

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

<b>JOHN D. KOTNOUR</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. <b>1,038,809</b>
	)	
<b>CITY OF OVERLAND PARK</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant requests review of the March 21, 2012 Order entered by Administrative Law Judge Kenneth J. Hursh. Both parties submitted briefs and the Board placed the claim on the summary docket for decision without oral argument.<sup>1</sup>

**APPEARANCES**

James E. Martin of Overland Park, Kansas, appeared for the claimant. Kip A. Kubin of Leawood, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopts the stipulations in the ALJ's original Award dated January 9, 2009, the findings set forth in the Board's Order dated May 29, 2009, and the opinion of the Kansas Court of Appeals filed on May 28, 2010.

**ISSUES**

Claimant requests review of the Administrative Law Judge's (ALJ) Order denying claimant's request for civil penalties for respondent's alleged failure to timely pay claimant the compensation awarded by the Appeals Board and affirmed by the Court of Appeals. The ALJ found that claimant's K.S.A. 44-512a demand letter was prematurely served on respondent and was therefore ineffective to support the assessment of penalties. The ALJ found that the Court of Appeals' decision did not become final until January 20, 2010, the date upon which the Kansas Supreme Court denied respondent's petition for Supreme Court review. As a result, the ALJ ruled that since there was no compensation unpaid and past due when claimant's K.S.A. 44-512a demand was served, no civil penalties could be assessed. The ALJ, however, did assess a \$500 penalty against respondent at \$100 per week for the approximate 5-week period from the date the ALJ found claimant's

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<sup>1</sup> K.A.R. 51-18-4(b).

compensation became due on January 20, 2012, to the date the compensation was paid by respondent on February 28, 2012.

The sole issue raised by claimant is whether the ALJ erred in denying penalties in excess of the \$500 penalty assessed by the ALJ pursuant to K.S.A. 44-512a. Claimant argues that the Workers Compensation Act is procedurally complete, exclusive and does not contain any provision staying payment of compensation owed pursuant to a decision of the Court of Appeals despite the pendency of a petition for review before the Kansas Supreme Court. Claimant further argues that the ALJ incorrectly interpreted K.S.A. 44-556 rather than applying that statute as written.

Respondent argues Supreme Court Rule 8.03(f) provides that if a petition for Supreme Court review is filed, then the decision of the Court of Appeals does not become final until the date of the Supreme Court's decision denying the petition for review. Respondent further contends claimant's demand for payment was premature as it was served months before the Supreme Court denied claimant's petition for review. Hence, there was no compensation due and unpaid until after the Supreme Court's denial of the request for review. Respondent also maintains the ALJ erred in awarding \$500 in penalties.

#### FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

The facts are not in dispute. The ALJ entered an award denying compensation on January 9, 2009. Claimant timely filed an application for Board review. The Board entered an Order dated May 29, 2009, reversing the ALJ's Award.<sup>2</sup> The Board held that the ALJ erred in finding claimant did not provide respondent with timely notice<sup>3</sup> of his accidental injury. The Board found that claimant sustained a 7 percent permanent partial functional impairment to his right leg and, based on that finding, awarded claimant permanent partial disability benefits (PPD) totaling \$7,140. Respondent appealed the Board's Order to the Kansas Court of Appeals. The Court of Appeals affirmed the Board's Order in an opinion dated May 28, 2010.<sup>4</sup>

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<sup>2</sup> *Kotnour v. City of Overland Park*, No. 1,038,809 2009 WL 1588630 (Kan. WCAB May 29, 2009).

<sup>3</sup> K.S.A. 44-520.

<sup>4</sup> *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 233 P.3d 299 (2010), *rev. denied* \_\_\_ Kan. \_\_\_ (2012).

On June 21, 2010, claimant served a K.S.A. 44-512a letter by certified mail on respondent and its counsel demanding payment of the PPD awarded by the Board, as affirmed by the Court of Appeals. On June 28, 2010, respondent timely filed a petition for Supreme Court review of the Court of Appeals' decision. The Supreme Court denied respondent's petition for review on January 20, 2012. Respondent paid claimant's PPD in full on February 28, 2012.

At the penalty hearing before the ALJ on March 21, 2012, claimant requested penalties at \$100 per week for 88.29 weeks, which represented the time period between the Court of Appeals' decision on May 28, 2010, and respondent's payment of the award on February 28, 2012.

Following the penalty hearing, the ALJ entered an order finding the decision of the Court of Appeals did not become final until claimant's petition for Supreme Court review was denied on January 20, 2012. Despite finding that claimant's K.S.A. 44-512a demand letter was premature, the ALJ nevertheless found that respondent must pay \$100 per week for a total of \$500, which represents penalties for the approximate 5-week period from January 20, 2012 through February 28, 2012.

The parties do not dispute that under the Order of the Board, no weekly benefits were due to claimant within the 10-week period next preceding the date of the Board's decision.

#### **PRINCIPLES OF LAW**

K.S.A. 44-512a allows civil penalties when compensation, which is unpaid and past due, is not paid in a timely manner. The statute requires that a written demand for payment be served setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due. The demand must be delivered either personally or by registered mail on the employer or the insurance carrier and their attorney of record. After proper service of the written demand, respondent has 20 days from the date the demand was served to pay the compensation unpaid and past due or face the assessment of civil penalties by the ALJ. The statute allows for the assessment of penalties by the ALJ of up to \$100 per week for each week any disability compensation is past due.

K.S.A. 2009 Supp. 44-556(a) provides:

Any action of the board pursuant to the workers compensation act, other than the disposition of appeals of preliminary orders or awards under K.S.A. 44-534a and amendments thereto, shall be subject to review in accordance with the act for judicial review and civil enforcement of agency actions by appeal directly to the court of appeals. Any party may appeal from a final order of the board by filing an appeal with the court of appeals within 30 days of the date of the final order. When

an appeal has been filed pursuant to this section, an appellee may file a cross appeal within 20 days after the date upon which the appellee was served with notice of the appeal. Such review shall be upon questions of law.

The Act for Judicial Review and Civil Enforcement of Agency Actions, referred to in K.S.A. 44-556 quoted above, was amended in 2009 and is now entitled the Kansas Judicial Review Act.<sup>5</sup> K.S.A. 77-618 provides that judicial review of orders of the workers compensation Director under the workers compensation act shall be in accordance with K.S.A. 44-556 and amendments thereto.

The following Rules of the Kansas Supreme Court<sup>6</sup> are material to the issues raised in this claim:

(1) Rule 1.01(e). All rules relating to appellate practice shall be applicable to both civil and criminal appeals, and govern procedure in both the Court of Appeals and the Supreme Court, unless otherwise indicated.

(2) Rule 7.03. Decisions of the appellate courts will be announced by the filing of the opinions with the clerk of the appellate courts at any time decisions are ready. On the date of filing, the clerk of the appellate courts will send one copy of the decision to the attorney of record for each party and, in appealed cases, one copy to the judge of the district court from which the appeal was taken. A certified copy of the opinion will be mailed to the district when the mandate issues.

(3) Rule 8.03(f). If the Supreme Court denies review, the Clerk shall so notify the parties. The decision of the Court of Appeals shall be final as of the date of the decision denying review, and the mandate shall be issued by the Clerk forthwith. The denial of the petition for review of a Court of Appeals' decision imports no opinion on the merits of the case. The denial of a petition for review is not subject to a motion for reconsideration by the Supreme Court.

(4) Rule 8.03(i). The timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review or during the time in which to file a petition for review, the opinion of the Court of Appeals is not binding on the parties, or on the district courts. . . . If review is refused, the decision of the Court of Appeals shall be final as of the date of the refusal, and the mandate of the Court of Appeals shall be issued by the Clerk forthwith.

Rule 9.04 specifically concerns the mechanics of filing an appeal of an order of the Board with the clerk of the appellate courts; docketing the appeal; and the transmission of

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<sup>5</sup> K.S.A. 77-601 et. seq.

<sup>6</sup> The Supreme Court rules discussed in this order were in effect both at the time of claimant's accidental injury and during the pendency of this claim in the appellate courts.

the record on appeal to the clerk. Subsection (c) of this Rule provides “All other procedures and matters not provided for in this order shall be governed by the Supreme Court rules relating to appellate practice and applicable statutes.”

#### ANALYSIS

The Board finds that the ALJ’s order should be reversed to the extent that it awards any civil penalties against respondent and should be affirmed in all other respects.

The Board has no quarrel with claimant’s arguments based on the *Bergstrom*<sup>7</sup> decision in which our Supreme Court declared:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.<sup>8</sup>

However, the Board disagrees that the ALJ impermissibly resorted to rules of statutory construction or speculated about legislative intent. The Board finds that the applicable statutes and Supreme Court rules are clear and unambiguous. Appeals from final orders of the Board to our appellate courts are governed by K.S.A. 44-556. That statute makes specific reference to, as it was called at the time of the accident in this claim and during the pendency of the matter before the appellate courts, the Act for the Judicial Review and Civil Enforcement of Agency Actions, now the Kansas Judicial Review Act. K.S.A. 44-556 requires that appeals to the appellate courts must comply with the Act for Judicial Review to the extent that it does conflict with K.S.A. 44-556.

K.S.A. 44-556 does not stay the payment of weekly benefits due during the pendency of an appeal of a Board order to the extent of weekly benefits due during the period commencing in the 10 weeks next preceding the Board’s order and, if weekly benefits remain due and owing, continuing until the decision of the Court of Appeals. That language is not ambiguous.

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<sup>7</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>8</sup> *Id.*, Syl. ¶ 1 & 2.

But, claimant invites the Board to ignore the Supreme Court rules. Claimant would have the Board “graft” language into K.S.A. 44-556 which is simply not there. Essentially, claimant’s position is that we should add to the statute that once a decision is rendered by the Court of Appeals all compensation awarded is immediately due and payable, even though the compensation includes amounts which did not become due in the 10-week period next preceding the date of the Board’s order. Claimant advances this notion despite the rules of the Kansas Supreme Court, which clearly provide that a decision of the Court of Appeals has no binding effect on anyone until the Supreme Court decides that the petition for review is denied. Only then can the mandate issue from the clerk of the appellate courts. The Board declines claimant’s invitation to add language to a statutory provision which, when read in conjunction with other applicable statutes and Supreme Court rules, is clear and unambiguous.

The K.S.A. 44-512a demand letter was served by claimant within the time period in which a petition for review could be timely filed and, in fact, respondent did timely file a petition for review with the Supreme Court. During the time the Supreme Court considered respondent’s petition for review, the Court of Appeals’ decision had no legal effect. No mandate could be issued and no compensation was unpaid and past due. Accordingly, the June 21, 2010 demand letter was premature and ineffective to support any award of penalties, including the \$500 in penalties assessed by the ALJ. Claimant’s demand letter was essentially a nullity, and it did not somehow “revive” when the Supreme Court denied respondent’s application for review.

The Board’s conclusions are consistent with both appellate court and Board precedent. A K.S.A 44-512a demand letter is premature and ineffectual unless an award of compensation is due and payable, but has not been paid.<sup>9</sup>

In *Robinson*<sup>10</sup>, claimant requested Board review of an order by the ALJ denying claimant’s request for K.S.A. 44-512a civil penalties against respondent for failure to pay compensation awarded by the Court of Appeals. The ALJ found that claimant’s K.S.A. 44-512a demand letter was served on respondent before the Court of Appeal’s decision was final because the Supreme Court had not ruled on claimant’s petition for review. The ALJ accordingly ruled that the demand was premature as there was no compensation payments past due and unpaid. Relying on the *Hallmark* case and Supreme Court Rule 8.03(f) and (i), the Board affirmed the ALJ’s order and stated:

Consequently, there were no payments due and unpaid when the claimant made his K.S.A. 44-512a demand because the Court of Appeals decision did not become

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<sup>9</sup> *Hallmark v. Dalton Construction Co.*, 206 Kan.159, 476 P.2d 221 (1970); *Harperv. Coffey Grain Co.*, 192 Kan. 462, 388 P.2d 607 (1964); *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, rev. denied, 251 Kan. 942 (1992).

<sup>10</sup> *Robinson v. SW Bell Telephone Co.*, No. 1,015,669, 2009 WL 5385875 (Kan. WCAB Dec. 3, 2009).

final until the Supreme denied the petition for review. . . . And there were no payments due for the 10-week period preceding the Board's Order. Accordingly, the K.S.A. 44-512a demand letter served by claimant was premature.<sup>11</sup>

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**CONCLUSION**

Claimant is not entitled to the assessment of any penalties because his K.S.A. 44-512a demand letter was served before compensation was due and unpaid, and was accordingly premature and ineffective. The ineffective K.S.A. 44-512a demand did not "revive" when the decision of the Court of Appeals became final.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated March 21, 2012, is reversed to the extent that it assessed any penalties against respondent, and is affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2012.

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

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BOARD MEMBER

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BOARD MEMBER

<sup>11</sup> *Robinson* at 6-7.

<sup>12</sup> K.S.A. 2010 Supp. 44-555c(k).

e: James E. Martin, Attorney for Claimant, [stacia@lojemkc.com](mailto:stacia@lojemkc.com)  
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier,  
[kak@kc-lawyers.com](mailto:kak@kc-lawyers.com)  
Kenneth J. Hursh, Administrative Law Judge