treatment and medical mileage requested by Claimant. Although the benefits provided may not have been provided as timely as Claimant would want, the benefits were provided within a reasonable amount of time following the request.

In part, the purpose and policy of K.S.A. 44-536(g) is to “encourage voluntarily compliance” with Claimant’s request for post-award medical benefits. Respondent did. To deny Claimant’s attorney an award of attorney fees under these facts would have a “chilling effect” on a Claimant’s ability to retain competent legal counsel, post-award and contrary to the legislative intent in K.S.A. 44-536(g).⁷

The Board must, therefore, determine what is “the proper amount of such attorney fees to be paid by the employer.” We are left to balance the good faith effort of Respondent by voluntarily providing additional medical treatment in this claim with Claimant’s attorney’s request for post-award attorney fees. Accordingly, the Board finds the reasonable attorney time expended and the results achieved, under the facts of this claim and taken from Claimant’s attorney’s Revised Billing (Ex A-1) are as follows:

1.	4/18/19 Telephone conference with client, memo to file.	.30
2.	5/2/19 Review file, prepare demand letter and filings for State, memo to file.	.50
3.	9/4/19 Telephone conference with client, memo to file.	.50
4.	9/5/19 Prepare demand letter and filings for State, memo to file.	.50
5.	10/29/19 Telephone conference with client, memo to file.	.20
6.	11/4/19 Prepare demand letter and filings for State, memo	

⁶ *Stithem v. Cessna Aircraft Co.*, No. 1,012,897, 2008 WL 2673166 (Kan. WCAB Jun. 30, 2008).

⁷ *Fife v. Boeing Company*, No. 162,556, 1997 WL 378641 (Kan. WCAB Jun. 11, 1997).

	<u>to file.</u>	<u>.50</u>
	Total Staff Time	2.5
1.	4/16/19 Review file, instructions to staff.	.30
2.	9/17/19 <u>Meet with client, memo to file, instructions to staff.</u>	<u>1.0</u>
	Total Attorney Time	1.3

Claimant's attorney has requested \$50 per hour for staff time and \$225 per hour for his attorney time. At the motion hearing, Respondent's attorney disputed whether the work performed by Claimant's attorney and his staff⁸ were necessary, but did not dispute the hourly rates requested. Accordingly, the hourly rates requested by Claimant's attorney are found to be reasonable under the specific facts of this case. Claimant's attorney is therefore awarded \$417.50 for post-award attorney fees through January 15, 2020 (Staff time 2.5/hrs x \$50/hr = \$125 and Attorney time 1.3/hrs x \$225/hr = \$292.50).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be reversed and post-award attorney fees shall be awarded to Claimant's attorney as set forth above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Order of Administrative Law Judge Kenneth J. Hursh dated January 16, 2020, is reversed and attorney fees are awarded to Claimant's attorney in the amount of \$417.50.

⁸ M.H. Trans. at 10, 15-16.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

The undersigned agrees an actual post-award medical award need not be issued for Claimant’s counsel to have a viable claim for post-award attorney fees under K.S.A. 44-536(g). The undersigned also agrees Claimant’s counsel provided services to Claimant in association with the surgical consultation and medical mileage reimbursement voluntarily provided by Respondent. Claimant’s counsel’s services are ministerial, however, and are not payable under K.S.A. 44-536(g).

The undersigned agrees with the Findings of Fact in the majority’s opinion, with two additions. First, in response to Claimant’s demand for medical mileage reimbursement and additional medical treatment of September 5, 2019, Respondent’s counsel advised Claimant’s counsel via email on September 13, 2019, medical mileage reimbursement would be provided. Claimant’s actual receipt of medical mileage reimbursement was delayed because Claimant moved to a different residence without notifying anyone. Second, Rockhill Orthopedics confirmed they received authorization from Respondent for the surgical consultation recommended by Dr. Pratt, and attempted to schedule the surgical consultation with Claimant on September 20, 2019. Claimant told Rockhill Orthopedics he did not want to schedule the appointment.⁹ It appears Respondent voluntarily provided the compensation demanded by Claimant within, at the most, fifteen days of Claimant’s seven-day demand.

⁹ See M.H. Trans., Resp. Ex. B.1.

As noted by the majority, Claimant's counsel demanded a surgical consultation on several occasions, and Respondent duly authorized it. It appears Claimant did not receive his medical mileage reimbursement quickly because he did not advise his address changed, and the mileage checks were sent to Claimant's old address. It also appears the delay in the surgical consultation was due to Claimant refusing to schedule the appointment on September 20, 2019, although Claimant's refusal may have been attributable to a language barrier. Nevertheless, the delay was not attributable to Respondent. Indeed, the majority notes Respondent voluntarily complied with Claimant's request for post-award medical benefits.¹⁰

Not all post-award services are payable under K.S.A. 44-536(g). In *May v. University of Kansas*,¹¹ the employee received an award of compensation with open future medical, which the employee exercised. The employee's attorney forwarded medical bills to the employer's attorney with a demand for payment. The employer complied with the future medical award and paid the bills without protest. The employee's attorney sought payment of the time incurred in forwarding the bills for payment. The Court of Appeals interpreted K.S.A. 44-536(g) to allow attorney fees for services directed to securing additional benefits for the employee, and monitoring a case to assure the timely payment of medical compensation from a respondent who had never been delinquent in making those payments was not contemplated by K.S.A. 44-536(g).¹² "Statutory attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved."¹³ "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."¹⁴ The Court found the employee's counsel essentially engaged in clerical, or "ministerial services", providing no additional benefit to the employee in the absence of evidence the employer failed to comply with the award, and denied the request for post-award attorney fees under K.S.A. 44-536(g).

This case is similar. Claimant's counsel forwarded his client's demand for medical mileage reimbursement and additional medical treatment. Respondent timely provided the compensation demanded. Despite Claimant's counsel's arguments to the contrary, the actual record contains no evidence Respondent either denied the benefits demanded by Claimant or engaged in dilatory conduct to frustrate Claimant's right to future medical treatment. Curiously, the majority of the time in the fees awarded herein was incurred by

¹⁰ See *supra* at 4.

¹¹ *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

¹² See *Id.* at 69-70.

¹³ *Id.* at 70 (citing *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 199, 786 P.2d 618 (1990)).

¹⁴ *Id.*

Claimant's counsel's staff, which underscores the clerical or ministerial nature of the services. Under *May*, attorney fees should not be awarded.

To be clear, the undersigned would deny the request for attorney fees only in this particular case with these particular facts. Attorneys who provide actual legal services to secure additional benefits for their injured clients deserve to be compensated for their efforts, and K.S.A. 44-536(g) serves that important interest. The statute also exists to provide injured workers access to counsel. Awarding attorney fees where an employer conscientiously complies with an award, as in this case, however, subverts K.S.A. 44-536(g). Accordingly, the undersigned respectfully dissents.

BOARD MEMBER

c: (Via OSCAR)

C. Albert Herdoiza, Attorney for Claimant
Shelly Naughtin, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge