

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JEANETTE ARD
Claimant

v.

CATHOLIC HEALTH INITIATIVES
Respondent

AP-00-0467-574
CS-00-0055-891

and

**INDEMNITY INSURANCE COMPANY
of NORTH AMERICA**
Insurance Carrier.

ORDER

Respondent requested review of the May 4, 2022, Order issued by Administrative Law Judge (ALJ) Ali Marchant. The Appeals Board heard oral argument on August 25, 2022.

APPEARANCES

Roger A. Riedmiller appeared for Claimant. Michael P. Bandre appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board considered the same record and adopted the same stipulations as the ALJ, consisting of the transcript of the Motion Hearing, held May 3, 2022, including exhibit A1; the transcript of the Post-Award Medical Hearing, held January 25, 2022, with exhibits A1-4; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did ALJ Marchant err in awarding Claimant post-award attorney fees?

FINDINGS OF FACT

Claimant sustained personal injuries from an accident arising out of and in the course of her employment on December 27, 2010. On January 6, 2018, Claimant's settlement was approved at a settlement hearing. As part of the award, future medical treatment was left open.

Subsequently, an issue arose concerning the delivery of prescription medication to Claimant's residence. Claimant sought reimbursement of the costs of renting a post office box to facilitate delivery of her medication. Respondent disputed rental of a post office box constituted medical treatment, and contended they were providing medical treatment by having the prescriptions delivered to Claimant's home. A post-award preliminary hearing took place on January 25, 2022. The request for reimbursement of the post office box was denied after ALJ Marchant found Respondent was providing medical treatment by having the prescriptions delivered to Claimant's home. The decision was not appealed.

Claimant's counsel subsequently sought post-award attorney fees totaling \$875.00 in association with the request for reimbursement of the post office box rental. In support of the motion for attorney's fees, Claimant counsel submitted the Affidavit, executed by Claimant's counsel, stating he has been licensed since 1987, primarily practices workers compensation law, and generally charges \$250.00 per hour in post-award proceedings.¹ Claimant's counsel also stated in the Affidavit he was seeking fees for 3.5 hours of work, including telephone calls, emails, file review, hearing preparation and attendance, and meeting with his client.² Claimant's counsel time was not itemized.³ Respondent argued Claimant's post-award medical request was frivolous, the Affidavit did not describe Claimant's counsel's time sufficiently, and an hourly attorney fee of \$250.00 was unreasonable.

ALJ Marchant issued the Order on May 4, 2022. First, ALJ Marchant found Claimant's post-award medical request and subsequent hearing were not frivolous because they were not completely without merit, although unsuccessful. ALJ Marchant concluded Claimant's counsel was entitled to post-award attorney fees. Second, ALJ Marchant, after considering the factors from KRPC 1.5, found Claimant's counsel's description of the time incurred was sufficiently descriptive and a reasonable hourly fee was \$225.00. ALJ Marchant awarded post-award attorney fees totaling \$787.50. The issue of post-award attorney fees in association with Claimant's counsel's motion for attorney fees was reserved. These review proceedings follow.

¹ See M.H. Trans., Cl. Ex. A1.

² See *id.*

³ See *id.*

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the award of post-award attorney fees should be reversed because the underlying post-award proceedings were frivolous. Respondent also argues Claimant's counsel did not give a sufficiently detailed accounting of the post-award attorney time he incurred, and \$225.00 is not a reasonable hourly attorney fee. Claimant's counsel argues the post-award proceedings were not frivolous and the award of attorney fees should be affirmed.

Generally, if an attorney renders services to an employee subsequent to the ultimate disposition of the initial claim, and in association with a hearing for additional medical benefits, the attorney shall be entitled to reasonable attorney fees for such services, which shall be awarded on the basis of reasonable and customary charges in the locality for such services and not on a contingent fee basis.⁴ If the services rendered result in a denial of additional compensation, and it is determined 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.⁵ The Appeals Board previously ruled a post-award medical proceeding was not frivolous, although unsuccessful, because it was not without merit.⁶

Having considered the record, the Board concludes Claimant's counsel is eligible to receive an award of attorney fees. Claimant's counsel's services clearly fall within the ambit of services to an employee subsequent to the ultimate disposition of the initial claim. The Board agrees with the analysis of the ALJ concerning the merits of Claimant's post-award medical motion. Although novel, Claimant sought reimbursement of the post office box to facilitate authorized medical treatment. Claimant described in detail at the post-award hearing the difficulty she experienced having medication delivered to her home. Claimant's post-award medical motion ultimately was unsuccessful, but this, alone, does not disqualify her attorney from receiving attorney fees. The post-award medical motion must be without merit, rendering its prosecution frivolous. Claimant's request was not devoid of merit to render it frivolous. Rather, Claimant's counsel made a good-faith argument for the extension of the application of the law. The prohibition against awarding attorney fees under K.S.A. 44-536(g)(3) does not apply.

⁴ See K.S.A. 44-536(g).

⁵ See K.S.A. 44-536(g)(3).

⁶ See *Wolf v. Evcon Industries, Inc.*, Nos. 155,949 & 155,950, 1998 WL 51317, at *4 (Kan. WCAB Jan. 30, 1998).

The Board next considers whether the award of attorney fees was reasonable. Although the Board previously approved an hourly fee of \$225.00 per hour as reasonable in post-award medical matters,⁷ the Board must consider K.S.A. 44-536(g), and the factors of KRPC 1.5(a), in determining a reasonable post-award attorney fee.⁸

The record is silent to the customary hourly rate in the Wichita area for post-award matters. Claimant's counsel states in his Affidavit he charges an hourly fee of \$250.00, but is silent on whether that rate has been approved. The Board previously approved an hourly fee of \$225.00 per hour in post-award matters. With regard to the amount of hours Claimant's counsel cites, the Board finds the description of services contained within Claimant's counsel's 3.5-hour block minimally sufficiently descriptive. While an itemized list detailing the time associated with each task would be much more helpful to the Board in determining reasonableness, 3.5 hours total seems a reasonable amount of time to spend in prosecuting Claimant's novel post-award motion.

The Board also considers the factors from KRPC 1.5(a), in determining the reasonableness of Claimant's counsel's attorney fee request. According to the record, Claimant's counsel incurred 3.5 hours of time. The compensability of the rental of a post office box to obtain authorized prescription medication is a unique issue of first impression requiring the skills of an experienced workers compensation practitioner. Prosecution of this unique issue would preclude Claimant's counsel from obtaining other work. Claimant's counsel was unsuccessful ultimately. Due to the nature of workers compensation litigation, Claimant's counsel was required to act relatively quickly. Claimant's counsel has represented Claimant for over seven years. Finally, Claimant's counsel, as ALJ Marchant noted, has practiced workers compensation law for almost thirty-five years, and regularly appears before the Administrative Law Judges and Appeals Board.

Having considered the entire record, K.S.A. 44-536(g), and the factors of KRPC 1.5(a), the Board agrees with ALJ Marchant. The Board concludes Claimant's counsel is entitled to an award of post-award attorney fees under K.S.A. 44-536(g). The Board finds and concludes a reasonable attorney fee is 3.5 hours of post-award attorney time paid at \$225.00 per hour, totaling \$787.50. The Order issued by ALJ Marchant should be affirmed in all respects.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Members the Order issued by ALJ Marchant, dated May 4, 2022, is affirmed.

⁷ See *Malone v. Fusion Electric*, No. 1,072,670, 2018 WL 3740425, at *5 (Kan. WCAB Jul. 26, 2018).

⁸ See *Pierson v. City of Topeka*, 56 Kan. App. 2d 92, 105-06, 424 P.3d 549 (2018).

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: Via OSCAR

Roger A. Riedmiller
Michael P. Bandre
Hon. Ali Marchant