

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

|  |   |                      |
|--|---|----------------------|
| <b>JIMMY D. SMOTHERS</b>                             | ) |                      |
| Claimant   | ) |                      |
| VS.  | ) |                      |
|  | ) | Docket No. 1,039,301 |
| <b>TRANSERVICE LOGISTICS, INC.</b>                   | ) |                      |
| Respondent   | ) |                      |
| AND  | ) |                      |
|  | ) |                      |
| <b>HARTFORD INSURANCE COMPANY<br/>OF THE MIDWEST</b> | ) |                      |
| Insurance Carrier                                    | ) |                      |

**ORDER**

Claimant appealed the May 13, 2009, Order Denying Pre-Award Interest entered by Administrative Law Judge Bruce E. Moore. The Board placed this appeal on its summary docket for disposition upon the parties' briefs.

**ISSUES**

In the May 13, 2009, Order, Judge Moore denied claimant's request for interest under K.S.A. 44-512b. The Judge reasoned therein:

The court agrees with Respondent and its insurance carrier. Nature and extent of impairment or disability was an issue for Regular Hearing, and remains an issue on appeal. Respondent never stipulated to a functional impairment for either of the affected extremities and could have submitted alternative evidence prior to its submission date. **K.S.A. 44-512b** refers to the "compensation claimed" to be due. Claimant never "claimed" the amounts of compensation determined by Respondent's experts, but in fact claimed compensation based upon higher ratings. Indeed, Claimant could have chosen to accept Respondent's ratings in settlement of the claim, but insisted on entitlement to a much higher sum.

In addition, **K.S.A. 44-512b** appears to contemplate that the issue as to whether there existed just cause or excuse to delay paying compensation should be presented to the court at the time of the original Award. Here, there was no finding in the original Award, based upon the Regular Hearing ("hearing conducted pursuant to K.S.A. 44-523 and amendments thereto") that Respondent had failed to

demonstrate “just cause or excuse for the failure of the employer or insurance company to pay, prior to an award, the compensation claimed”. This issue should have been presented to the court at the time of Regular Hearing. As the matter is on appeal to the Board, the court does not have access to any of the hearing transcripts or submission letters to enable it to know whether the issue was previously raised. It was not referenced as an issue for determination in the court’s Award.

If the court failed to address the issue, the matter is now before the Board, which is empowered by **K.S.A. 44-512b** to make the findings requested by Claimant. If the issue was not raised before this court at the time of Regular Hearing, this court lacks jurisdiction over the issue, and the proper forum for the relief requested is before the Board.

In short, the Judge cited several reasons for denying claimant’s request; namely, that nature and extent of disability was an issue to be determined by the Judge; claimant claimed compensation in excess of the amount that he now maintains was wrongfully withheld; and claimant’s request for interest was untimely as it should have been presented at the regular hearing before the initial Award (dated January 13, 2009) was entered.

Claimant contends K.S.A. 44-512b does not require any type of demand and that this Board has held that when there is a minimum amount due an injured worker that amount should be paid even if the ultimate amount remains in controversy. Next, claimant maintains that K.S.A. 44-512b does not require that the issue must be raised at the time of the regular hearing but, instead, the statute merely requires that a hearing be held on the issue to allow the employer and its insurance carrier an opportunity to present their position.

Claimant argues there was never a dispute that he was entitled to receive workers compensation benefits for a February 4, 2007, accident, which resulted in surgery and permanent injury to his left upper and lower extremities. Moreover, respondent and its insurance carrier (respondent) indicated in its submission brief to the Judge (which the Division received on November 21, 2008) that claimant’s permanent impairment should be based upon the ratings provided by his treating physicians, Dr. Zeiders and Dr. Unsell. Claimant contends he then demanded payment from respondent on January 26, 2009, based upon the functional impairment ratings provided by those doctors. And when respondent did not reply, claimant initiated this request for an interest penalty. Claimant maintains that when respondent admitted in its submission letter that this claim was compensable and claimant had a permanent partial disability, respondent lacked justification for withholding payment of the minimum sum of permanent partial disability benefits that were due him.

Finally, claimant argues in many instances it is illogical to raise the issue of interest at regular hearing because the employer and its insurance carrier have 60 days following that hearing to determine the minimum amount due, which may be based upon the evidence presented by the injured worker or additional medical evaluations. Claimant maintains that

requiring the interest issue to be raised at the regular hearing may encourage some employers and their insurance carriers to create issues or evidence merely to avoid penalties.

In summary, claimant requests interest from the date of respondent's submission brief, November 19, 2008, when respondent advised the Judge it was relying upon the ratings from Dr. Zeiders and Dr. Unsell. In the alternative, claimant requests interest from when those ratings were provided since respondent never sought or pursued any other rating.

Respondent agrees claimant injured his left knee and left upper extremity. Respondent, however, disputes claimant also injured his right hip as a result of his February 4, 2007, accident at work. Moreover, respondent argues it paid claimant the sum of \$25,605.29 after claimant requested payment of the undisputed amount due following the January 13, 2009, Award entered by Judge Moore.

Next, respondent maintains it should not be required to pay claimant either interest or penalties as it never stipulated to a minimum functional impairment percentage and the nature and extent of claimant's disability was an issue before the Judge and later appealed to this Board. Accordingly, in the absence of a stipulation as to claimant's impairment, respondent argues there is no basis to award interest. Respondent notes that it would be inappropriate to assess interest from when it obtained the functional impairment ratings from Drs. Zeiders and Unsell as it had the right to seek additional medical evaluations and the Judge could have requested an independent medical evaluation. In short, respondent maintains that absent stipulation there is no *undisputed* amount owed claimant and, therefore, claimant's request for penalties has no merit.

The principal issue before the Board on this appeal is whether respondent should be ordered to pay claimant interest under K.S.A. 44-512b when that request was not made during litigation of the underlying claim.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This is a claim for a February 4, 2007, accident in which claimant fell at work and fractured his left kneecap. While on crutches claimant developed cubital tunnel syndrome in his left elbow. Later, claimant developed right hip pain.

In an Award issued on January 13, 2009, Judge Moore determined claimant was entitled to receive permanent partial disability benefits under K.S.A. 44-510e for a 28 percent whole person functional impairment. Adopting the opinions provided by claimant's medical expert, Dr. P. Brent Koprivica, the Judge found claimant sustained a 20 percent impairment to the left lower extremity for the patella injury, a 30 percent impairment to the left upper

extremity for cubital tunnel syndrome, and a 10 percent impairment to the right lower extremity for the right hip. Judge Moore rejected the 10 percent left upper extremity rating provided by Dr. Robert Unsell because that rating was not based upon the required fourth edition of the *AMA Guides*.<sup>1</sup> Likewise, the Judge rejected the 20 percent left lower extremity rating provided by Dr. Gregory Zeiders because that rating was not based upon that publication. Finally, the Judge limited claimant's award of permanent partial disability benefits to \$50,000.

Respondent appealed the January 13, 2009, Award to this Board and argued that claimant should not receive any benefits for the alleged hip injury. In addition, respondent argued claimant was entitled to receive permanent disability benefits under the schedule of K.S.A. 44-510d for a 10 percent impairment to the left upper extremity (per Dr. Unsell) and a 9 percent impairment to the left lower extremity (per Dr. Zeiders). Claimant, on the other hand, challenged the \$50,000 cap the Judge placed on his permanent partial disability benefits.

In its decision dated May 29, 2009, the Board affirmed the January 13, 2009, Award. Claimant has appealed the Board's decision to the Kansas Court of Appeals, where the claim is now pending.

Meanwhile, on March 30, 2009, claimant filed this request for interest under K.S.A. 44-512b for respondent's failure to pay permanent partial disability compensation before the Judge's final award. K.S.A. 44-512b states, in part:

**Failure to pay compensation prior to award without just cause; interest, penalty.**

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

(b) Interest assessed pursuant to this section shall be considered a penalty and shall not be considered a loss or a loss adjustment expense by an insurance carrier in the promulgation of rates for workers compensation insurance.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The Board in *Mutziger*<sup>2</sup> set forth how interest was calculated under K.S.A. 44-512b.

Claimant maintains that he was not required to request interest at the regular hearing, which was held on October 10, 2008. Claimant does not suggest when a worker's right to request interest expires.

As indicated above, the regular hearing was held on October 10, 2008. At that time the Judge reviewed the parties' stipulations. Nothing was said at that hearing regarding a claim for interest. The Division received claimant's submission letter on November 12, 2008. Interest was not mentioned in that document nor in respondent's submission brief to the Judge, which the Division received on November 21, 2008. Moreover, claimant presented written argument to the Judge, which the Division received on December 15, 2008. Again, there is no mention of a claim for interest in that document. The Division's file reflects that claimant first requested an interest penalty in an application filed with the Division on March 30, 2009.

In the recent Board decision of *Minden*,<sup>3</sup> the Board held the time for requesting pre-award interest is at the time of the first full hearing (referred to as the K.S.A. 44-523 hearing or regular hearing before the administrative law judge). The Board reasoned that procedure allowed the parties to present evidence on the issue of whether there was just cause or excuse to withhold payment of benefits. The Board also suggested there was incongruity between K.S.A. 44-512b, which provided interest penalty, and K.S.A. 44-556(b), which permitted employers and their insurance carriers to withhold the payment of disability compensation that accrued before the 10-week period preceding the Board's decision. K.S.A. 2008 Supp. 44-556(b) provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

And when claims are appealed to this Board, K.S.A. 2008 Supp. 44-551(i)(2)(C) provides that only medical compensation must be provided during the pendency of the appeal and that is only when compensability is not in issue.

Simply stated, the Workers Compensation Act provides that interest can be assessed under K.S.A. 44-512b for the failure to pay compensation that could be withheld pending an appeal.

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<sup>2</sup> *Mutziger v. Homier Distributing Company*, No. 1,018,165, 2008 WL 4763706 (Kan. WCAB Sept. 29, 2008).

<sup>3</sup> *Minden v. Paola Housing Authority*, No. 1,025,883, 2009 WL 1314316 (Kan. WCAB April 24, 2009).

The Board has reviewed the three earlier Board decisions cited by claimant in his brief; namely, *Hughes*,<sup>4</sup> *Bachman*,<sup>5</sup> and *Kuepker*.<sup>6</sup> Those decisions are distinguishable as they do not address the specific issue now before the Board. Moreover, it appears that in *Hughes* the Board declined to address the interest penalty as it was raised for the first time on appeal and, therefore, there had been no hearing as required by K.S.A. 44-512b(a). In *Kuepker* the Board likewise declined to review the claim for interest as it also was raised for the first time on appeal (although the parties had stipulated at the regular hearing that the worker's permanent partial disability benefits were limited to his 20 percent functional impairment). And in *Bachman*, the Judge addressed the interest penalty at the time of the parties' pre-hearing settlement conference<sup>7</sup> and the Judge awarded interest in the final award.

Claimant's policy arguments are persuasive. But the Workers Compensation Act restricts when a worker may request an interest penalty for the failure to pay compensation before an award. In *Minden*, the Board interpreted K.S.A. 44-512b and concluded the request for interest penalty should be made at the time of the regular hearing. The Board is not persuaded to deviate from its holding in *Minden*. Accordingly, the Board holds that claimant's present request for interest is untimely as the request should have been made at the regular hearing, the K.S.A. 44-523 hearing referred to in K.S.A. 44-512b.

In conclusion, the Order Denying Pre-Award Interest should be affirmed.

**WHEREFORE**, the Board affirms the May 13, 2009, Order Denying Pre-Award Interest entered by Judge Moore.

**IT IS SO ORDERED.**

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<sup>4</sup> *Hughes v. Reno Construction*, No. 241,237, 2000 WL 1708356 (Kan. WCAB Oct. 31, 2000).

<sup>5</sup> *Bachman v. E. J. Cody Company, Inc.*, No. 219,240, 2004 WL 485712 (Kan. WCAB Feb. 25, 2004).

<sup>6</sup> *Kuepker v. Rodney's Refrigeration, Inc.*, No. 227,024, 1998 WL 921325 (Kan. WCAB Dec. 30, 1998).

<sup>7</sup> See K.S.A. 2008 Supp. 44-523(d).

Dated this \_\_\_\_ day of August, 2009.

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BOARD MEMBER

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**CONCURRING OPINION**

I agree with the result reached by the majority but would limit the holding to the fact that the request is untimely because claimant failed to make his entitlement to interest an issue at the regular hearing or before the evidentiary record was closed. I agree with claimant that once respondent admitted the compensability of the claim and argued to the ALJ for a specific percentage of impairment, a floor was established.<sup>8</sup> At that point, the minimum amount of permanent partial disability compensation that respondent agreed was due should have been paid. Had claimant made the payment of interest an issue before the ALJ's Award was entered then I would find claimant to be entitled to interest on the amount of permanent partial disability compensation that respondent admitted was due.

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>8</sup> At the regular hearing, when stipulations are being taken and the issues are being identified, once nature and extent of disability is determined to be at issue, this is when it would be appropriate for the ALJ to also establish what each party contends is the claimant's percentage of functional impairment and disability.