

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

THOMAS L. DECOSTER)	
Claimant)	
)	
VS.)	
)	
AMERICAN FUN FOOD CO., INC.)	
Respondent)	Docket Nos. 1,049,135
)	and 1,049,804
AND)	
)	
FIRSTCOMP INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 30, 2010, Order entered by Administrative Law Judge John D. Clark.¹ The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman. David H. Farris, of Wichita, Kansas, appeared for claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent. The Board placed this matter on its summary docket for determination without oral argument.

The Administrative Law Judge (ALJ) assessed penalties against respondent at an amount of \$100 per week for 4.5 weeks, or a total of \$450.²

¹ On August 27, 2010, the Director appointed John Nodgaard to serve as Special Administrative Law Judge in these two docketed claims. It does not appear, however, that Mr. Nodgaard conducted any hearings or issued any orders.

² Although the Order does not say what the penalties were for, penalties were requested for what was alleged to be the late payment of temporary total disability benefits for claimant's low back injury, which is the subject of Docket No. 1,049,135.

ISSUES

Respondent asserts the ALJ exceeded his jurisdiction in ordering penalties against respondent because claimant's demand letter pre-dated the medical report which supposedly placed claimant in temporary total disability status. Respondent further contends claimant has not met the mandates and requirements of K.S.A. 44-512a.

Claimant argues that respondent refused to comply with court orders and did not pay benefits in a timely manner. Accordingly, claimant asks the Board to affirm the ALJ's Order assessing penalties in the amount of \$450.

The issue for the Board's review is: Is claimant entitled to penalties?

FINDINGS OF FACT

On March 30, 2010, the ALJ entered orders in both Docket No. 1,049,135 and Docket No. 1,049,804. In Docket No. 1,049,135,³ the ALJ held:

1. Temporary total disability payments are ordered paid if the Claimant is taken off work by Dr. Henry.
2. The outstanding medical of Dr. Dobyms is ordered paid as authorized medical.
3. Dr. Henry is the authorized physician for all treatment, tests, and referrals.
4. Dr. Munhall's bill to be paid as unauthorized medical.⁴

On the same day, in Docket No. 1,049,804,⁵ the ALJ ordered:

1. Temporary total disability payments are ordered paid if the Claimant is taken off work by the authorized physician.
2. Dr. Dobyms is the authorized physician for all treatment, tests, and referrals.
3. Dr. Munhall's bill to be paid as unauthorized medical.⁶

³ In Docket No. 1,049,135, claimant is alleging injuries to his "low back, tail bone, both hips and both legs and all parts affected thereby." Form K-WC E-1, Application for Hearing, filed January 25, 2010.

⁴ ALJ Order, Docket No. 1,049,135 (Mar. 30, 2010).

⁵ In Docket No. 1,049,804, claimant is alleging injuries to his "neck and all parts affected thereby." Form K-WC E-1, Application for Hearing, filed March 8, 2010.

⁶ ALJ Order, Docket No. 1,049,804 (Mar. 30, 2010).

On May 3, 2010, a status conference was held in these two consolidated cases concerning respondent's failure to authorize claimant's medical treatment as ordered. On June 3, 2010, a preliminary hearing was held in the two cases, wherein claimant's attorney was again complaining that respondent was failing to authorize or was slow in authorizing claimant's medical treatment. On that day, the ALJ clarified that Dr. Dobyms was authorized to treat claimant's neck condition, Dr. Osland was authorized to treat claimant's right shoulder condition, and Dr. Henry was authorized to treat claimant's back condition. The ALJ further ordered:

4. No change may be made to any of the above authorized physicians without approval from the court.
5. The insurance company and its counsel are expressly forbidden to in any way interfere with the claimant's medical treatment.⁷

On July 15, 2010, Dr. Osland issued an off-work slip taking claimant off work from the standpoint of his neck and back condition, but not his shoulder.

On August 11, 2010, a medical report was issued by Dr. Henry taking claimant off work for claimant's back.

On July 20, 2010, claimant's attorney sent respondent a demand letter pursuant to K.S.A. 44-512a demanding payment of temporary total disability benefits from July 15, 2010, until claimant was released to gainful employment. On August 17, 2010, claimant's attorney filed an Application for Penalties and Sanctions. In a Motion Hearing held September 30, 2010, claimant's attorney advised the ALJ that on July 15, 2010, Dr. Osland took claimant off work. No temporary total disability benefits had been paid by respondent. On August 11, 2010, Dr. Henry also took claimant off work and recommended claimant have a multilevel surgical intervention on his back. Again, respondent did not pay claimant temporary total disability benefits, nor was surgery authorized.

At the hearing on the penalties motion held September 30, 2010, claimant's attorney asserted that a status conference was held on these cases on August 30, 2010, at which time ALJ Klein, in the absence of ALJ Clark, told respondent's attorney that "if something wasn't done within approximately a week's time he would move up the penalties hearing that we had scheduled for today."⁸ Claimant's attorney said that on September 7, 2010, respondent authorized the surgery and on September 12, 2010,⁹ temporary total disability

⁷ ALJ Order, Docket Nos. 1,049,135 & 1,049,804, (June 2, 2010). Although the Order is dated June 2, 2010, the ALJ did not sign the order until June 3, 2010.

⁸ Motion Hearing Trans. at 3-4.

⁹ September 12, 2010, was a Sunday. If the check for temporary total disability compensation was sent by mail, then most likely it was received on September 11 or September 13, 2010.

benefits were paid dating back to July 15, 2010. Claimant's attorney argued that at a minimum, penalties should be assessed at least for 4.5 weeks, from August 11, 2010, when Dr. Henry took claimant off work. Claimant's attorney also argued that at the maximum, respondent should be assessed penalties from July 15, 2010, when Dr. Osland took claimant off work. Claimant asked for penalties of \$100 per week.

Respondent's attorney argued that on March 30, 2010, the ALJ only ordered temporary total disability benefits paid if claimant was taken off work by Dr. Henry. Claimant's July 20, 2010, demand letter stated that claimant had been taken off work for his back and neck by Dr. Osland, who had only been authorized to treat claimant's right shoulder condition. Respondent's attorney said respondent tried to gather information on why claimant was being taken off work by Dr. Osland. Then, in late August, respondent's attorney was informed that Dr. Henry had taken claimant off work as of August 11, 2010. Respondent argues that no K.S.A. 44-512a demand letter was sent after claimant was taken off work by Dr. Henry.

At the time of the Motion Hearing, claimant's surgery had been authorized, and temporary total disability compensation was being paid. Although there seemed to be some question as to whether temporary total disability was being paid at the correct rate, that was not made an issue for the penalties hearing.

The ALJ ordered respondent to pay penalties in the amount of \$450, representing 4.5 weeks at \$100 per week, which approximately corresponds to the period of time from the date Dr. Henry took claimant off work until September 12, 2010, the date claimant says he received the temporary total disability check.

PRINCIPLES OF LAW

An award of penalties under K.S.A. 44-512a is not a preliminary award, but instead is a final order.¹⁰ It is subject to de novo review on the record as a final order provided written request for review is filed within ten days from the order's effective date.¹¹

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

¹⁰ *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993); *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, *rev. denied* 251 Kan. 942 (1992).

¹¹ K.S.A. 2009 Supp. 44-551(b)(1); K.S.A. 2009 Supp. 44-555c(a).

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.

ANALYSIS

Only in the Order of March 30, 2010, in Docket No. 1,049,135, did the ALJ order respondent to pay temporary total disability compensation for claimant's back injury and only "if the Claimant is taken off work by Dr. Henry." Furthermore, the Order provided that "Dr. Henry is the authorized physician for all treatment, tests, and referrals." Claimant issued his demand letter on July 20, 2010. At that time, only Dr. Osland had taken claimant off work, and he took claimant off work due to claimant's neck and back conditions, not for claimant's right shoulder condition. Dr. Osland, by Order of June 2, 2010, was only authorized to treat claimant's right shoulder.

On August 11, 2010, Dr. Henry took claimant off work due to claimant's back. Claimant did not issue a new demand letter to respondent's insurance company and its counsel.

Claimant's demand must fail because at the time it was served, no temporary total disability compensation had been ordered paid and was past due. Dr. Henry had not taken claimant off work and, therefore, the condition precedent to the ALJ's order of March 30, 2010, had not occurred.

CONCLUSION

The Order assessing penalties should be reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated September 30, 2010, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge