

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DONITA K. ZAMMARRIPA</b>	)	
Claimant,	)	
	)	
v.	)	
	)	
<b>JAI AMBE MAA INC.</b>	)	
d/b/a <b>COMFORT INN</b>	)	
Respondent,	)	CS-00-0316-666
	)	AP-00-0453-065
and	)	
	)	
<b>AMERICAN ZURICH INSURANCE CO.</b>	)	
Insurance Carrier.	)	

**ORDER**

Respondent requested review of the September 1, 2020, Order awarding attorney’s fees by Administrative Law Judge (ALJ) Ali Marchant. The Board heard oral argument on January 7, 2021.

**APPEARANCES**

Melinda Young appeared for Claimant. Kendra M. Oakes appeared for Respondent and its Insurance Carrier.

**RECORD AND STIPULATIONS**

The Board considered the post-award record and adopted the stipulations listed in the record.

**ISSUE**

The Court found “although a hearing was never necessary in order to obtain Claimant’s benefits, those services benefitted Claimant, and were not merely ministerial, and Claimant is entitled to attorney fees for them.”<sup>1</sup> Claimant’s counsel was awarded post-award attorney’s fees in the amount of \$13,120.00 for work completed on the case from

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<sup>1</sup> ALJ Order (Aug. 6, 2020) at 3.

May 2013 to March 2020. The fees represented 10.8 hours at a rate of \$150 per hour, 34.4 hours at a rate of \$175 per hour, 9.7 hours at a rate of \$200 per hour, and 70.8 hours at a rate of \$50 per hour. Respondent was also ordered to pay Claimant \$74.45 for postage and fax expenses incurred.

Respondent requests review of the Order, arguing Claimant is not entitled to post-award attorney fees. Specifically, Respondent argues Claimant's attorney failed to provide sufficient detail to determine what each entry relates to; entries regarding making copies, mailing or faxing, submitting and forwarding medical mileage, and monitoring authorized medical treatment are ministerial tasks; and no hearing was required to secure additional benefits. Respondent also argues there is no statutory basis for awarding costs associated with copies, postage, and faxes, because they were not performed in connection with a hearing for additional medical benefits, and were purely clerical or ministerial.

Claimant argues the Order should be affirmed because no evidence was presented proving the time spent by Claimant's counsel was not incurred, and Respondent's repeated slow responses to pay benefits owed required Claimant's counsel to intervene on behalf of Claimant to secure those benefits.

The issue on appeal is whether Claimant's attorney is entitled to post-award attorney's fees and expenses?

### **FINDINGS OF FACT**

Claimant was awarded benefits through an Award issued December 10, 2012, for injuries to her back in the course of her employment with Respondent. Respondent appealed to the Board on December 26, 2012. The Board issued a decision modifying the Award on May 9, 2013.

From May 2013 through March 2020, Claimant's counsel drafted and sent emails, letters, and filed several post-award medical applications. Claimant's counsel, on two occasions in 2016, faxed letters to the Court, canceling scheduled hearings just prior to the hearing date, and stating the demands had been met by the Respondent. A Notice of Post Award Hearing was filed with the Division April 23, 2019. That hearing was continued by the Division on May 6, 2019. On June 12, 2020, Claimant filed a Motion for Post-Award Attorney's fees.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A.44-536(g) reads in part:

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.

(1) If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation.

(2) If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567, and amendments thereto, to the extent of the liability of the fund.

(3) If the services rendered herein result in a denial of additional compensation, penalties, or other benefits, and it is determined that the attorney engaged in frivolous prosecution of the claim, the employer and insurance carrier shall not be liable for any portion of the attorney fees incurred for such services.

The Board's review of an order is *de novo* based on the record.<sup>2</sup> *De novo* review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.<sup>3</sup>

Respondent argues the plain language of K.S.A. 44-536(g) requires a denial of attorney fees unless an actual hearing for the benefits sought is held. This argument is without merit. The statute states "in connection with...a hearing for additional medical benefits." The plain language does not require an actual hearing be held, provided the time expended on behalf of an injured worker is in pursuit of securing additional benefits.

Respondent also argues attorney fees should be denied because the time billed by Claimant's counsel is clerical/ministerial in nature and the description provided is too vague to determine whether the time submitted for the task is reasonable. The Board has previously held time billed for clerical/ministerial services is contrary to public policy and shall not be reimbursed in a request for attorney fees.<sup>4</sup> Here, Claimant's counsel submitted 22 paralegal hours for entries entitled "Copy and mail," "Copy and fax" and "copy." The Board finds under the itemization presented in this claim, these entries are clerical/ministerial and denied.

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<sup>2</sup> *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>3</sup> *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

<sup>4</sup> *Webb v. Hi-Low Industries*, No. 247,563, 2015 WL 6777013, at \*4 (Kan. WCAB Oct. 30, 2015).

The Board also held entries submitted for reimbursement for attorney fees must provide a reasonably detailed itemization of the time requested. The Board takes issue with the following entries contained in the itemization of Claimant's counsel:

- There are eleven entries contained on the itemization submitted by Claimant's counsel on July 21, 2016, regarding a prescription. Ten of the eleven entries deal with phone calls and emails between Claimant's counsel, Claimant, the adjuster and Respondent's counsel for a total of 2.9 paralegal hours. No additional information was provided by Claimant's counsel regarding these entries. Without additional detailed information explaining why 2.9 hours were expended regarding a prescription, the Board finds this time to be unreasonable and reduces it to 1.5 paralegal hours. This, added to the .2 paralegal hours expended for "review receipts for medication," reduces the July 21, 2016, entry to 1.7 paralegal hours.
- Regarding the May 22, 2017, entry entitled "Call with Client re: mediation," Claimant's counsel submitted .4 legal and .2 paralegal hours without further explanation. Without additional detailed information explaining why both legal and paralegal time was submitted for the same entry, the Board finds this time to be unreasonable and eliminates the .2 paralegal hours.
- There is a March 28, 2018, entry entitled "Call with Client re: cancellation of appointment." Claimant's counsel submitted .3 legal and .2 paralegal hours without further explanation. Without additional detailed information explaining why both legal and paralegal time was submitted for the same entry, the Board finds this time to be unreasonable and eliminates the .2 paralegal hours.
- The two entries on November 18, 2019, entitled "Email to MVP re: status on mileage check." Claimant's counsel submitted .2 paralegal hours for what appears to be the same issue. No additional explanation was provided. Without additional detailed information explaining why there are two entries regarding the same issue on the same date, the Board finds this time to be unreasonable and eliminates one of the .2 paralegal hours.
- The four entries on December 2, 2019. Three of the four entries list "NOI for medical mileage." Claimant's counsel submitted .4 legal and .6 paralegal hours without further explanation. Without additional detailed information explaining why both legal and paralegal time was submitted regarding the same issue, the Board finds this time to be unreasonable and eliminates the .6 paralegal hours.<sup>5</sup>

Claimant's counsel withdrew the June 6, 2019, entry entitled "Email to MVP re: apology" requesting .3 paralegal hours. This, combined with the above listed reductions,

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<sup>5</sup> M.H. Trans., Cl. Ex. 2.

total 24.9 paralegal hours. This reduces the paralegal hours ordered paid from 70.8 to 45.9 hours.

Finally, Respondent argues Claimant should not have been ordered to reimburse Claimant for the expense of postage and faxes as “costs.” K.S.A. 44-510k(c) states in part:

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536, and amendments thereto. As used in this subsection, "costs" include, 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.

The statute lists specific items deemed to be “costs,” but the list is noninclusive. The ALJ ordered Respondent to pay Claimant \$74.45 for postage and faxes. The Board disagrees and finds under the facts of this claim, postage and faxes are not “costs” and denies payment.

**AWARD**

**WHEREFORE**, it is the decision of the Board the Order Awarding Attorney’s Fees of Administrative Law Judge Ali Marchant dated September 1, 2020, is affirmed as to the award of attorney fees of 10.8 hours at a rate of \$150, 34.4 hours at a rate of \$175 per hour, and 9.7 hours at a rate of \$200 per hour. The Board modifies the award of paralegal fees from 70.8 hours to 45.9 at a rate of \$50 per hour. The Board reverses the award of \$74.45 in incurred expenses for postage and faxes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2021.

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

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

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

DISSENT

The undersigned disagrees with the conclusion of the majority. K.S.A. 44-536(g) allows post-award attorney fees based upon reasonable and customary charges in the locality for the services. At a minimum, the attorney requesting a fee must make a proffer to the ALJ showing the services are reasonable and customary. Claimant attorney's affidavit says nothing about the reasonableness of the claimed fees. No evidence or testimony was provided at the motion hearing suggesting the claimed fees are reasonable.

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BOARD MEMBER

c: (Via OSCAR)

Melinda Young, Attorney for Claimant

Kendra M. Oakes, Attorney for Respondent and Insurance Carrier

Hon. Ali Marchant, Administrative Law Judge