



CHARTERED
ATTORNEYS AT LAW

March 27, 2009

TO ALL INTERESTED COMPANIES

Re: Expert witness fees in Kansas Workers' Compensation post-Award situations—John W. Higgins v. Abilene Machine, Inc.

Dear Friends:

Today, the Kansas Supreme Court decided that “costs” in post-Award medical situations do not include a claimant’s expert witness fees. Attorneys in the Workers Compensation Practice Group of Wallace, Saunders, Austin, Brown & Enochs litigated, briefed and argued this case and were successful.

The case involved no issues of disputed fact. Rather, this issue of first impression concerned whether a claimant’s expert witness fees incurred in the process of procuring post-Award medical benefits must be paid by Respondent and its insurance carrier in Kansas workers compensation proceedings.

As some of you may be aware, Kansas law provides that a claimant, following the issuance of an Award, may request additional medical benefits from an administrative law judge when that claimant believes that his or her physical condition has materially changed since the Award as a result of the original, underlying injury.

The relevant statute, K.S.A. 44-510k(c), allows an administrative law judge to assess against Respondents and their insurance carriers a litany of costs associated with such proceedings, including, but 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.” Respondents and their insurance carriers are also responsible for the payment of claimants’ attorney fees in such proceedings by way of K.S.A. 44-536(g).

In this case, Claimant made several strong arguments that the term “witness fees,” as identified in the relevant statute, was broad enough to encompass

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expert witness fees which are inherently associated with such proceedings. After all, medical expert testimony is almost always required for the claimant to prove he or she needs additional medical treatment and that the cause for such treatment is the original work-related injury.

To support this argument, Claimant pointed out that the list of costs and fees for which Respondents are responsible in post-Award medical proceedings is not exhaustive and that an administrative law judge should be able to assess such expert witness fees against Respondents as a matter of discretion. The Kansas Supreme Court agreed with our contention that the term "witness fees" is a term of art within the Kansas Workers Compensation Act and that it carries the same meaning as "witness fees" within the Kansas Code of Civil Procedure, in which expert witness fees must be specifically enumerated as costs recoverable by a prevailing party.

The Kansas Supreme Court was somewhat persuaded by Claimant's argument that forcing a claimant to pay his or her own medical expert is an unnecessary deterrent and thwarts the purpose of the post-Award medical procedure statute in that it does not encourage cooperation by Respondents to provide medical care. Ultimately, though, the Court decided that this was a public policy consideration that must be taken up by the Kansas Legislature, which surely must have known that it had crafted a statute by which expert medical witness fees were not recoverable by claimants.

We are very pleased with this result. Had the Kansas Supreme Court reached the opposite conclusion, the costs of the entire process of claiming the need for post-Award medical treatment would be borne by Respondents. In such an environment bereft of financial consequences for Claimants, we can imagine hordes of claimants hiring their favorite medical experts and eliciting favorable testimony regarding the need for future treatment. Respondents under such a legal regime would have a difficult choice: capitulate to their demands, or litigate the matter to what could only be described as a Pyrrhic victory. Fortunately, this result did not ensue.

As always, Claimant has twenty days to seek reconsideration of this decision before it is final. We do not anticipate that such an effort would be successful. Claimant has unsuccessfully appealed the administrative law judge's ruling to the Workers Compensation Board, the Kansas Court of Appeals, and now the Kansas Supreme Court. We remain ready to defend this favorable result.

Sincerely,

Ryan D. Weltz
For the Firm