

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUGLAS L. HAWKINS)	
Claimant)	
VS.)	
)	Docket No. 1,013,592
USD 484)	
Respondent)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the January 9, 2009, Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded medical treatment in the form of the specific hearing aids recommended by Steven E. Press, Ph.D., and respondent was ordered to pay the invoice price for those hearing aids within 30 days of the Order or be assessed a 10 percent penalty on the amount of \$5,835.00, the full price of the invoice.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Ronald J. Laskowski of Topeka, Kansas.

The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held April 7, 2004, with attachments; the transcript of Preliminary Hearing held September 8, 2004, with attachments; the transcript of Preliminary Hearing held December 15, 2004, with attachments; the transcript of Settlement Hearing held September 20, 2006, with attachments; the transcript of Motion For Penalties Hearing held January 7, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ err in ordering payment of medical expenses at a penalties hearing? Claimant asserts that respondent has failed to

comply with an earlier Order from the ALJ wherein Dr. Press was authorized to either repair or replace claimant's hearing aids. That was the basis for the request for penalties. Respondent counters, arguing that the purpose of the hearing was to consider a request for penalties. The ALJ had no jurisdiction to order ongoing medical treatment at a penalties hearing.

2. Did the ALJ err in awarding full payment of medical expenses for the recommended hearing aids, with a prospective penalty, in violation of the statutory mandate for respondent to pay pursuant to the medical fee schedule? The ALJ ordered respondent to pay for the full cost of the hearing aids recommended by Dr. Press without regard for the medical fee schedule. Respondent argues this is contrary to the Kansas Workers Compensation Act. Respondent further argues that an assessment of penalties before any medical amounts became due violates K.S.A. 44-512a. Claimant argues that respondent has been lax in paying in the past and the doctor refused to provide the hearing aids until full payment had been received, without consideration of the medical fee schedule. Therefore, both the penalty and the second order for the medical treatment was justified.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the ALJ's Order should be reversed.

Claimant suffered permanent hearing loss as a music teacher for respondent school district. The hearing loss was claimed as a workers compensation injury, and the matter was settled by agreement of the parties at a Settlement Hearing on September 20, 2006. At that time, claimant reserved the right to review and modify the award, and future medical treatment was left open for future determination.

Claimant filed a form K-WC E-4, Application For Post Award Medical, on March 31, 2008. A hearing was set for May 28, 2008, and an Order was issued from that hearing on June 3, 2008. However, no record of that hearing was made by the ALJ. The Order authorized Dr. Press to repair or replace claimant's hearing aids.

An invoice was provided by Dr. Press showing the hearing aids with a cost of \$2,800.00 each, totaling \$5,600.00 with an extra \$235.00 for a remote control feature. Respondent contacted Dr. Press and requested a copy of the invoice on the hearing aids, as the Kansas Medical Fee Schedule allows the invoice price plus 40 percent. Respondent was advised that Dr. Press refused to abide by the Kansas Medical Fee

Schedule. The Motion For Penalties Hearing was held on January 7, 2009, with claimant requesting not only penalties, but also that the ALJ enforce the original order for the hearing aids. Claimant also disputed respondent's interpretation of the medical fee schedule with regard to hearing aids. Respondent contends that a hearing aid is a durable medical good and thus the invoice-price-plus-40-percent schedule applies. Claimant contends that respondent is required to pay the entire invoice, and in this instance, respondent should pre-pay as requested by Dr. Press. It was acknowledged that respondent had agreed to pay for the hearing aids under the medical fee schedule, but Dr. Press had refused the offer.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-510j(h) states in part:

Any health care provider, nurse, physical therapist, any entity providing medical, physical or vocational rehabilitation services or providing reeducation or training pursuant to K.S.A. 44-510g and amendments thereto, medical supply establishment, surgical supply establishment, ambulance service or hospital which accept the terms of the workers compensation act by providing services or material thereunder shall be bound by the fees approved by the director and no injured employee or dependent of a deceased employee shall be liable for any charges above the amounts approved by the director.

Here, the ALJ ordered respondent to reimburse a health care provider for fees which respondent contends exceed the medical fee schedule. As there was never a determination from this record as to the amount of the invoice for the hearing aids, there was no determination of the exact amount due and owing. However, regardless of the failure to determine the amount actually due, the ALJ would have exceeded his jurisdiction by ordering payment of amounts which exceed the medical fee schedule. Additionally, any health care provider who provides services under the Kansas Workers Compensation Act has, by statute, accepted the provisions of the medical fee schedule. If a health care provider refuses to accept the medical fee schedule, a new health care provider should be appointed.

K.S.A. 44-512a(a) states:

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 in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill,

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.

On October 24, 2008, claimant filed an Application For Penalties with the Division of Workers Compensation (Division). The Penalties Hearing was set before the ALJ on January 7, 2009. As a result of the Penalties Hearing, the ALJ also ordered respondent to provide the specific hearing aid and equipment recommended by Dr. Press. The ALJ exceeded his jurisdiction by ordering medical treatment at a Penalties Hearing. If the matter had been converted to a Post Award Medical Hearing under K.S.A. 44-510k, then respondent would be entitled to an opportunity to present evidence, including the taking of testimony on any disputed matter.¹ This opportunity, when specifically requested by respondent, was denied by the ALJ.

K.S.A. 44-512a(b) states:

After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

The above statute makes it clear that penalties are to be assessed upon the failure of a respondent to pay compensation which is "in fact past due". Here, the Order of the ALJ provides prospective relief, a benefit not contemplated by the penalties statute. The ALJ, in ordering this prospective relief, erred.

CONCLUSIONS

The Order of the ALJ dated January 9, 2009, granting medical treatment with Dr. Press which exceeds the Kansas Medical Fee Schedule, is reversed. However, as

¹ K.S.A. 44-510k(a).

letters attached to respondent's brief to the Board indicate that payment has already been made, the appropriate remedy would be to present the matter for review by the medical administrator under K.S.A. 44-510i and K.S.A. 44-510j. The Order providing prospective penalty relief to claimant is reversed, as the ALJ exceeded his jurisdiction in allowing penalties on amounts not past due.

DECISION

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Thomas Klein dated January 9, 2009, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge