

medical bill regarding the provision of a knee brace on October 4, 2010, by Dr. Bassett; (3) the aggregate of unpaid medical mileage; and (4) the aggregate of unreimbursed prescription co-payments. The ALJ treated claimant's attorney's April 28, 2011, written submission of aggregate unpaid medical mileage and aggregate prescription co-payments as past due medical bills for purposes of assessing a penalty. With the exception of the two October 4, 2010, bills mentioned above, the ALJ found that "every 'past due medical bill' itemized by Claimant was paid within 20 days of the April 28, 2011 written demand."¹ The ALJ determined it would be inappropriate to assess a penalty against respondent for the wrongful retention by health care providers of medical treatment co-payments, as those co-payments were being retained by the health care providers, rather than respondent or its insurance fund.

Claimant requests the Board reverse in part the Penalties Order to the extent that it fails to award claimant penalties pursuant to K.S.A. 44-512a for each of the bills enumerated in his brief or a total of \$450.00. Claimant asserts that medical mileage constitutes a medical bill. Accordingly, claimant contends that respondent should pay a penalty when it failed to timely pay for each occasion claimant incurred medical mileage.

Claimant also paid six pharmacy co-payment bills to Reed Pharmacy (Reed) with her own funds. Respondent reimbursed claimant's health insurance carrier for the pharmacy bills, but did not reimburse claimant for the co-payments. The ALJ aggregated the pharmacy bills and ordered respondent to pay claimant one penalty of \$25.00. Claimant alleges the ALJ erred by not ordering respondent to pay six separate penalties of \$25.00 each.

Claimant next contends the ALJ erred by not requiring respondent to pay six separate penalties for failing to reimburse claimant for co-payments she made to Hays Orthopaedic Clinic (Hays Orthopaedic) and Trinity Medical Associates (Trinity) for six separate visits. Respondent paid the medical providers, but did not reimburse claimant for the co-payments.

Respondent argues that medical mileage is not a medical bill. Therefore, the ALJ should not have imposed any penalty for respondent's failure to timely reimburse claimant for medical mileage. Respondent indicates that it paid Hays Orthopaedic and Trinity in accordance with the Workers Compensation Fee Schedule (Fee Schedule) in a timely manner. Respondent argues it should not be ordered to pay penalties because the medical providers would not refund claimant's co-payments.

The issues before the Board on this appeal are:

¹ ALJ Penalties Order (Aug. 17, 2011) at 1.

1. Is statutorily required reimbursement of medical mileage considered medical compensation and thus subject to the provisions of K.S.A. 44-512a? If so, is each time claimant incurred medical mileage considered a separate medical bill?

2. Is reimbursement of co-payments made by claimant for prescriptions medical compensation and thus subject to the provisions of K.S.A. 44-512a? If so, is each prescription co-payment made by claimant a separate medical bill?

3. Is reimbursement for co-payments made by claimant to Hays Orthopaedic and Trinity medical compensation and thus subject to the provisions of K.S.A. 44-512a? If so, is each co-payment made by claimant a separate medical bill?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

On January 5, 2011, the ALJ issued a Preliminary Hearing and Post-Award Medical Order in Docket Nos. 1,040,936 and 1,052,500. The ALJ ordered that medical expenses incurred to date were to be paid as authorized medical expenses in Docket No. 1,052,500.

On April 28, 2011, claimant's counsel sent a letter by certified mail to respondent's counsel making a demand for payment of certain medical expenses. The letter requested reimbursement of medical mileage, pharmacy co-payments, four co-payments to Hays Orthopaedic, two co-payments to Trinity and other medical expenses. On June 9, 2011, claimant filed an Application for Penalties.

On August 4, 2011, a hearing was held on claimant's application for penalties. By the date of the hearing, many of the medical expenses had been paid. On August 12, 2011, claimant sent a letter to the ALJ requesting \$475.00 in penalties. The penalties requested were for the following unpaid medical expenses:

A \$25.00 penalty for unpaid medical mileage for six visits claimant made to Drs. Bassett and Lairmore,² for a total of \$150.00.

A \$25.00 penalty for six unreimbursed prescription co-payments claimant made to Reed, for a total of \$150.00.

A \$25.00 penalty for two co-payments claimant made to Trinity (for services rendered by Dr. Sanger) for a total of \$50.00. Trinity has retained claimant's co-payments, despite the fact that respondent has paid Trinity pursuant to the Fee Schedule.

² This doctor's name appears as Lairmore and Larimore in the record.

A \$25.00 penalty for four co-payments that claimant paid to Hays Orthopaedic (for services rendered by Dr. Bassett) for a total of \$100.00. Hays Orthopaedic has retained claimant's co-payments, despite the fact that respondent has paid Hays Orthopaedic pursuant to the Fee Schedule.

A \$25.00 penalty for an untimely paid medical bill of \$137.00 to Hays Orthopaedic (for a knee brace prescribed by Dr. Bassett) on October 4, 2010.

At the hearing, respondent conceded it received timely demand for compensation and that 20 days had passed since that demand was made.³ The ALJ left the record open for approximately 10 days to allow respondent to present evidence that any of the bills were unrelated to claimant's knee injury. Respondent presented no such evidence. Respondent presented no evidence that any of the medical bills in question had been reimbursed.

Separate requests for medical mileage reimbursement were submitted by claimant as follows: October 4, 2010, and November 3, 2010; November 22, 2010; January 5, 2011; and March 31, 2011, and April 14, 2011.⁴ A request for medical mileage was made for three other dates, but respondent paid that medical mileage prior to the motion hearing. Claimant also submitted receipts to respondent evidencing that she had made six co-payments for prescriptions to Reed.

At the motion hearing, claimant's counsel proffered that if claimant were to testify, she would state that a prescription on September 24, 2010, was a result of a visit with Dr. Van Norden, who was authorized by respondent. Respondent then denied compensability of the claim. The remainder of the prescriptions resulted from visits with Dr. Sanger, claimant's family physician.⁵ Claimant would also testify the pharmacy bills were incurred as a result of her accident.

Claimant went to Dr. Sanger when Dr. Van Norden was no longer authorized by respondent. She saw Dr. Sanger at Trinity twice and he referred her to see Dr. Bassett at Hays Orthopaedic. Claimant then saw Dr. Bassett on four occasions. Because claimant's private medical insurance was paying her bills at Hays Orthopaedic and Trinity, she was required to make a co-payment. Claimant paid two separate co-payments to Trinity on September 24, 2010, and September 28, 2010. Trinity provided separate receipts to claimant for each co-payment. Claimant made four separate co-payments and received four separate receipts for her visits with Dr. Bassett at Hays Orthopaedic.

³ M.H. Trans. at 13.

⁴ *Id.*, Cl. Ex. 1.

⁵ *Id.*, at 17-18.

Respondent made one payment to Trinity and four payments to Hays Orthopaedic on May 2, 2011.⁶

The ALJ awarded claimant \$100.00 in penalties against respondent for (1) a past due medical bill regarding an October 4, 2010, office visit with Dr. Bassett; (2) a past due medical bill regarding the provision of a knee brace on October 4, 2010, by Dr. Bassett; (3) the aggregate of unpaid medical mileage; and (4) the aggregate of unreimbursed prescription co-payments.

The ALJ ruled that demands for reimbursement of medical mileage and co-payments are not medical bills and cited K.S.A. 44-512a and K.A.R. 51-9-10. The ALJ stated in his Award:

The cited statutory language appears to support the imposition of penalties whenever “any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due.” However, the statute goes on to provide that penalties are assessed whenever “any disability compensation is past due,” or “for each past due medical bill.” Demands for reimbursement of medical mileage and co-pays are not “medical bills,” as that term is generally used. **K.A.R. 51-9-10**, when discussing “medical bills,” says “[s]eparate bills should be submitted by each surgeon, assistant, anesthetist, consultant, hospital, or nurse.” Requests for medical mileage or reimbursement of co-pays are not addressed.⁷

The ALJ emphasized that K.S.A. 44-512a(a) imposes a penalty “for each past due medical bill.” In his Penalties Order, the ALJ indicated he would treat the demands for medical mileage and prescription co-payments as “past due” medical bills for purposes of assessing penalties. He then concluded that the six separate occasions of incurred medical mileage would be aggregated as one bill for purposes of assessing penalties and imposed one penalty of \$25.00. He used this same analysis in awarding one \$25.00 penalty for the six unreimbursed prescription co-payments. The ALJ did not impose a penalty for the unreimbursed co-payments claimant made to Trinity and Hays Orthopaedic, stating: “. . . it would be inappropriate to assess a penalty against the Respondent/self-insurance fund for the healthcare provider’s wrongful retention of co-pays.”⁸

Neither claimant nor respondent disputed the ALJ’s awarding of penalties for the failure of respondent to pay \$200.00 for claimant’s October 4, 2010, visit to Dr. Bassett and for an untimely paid bill of \$137.00 on October 4, 2010, for a knee brace. Both of these

⁶ *Id.*, Resp. Ex. A.

⁷ ALJ Penalties Order (Aug. 17, 2011) at 2.

⁸ *Id.*

medical expenses were incurred at Hays Orthopaedic and were on the same statement by Hays Orthopaedic.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

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

(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 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.

(b) 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.

K.A.R. 51-9-10(a) states:

Upon the completion of treatment in all compensation cases, physicians shall promptly notify the employer or carrier, and shall render their final bills forthwith. Bills for medical care providers and hospitals shall be itemized showing the date and the charge for services rendered. Separate bills should be presented to the employer or carrier by each surgeon, assistant, anesthetist, consultant, hospital, or nurse. In cases requiring prolonged treatment, physicians should submit partial bills, fully itemized, at intervals of at least 60 days.

K.A.R. 51-9-11 states:

(a) It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community.

(b) The employer shall reimburse the worker for the reasonable cost of transportation under the following conditions:

(1) if an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker's home; or

(2) if the worker, because of the worker's physical condition, cannot drive and must therefore hire transportation to obtain medical treatment.

Reimbursement may include, among other things, reimbursement for the cost of taxi service, other public transportation, and ambulance service, if required by a physician, and for the cost of hiring another individual to drive the worker for medical treatment. Any charges presented to the employer or insurance carrier for payment shall be a fair and reasonable amount based on the customary charges for those services.

(c) If an injured worker drives that worker's own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and if any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.

(d) In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the reasonable cost of transportation shall be determined by a hearing before a workers compensation administrative law judge.

In *Wirth*,⁹ the Board ruled that medical mileage is a medical expense. The Board stated: "The Board concludes that both the foregoing statute [K.S.A. 44-510h] and

⁹ *Wirth v. Via Christi Regional Medical Ctr.*, No. 270,139, 2004 WL 2382715 (Kan. WCAB Sept. 30, 2004).

regulation [K.A.R. 51-9-11] contemplate that mileage incurred to obtain authorized medical treatment is clearly a medical expense. Therefore, for purposes of the penalty statute such mileage reimbursement should be treated as medical compensation.”¹⁰

ANALYSIS

The ALJ concluded that medical mileage is not a medical expense, but found respondent liable for a \$25.00 penalty. The ALJ’s rationale was that K.S.A. 44-512a supports the imposition of a penalty whenever any compensation is not paid when due. In *Wirth*, the Board determined that medical mileage is a medical expense pursuant to K.S.A. 44-510h and K.A.R. 51-9-11. The cost of traveling to an appointment with a medical provider is a medical expense. K.S.A. 2010 Supp. 44-510h specifically provides the employer will provide for claimant’s transportation to a medical provider. The requirement to provide transportation is in the same sentence as medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches and apparatus. K.S.A. 44-512a provides that penalties can be assessed for late payment of medical expenses. Accordingly, the Board concludes medical mileage is a medical expense, and a penalty may be assessed when medical mileage is not timely paid.

The ALJ determined that the unreimbursed prescription co-payments made by claimant are not medical expenses. The Board disagrees and finds that an unreimbursed prescription co-payment constitutes a medical expense. K.S.A. 2010 Supp. 44-510h states that an employer shall provide medicine as may be reasonably necessary to cure and relieve the employee from the effects of the injury. It is undisputed that the medications claimant received were prescribed as a result of her work-related accident.

Claimant asserts the co-payments she made to Hays Orthopaedic and Trinity should be considered medical expenses. Respondent argues that it paid the medical providers directly. It asserts that if it reimbursed claimant the co-payments, it would be paying the same medical expenses twice. The ALJ concurred and indicated it would be wrong to assess a penalty against respondent because the medical providers are wrongfully retaining claimant’s co-payments.

A close review of the bill and receipts from Hays Orthopaedic is useful. The Hays Orthopaedic bill reflects that claimant made four payments matching the co-payments. She also provided four receipts from Hays Orthopaedic showing she made the co-payments. The bill and receipts were all dated prior to the date respondent paid Hays Orthopaedic. Claimant also made the co-payments to Trinity prior to the date respondent paid Trinity. She made the co-payments in September 2010, and respondent paid Trinity in May 2011. The letter from claimant’s attorney to respondent’s attorney demanding

¹⁰ *Id.*

reimbursement was sent on April 28, 2011, which was before respondent paid Trinity and Hays Orthopaedic. At the time respondent paid Trinity and Hays Orthopaedic, respondent was aware or should have been aware that claimant had already made the co-payments.

Claimant incurred the co-payments as a result of respondent's failure to provide authorized medical treatment. Had respondent continued to authorize Dr. Van Norden, claimant may not have had to make co-payments to Reed Pharmacy, Trinity and Hays Orthopaedic. The Board concludes the co-payments made by claimant are medical expenses pursuant to K.S.A. 2010 Supp. 44-510h. Accordingly, a penalty may be assessed against respondent pursuant to K.S.A. 44-512a for respondent's failure to reimburse claimant for the co-payments.

The Board next turns its attention to the issue of whether each medical expense is a separate medical bill within the meaning of K.S.A. 44-512a. That statute allows a penalty to be assessed ". . . 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."¹¹ The ALJ aggregated the medical mileage and co-payments and determined they were not medical expenses within the meaning of K.S.A. 2010 Supp. 44-510h. However, for purposes of assessing penalties, the ALJ treated unpaid medical mileage and prescription co-payments as "past due" medical bills. Accordingly, he awarded one penalty of \$25.00 for the aggregated unreimbursed medical mileage and one penalty of \$25.00 for the aggregated unreimbursed prescription co-payments.

Claimant completed four separate medical mileage requests containing details of six separate dates that she incurred medical mileage. Claimant paid Reed for six prescriptions on six separate dates. She made six co-payments on six different dates to Trinity and Hays Orthopaedic. Claimant would receive a bill for her pharmacy or medical co-payment and then immediately pay it.

Aggregating all of the medical mileage requests as one medical bill requires a very narrow definition of what constitutes a medical bill. The unpaid medical mileage was incurred by claimant in five separate months and four separate demands for reimbursement were made. The Board finds that claimant had four separate medical bills for medical mileage which respondent failed to pay in a timely manner. Therefore, pursuant to K.S.A. 44-512a, the Board concludes that respondent is assessed a penalty of \$25.00 each for four demands of unreimbursed medical mileage for a total of \$100.00.

Claimant received six prescriptions from Reed and paid co-payments for them on six separate occasions. Therefore the Board finds that claimant's pharmacy co-payments constitute six separate medical bills. Each of these medical bills should have been paid by respondent in a timely fashion, but was not. Therefore, pursuant to K.S.A. 44-512a,

¹¹ K.S.A. 44-512a(a).

respondent is assessed a penalty of \$25.00 for unreimbursed pharmacy co-payments for a total of \$150.00.

Finally, the Board finds that claimant incurred six separate medical bills for co-payments she made to Trinity and Hays Orthopaedic. She received and paid the medical bills for co-payments from Trinity and Hays Orthopaedic on six separate occasions. These medical bills should have been paid by respondent in a timely fashion, but were not. Therefore, pursuant to K.S.A. 44-512a, respondent is assessed a penalty of \$25.00 for each medical bill of unreimbursed medical co-payments for a total of \$150.00.

CONCLUSION

1. Unreimbursed medical mileage is a medical expense contemplated by K.S.A. 2010 Supp. 44-510h. Claimant incurred four separate medical bills for unreimbursed medical mileage. Pursuant to K.S.A. 44-512a, respondent is assessed a penalty of \$25.00 for each request of unreimbursed medical mileage for a total of \$100.00.

2. The unreimbursed pharmacy co-payments that claimant made are medical expenses within the meaning of K.S.A. 2010 Supp. 44-510h. Claimant incurred six separate medical bills for unreimbursed pharmacy co-payments. Pursuant to K.S.A. 44-512a, respondent is assessed a penalty of \$25.00 for each unreimbursed pharmacy co-payment for a total of \$150.00.

3. The unreimbursed co-payments that claimant made to Trinity and Hays Orthopaedic are medical expenses within the meaning of K.S.A. 2010 Supp. 44-510h. Claimant incurred two separate medical bills at Trinity and four separate medical bills at Hays Orthopaedic for unreimbursed medical co-payments. Pursuant to K.S.A. 44-512a, respondent is assessed a penalty of \$25.00 for each unreimbursed co-payment for a total of \$150.00.

4. The Board affirms the two penalties of \$25.00 each that the ALJ assessed for respondent's failure to timely pay the October 4, 2010, medical bills to Hays Orthopaedic of \$200.00 for claimant's visit with Dr. Barrett and \$137.00 for a knee brace.

WHEREFORE, the Board modifies in part, reverses in part, and affirms in part the August 17, 2011, Penalties Order entered by ALJ Moore. The Board assesses penalties against respondent in the amount of \$400.00 as set forth above and affirms the two penalties of \$25.00 each that the ALJ assessed for respondent's failure to timely pay the October 4, 2010, medical bills to Hays Orthopaedic of \$200.00 for claimant's visit with Dr. Barrett and \$137.00 for a knee brace, for a total of \$450.00 in penalties.

IT IS SO ORDERED.

Dated this ____ day of November, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Christopher J. Shepard, Attorney for Respondent and its Insurance Fund
Bruce E. Moore, Administrative Law Judge