

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

JAMES F. BROWN)	
Claimant)	
VS.)	
)	Docket No. 1,052,683
FOCUS INDUSTRIAL WORKFORCES, INC.)	
Respondent)	
AND)	
)	
CASTLEPOINT NATIONAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the February 9, 2012 Order by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

Frederick J. Patton, of Topeka, Kansas, appeared for the claimant. David F. Menghini, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

ISSUES

The ALJ ordered respondent to pay penalties in the amount of \$400 for failing to timely pay temporary total disability and \$16,196.74 for respondent's failure to pay medical bills in a timely fashion after receiving a 20 day demand letter pursuant to K.S.A. 44-512a. The ALJ opined that there was no reason for respondent to delay payment since the parties entered into an agreed order as exactly how much was to be paid and respondent provided no excuse for delaying payment.

Respondent argues that claimant's claim is without merit and that claimant made an untimely and premature demand for payment from the October 25, 2011 Order. Further, respondent argues claimant failed to submit his bills in the format required by the Workers' Compensation Fee Schedule. Therefore, the ALJ's Order granting penalties should be reversed.

Claimant argues that the Order should be affirmed because the parties entered into an agreed order and therefore respondent waived its right to appeal and the 10 day appeal period does not apply. Therefore, the demand was not premature. And had respondent wanted to preserve its right to appeal it should have raised any disputed issues before the ALJ through objections on the record for review.

ISSUES

1. Was claimant's 20 day demand for benefits premature, thereby rendering his claim for penalties unenforceable?
2. Was claimant's failure to submit medical bills on Form 1500 or a similar form pursuant to the Kansas Workers' Compensation Fee Schedule defective such that it rendered the bills unpayable pursuant to K.S.A. 44-510i and as a result not subject to penalties?

FINDINGS OF FACT

Claimant suffered personal injury by accident on August 10, 2010, when he fell, injuring his low back. Initially, claimant thought the injury was minor. However, as his shift continued, he developed difficulty with urination and later had difficulty with bowel issues. Claimant also noted a change in sensation to his legs. Claimant was referred to the University of Kansas Neurosurgery department where he received extensive treatment, including surgery. The matter progressed through the workers compensation system and claimant incurred medical expenses totaling \$161,967.45 and unpaid temporary total disability compensation (TTD) totaling \$8,000.00.

On October 25, 2011, the parties appeared before the ALJ and announced that they had reached an accord. Respondent agreed to pay, pursuant to the October 25, 2011, agreed Order, \$8,000.00 in TTD and the listed medical expenses, "subject to the medical fee schedule". The list of medical expenses included only the health care provider, the amount of the requested fee and the date of the treatment. Specific treatment codes or treatment descriptions were not included on the list.

The agreed Order was signed by the parties and the ALJ and filed with the Division on October 25, 2011. On October 26, 2011, claimant served upon respondent, via registered mail, a 20 day demand letter pursuant to K.S.A. 44-512(a) [sic]. The letter specified that failure to pay within 20 days would result in a request for civil penalties.

The ordered \$8,000.00 TTD payment was not paid until December 12, 2011.

At the Motion/Penalties Hearing on January 13, 2012, respondent acknowledged the delay in paying the TTD and medical expenses. However, respondent argued that the demand letter served by claimant was premature as the 10 day appeal time under K.S.A.

44-551(i)(1) had not run. Respondent further argued that claimant failed to properly submit the medical bills on the Form 1500 as is required by the medical fee schedule. This resulted in a substantial delay in respondent's ability to pay the bills.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-551(i)(1) states:

(i) (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

K.S.A. 44-525(a) states:

(a) Every finding or award of compensation shall be in writing signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. The award of the administrative law judge shall be effective the day following the date noted in the award.

Respondent argues that this matter is controlled by the Board's prior decision in *Harris*¹. However, the ALJ ruled that *Harris* was not applicable as this agreement was the result of an agreed order. He determined that an appeal from an agreed order would be patently frivolous. The Board considered a similar situation in *Keller*². In *Keller*, the parties entered into an Agreed Award on October 15, 2001. On October 16, 2001, demand was served upon respondent and its attorney for payment of the full amount from the Agreed

¹ *Harris v. Carestaf*, No. 1,013,079, 2004 WL 1778912 (Kan. WCAB July 23, 2004)

² *Keller v. Sabreliner Corporation*, No. 251,293, 2002 WL 598480 (Kan. WCAB Mar. 29, 2002).

Award. As noted in *Keller*, the effective date of an award is the “day following the date noted in the award”, citing K.S.A. 44-525(a). Additionally, K.S.A. 2010 Supp. 44-551(i)(1) states:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

As was noted in *Keller*, K.S.A. 2010 Supp. 44-551 does not differentiate between the species of award. The same 10-day appeal time would apply whether the award resulted from litigation or an agreed award entered by an administrative law judge.

K.S.A. 44-512a 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 . . . 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 bill³

A statutory demand under K.S.A. 44-512a can only be effective for compensation awarded claimant and then due and unpaid.⁴ Additionally, written demand served upon a respondent before the award becomes final, i.e., before the 10-day appeal time has passed, is ineffective to predicate an action for penalties under K.S.A. 44-512a.⁵

This finding renders moot the remaining issue in this matter. The award of penalties against respondent is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be reversed. Claimant’s demand under K.S.A. 44-512a was premature and therefore, ineffective to predicate an action for penalties under K.S.A. 44-512a.

³ K.S.A. 44-512a(a).

⁴ *Hallmark v. Dalton Const. Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

⁵ *Id.*, Syl. 2

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated February 9, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Fredrick J. Patton, Attorney for Claimant
David F. Menghini, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge