

- On November 19, 2004, respondent's insurance carrier issued a check to claimant in the sum of \$7,169, which claimant's attorney allegedly received on November 25, 2004.

Claimant argues the compensation became due on the date of his initial demand and, therefore, it was four weeks late when it was received on November 25, 2004. In the alternative, claimant argues the November 25, 2004 payment was 10 days (or 1.5 weeks) late if the end of the 20-day grace period, or November 15, 2004, is the appropriate day to use in computing penalties under K.S.A. 44-512a. In either event, claimant requests penalties in the sum of \$100 per week.

On the other hand, respondent and its insurance carrier argued at the January 25, 2005 hearing before Judge Clark that the insurance carrier did not receive claimant's demand until October 28, 2004, and, therefore, its 20-day grace period ran through November 16, 2004. They argue payment was only three days late as they issued the check to claimant on November 19, 2004, and K.S.A. 44-512a "does not state that the penalties are calculated based on the date the check is received by claimant's counsel."¹

The issues before the Board on this appeal are:

1. When is disability compensation awarded by this Board deemed past due and payable as contemplated by the penalty statute, K.S.A. 44-512a?
2. What penalty is reasonable and fair under these facts?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the pertinent record, the Board finds and concludes claimant's request for penalties should be denied.

The Workers Compensation Act provides that penalties may be awarded workers when their employers or their employers' insurance carriers fail to pay compensation after it has been awarded and after it has become due. The Act, however, requires a worker to serve written demand for payment upon the employer or its insurance carrier, which sets forth with particularity the compensation claimed to be unpaid and past due. The Act provides a 20-day grace period following receipt of the written demand for the employer or its insurance carrier to pay the compensation and avoid the civil penalty. K.S.A. 44-512a provides, in part:

¹ P.A.M.H. Trans. at 5.

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation . . . if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

Accordingly, the first question to address when considering penalties is what compensation was past due and payable when claimant served his written demand for payment. In *Hallmark*,² the Kansas Supreme Court held compensation awarded was not due until the time for filing an appeal had expired.

Under K.S.A. 1969 Supp. 44-556 no compensation is due or payable until the expiration of twenty days after the director has made and filed his award, and a statutory demand for payment of compensation served during such period is ineffective and forms no basis upon which to predicate an action under K.S.A. 44-512a.³

Applying the holding from *Hallmark* to this claim, the disability benefits awarded claimant in the Board's October 15, 2004 Order were neither past due nor payable when claimant served written demand for payment as the 30-day period for appealing the Board's decision to the Kansas Court of Appeals had not expired.

The Board is aware that the legislature amended K.S.A. 44-556 after the *Hallmark* decision and there may be a question whether the disability compensation due for the 10-week period preceding the Board's Order would be considered past due and payable upon the effective date of the Board's decision. The Board need not address that issue in this claim, however, as the disability compensation awarded claimant terminated June 25, 2004, and, thus, was not compensation that accrued within the 10-week period before the Board's Order.

Based upon the above, the January 25, 2005 Order should be reversed. And the issue regarding what is a fair amount of penalty due claimant is moot.

² *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

³ *Id.* at Syl ¶ 2.

WHEREFORE, the Board reverses the January 25, 2005 Order and denies claimant's request for penalties.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: David H. Farris, Attorney for Claimant
- Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
- John D. Clark, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director