

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROBERT TAYLOR GOULD)
Claimant)
V.)
WRIGHT TREE SERVICE, INC.)
Respondent) Docket No. 1,068,630
AND)
CANNON COCHRAN MANAGEMENT)
Insurance Carrier)

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 22, 2016, Order entered by Administrative Law Judge (ALJ) Steven J. Howard. This is a proceeding for penalties. The case has been placed on the summary docket for disposition without oral argument. John G. O'Connor of Kansas City, Kansas, appeared for claimant. P. Kelly Donley and Travis L. Cook of Wichita, Kansas, appeared for respondent.

The ALJ wrote:

[B]ased upon the current state of the record and pursuant to K.S.A. 44-512a, Respondent has failed to pay the benefits as required under the decision of the Board. Accordingly, and based upon the foregoing, claimant is entitled to penalties at the rate of \$100.00 per week for the period of October 8, 2015 through February 15, 2016, a period of 15 weeks, for a total of \$1,500.00. Additionally, claimant is entitled to penalties for the non-payment of medical bills previously awarded by the Board. Those penalties are the greater of \$25.00 per bill, or ten percent of the \$106,886.98 awarded. Additionally, therefore, penalties are herein awarded in the sum of \$10,688.69 for nonpayment of the medical awarded.¹

The Board has considered the record and adopted the stipulations listed in the Order.

¹ ALJ Order (Feb. 22, 2016) at 3.

ISSUES

Respondent argues claimant is not entitled to penalties because no compensation is past due and payable. Respondent maintains the compensation awarded to claimant in the Board's August 28, 2015, Order was stayed pending appellate review. Respondent argues none of the awarded compensation is past due and payable because it has timely stayed payment since claimant submitted his demand: first by requesting a stay, and then by filing a supersedeas bond when the stay request was denied. Respondent argues the Kansas Rules of Civil Procedure apply, specifically, K.S.A. 60-262 and K.S.A. 60-2103 apply to their application for a stay and approval of a supersedeas bond.

Further, respondent argues the medical expenses listed in claimant's application are in excess of the Kansas Fee Schedule. Alternatively, respondent contends claimant is not entitled to the amount of penalties requested in his application because the majority of the bills were paid by claimant's personal health insurance provider.

Claimant contends the ALJ's Order should be affirmed. Claimant argues respondent's arguments are not supported by case authority. Further, claimant argues respondent failed to raise, at any stage in the proceedings, the unproven assertion that claimant's demand is in excess of the Kansas Fee Schedule. Claimant maintains that a denial of penalties because his personal health insurance provider has paid most of the bills negates the purpose of K.S.A. 44-512a. Claimant opposes the stay requested by respondent.

The issues for the Board's review are:

1. Is claimant entitled to penalties under K.S.A. 44-512a?
2. If so, was the amount of penalties ordered by the ALJ appropriate?
3. Did the ALJ err by not approving respondent's request for a stay and approval of its supersedeas bond?

FINDINGS OF FACT

On August 28, 2015, the Board awarded permanent partial disability compensation to claimant in the amount of \$11,250.83, finding his accident arose out of and in the course of his employment with respondent.² The Board also awarded claimant medical compensation related to his work-related injury by accident. Respondent appealed to the Kansas Court of Appeals on September 22, 2015. Claimant submitted his demand for

² *Gould v. Wright Tree Service, Inc.*, No. 1,068,630, 2015 WL 5462032 (Kan. WCAB Aug. 28, 2015).

compensation on October 8, 2015. All necessary requisites, the timeliness, and the form of the demand were stipulated as being appropriate and proper.³

Respondent submitted a Motion for Stay to the Board on October 15, 2015, which was later denied because “respondent failed to show it is likely to prevail on appeal or will suffer irreparable injury if relief is not granted.”⁴ The Kansas Court of Appeals also denied respondent’s Motion for Stay on January 5, 2016. The Court of Appeals did not provide a reason for its denial.⁵

During a motion hearing held before the ALJ on February 9, 2016, respondent agreed none of the medical expenses included in claimant’s demand were paid by either respondent or its insurance carrier. Claimant also noted for the record that a petition was filed with the Leavenworth County District Court on January 11, 2016, to convert the compensation awarded into a money judgment.⁶

Respondent attached a Notice of Bond and Request for Approval to its Motion before the ALJ. The ALJ determined he lacked jurisdiction to address the bond. Respondent next filed a Notice of Bond and Request for Approval with the Board on March 1, 2016. The Board denied respondent’s request for lack of jurisdiction, noting K.S.A. 44-530 confers jurisdiction of the matter on the District Court.

PRINCIPLES OF LAW

K.S.A. 44-512a(a) provides:

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

³ See M.H. Trans. at 5.

⁴ *Gould v. Wright Tree Service, Inc.*, No. 1,068,630 (Kan. WCAB Dec. 14, 2015).

⁵ M.H. Trans., Cl. Ex. 1 at 15.

⁶ M.H. Trans. at 7; Case No. 2016CV08.

thereafter refused or is not made within 20 days from the date of service of such demand.

ANALYSIS

1. Is claimant entitled to penalties under K.S.A. 44-512a?

K.S.A. 44-512a(a) requires four conditions to be met in order to qualify for penalties: an award of compensation; failure to pay the amount due pursuant to the award; a written demand for payment served on both the employer or insurance carrier and their attorney; and, a showing that the demand has been refused or not paid within 20 days. The right to proceed under the statute arises when the Board issues its Order.⁷ The Supreme Court, in *Acosta v. Nat'l Beef Packing Co.*,⁸ wrote:

The right to an action under K.S.A. 44-512a occurs when an award becomes the final award of the Board. See *Harper v. Coffey Grain Co.*, 192 Kan. 462, 466, 388 P.2d 607 (1964). An appeal of the award to the appellate courts does not stay the operation of the statute. 192 Kan. at 467. See K.S.A. 44-556 (stating that an appeal of an award to the Court of Appeals does not stay the payment of compensation due).⁹

The Board entered an Order for compensation on August 28, 2015. Claimant was awarded monetary compensation in the amount of \$11,250.83 and medical compensation related to his injuries. All amounts were due and owing.

Demand was made by certified letter dated October 5, 2015. Division of Workers Compensation (Division) records show claimant's demand was served on respondent on October 8, 2015, the insurance carrier on October 13, 2015, and respondent's attorney.¹⁰ Respondent stipulated the demand was made in the appropriate form and none of the demanded payments were made.¹¹ Respondent filed a Motion for Stay with the Board on October 19, 2015. Respondent's Motion to stay payment of benefits was denied by the Board on December 14, 2015. Respondent also filed a Motion for Stay with the Court of Appeals, which was denied on January 5, 2016.

⁷ See *Nuessen v. Sutherlands*, No. 1,057,760, 2014 WL 889869 (Kan. WCAB Feb. 24, 2014).

⁸ *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 44 P.3d 330 (2002).

⁹ *Id.* at 398.

¹⁰ The date of service on respondent's attorney's return receipt was faded and difficult to read. The only legible date was the year, 2015.

¹¹ M.H. Trans. at 5.

On the date of the motion hearing, February 9, 2016, respondent had still not paid pursuant to the Board's Order. By January 5, 2016, both of respondent's Motions for Stay had been denied. Respondent knew it was ordered to pay the money, yet still had not paid pursuant to the Board's Order. All of the requirements pursuant to K.S.A. 44-512a(a) had been satisfied when the ALJ issued his Order for penalties. Respondent argues some of the medical bills exceed the amount allowable by the Fee Schedule. However, there is no evidence respondent offered to pay the undisputed amount or file a fee dispute pursuant to K.S.A. 44-510j. The Board agrees penalties were appropriate in this instance.

2. Was the amount of penalties ordered by the ALJ appropriate?

Respondent argues the amount of the penalties assessed by the ALJ was excessive. The Board disagrees. Regarding penalties for unpaid medical bills, the ALJ is bound by K.S.A. 44-512a(a) to order the larger of \$25.00 or 10 percent of the past due amount, which he did. Regarding the penalty for unpaid monetary compensation, after both the Board and the Court of Appeals denied respondent's Motion for Stay, respondent should have paid the compensation ordered in the Board's Order. On the date of the motion hearing giving rise to this appeal, respondent still had not paid the compensation due and expressed no intention to do so. The Board finds the penalties ordered by the ALJ appropriate.

3. Did the ALJ err by not approving respondent's request for a stay and approval of a supersedeas bond?

Respondent, in its brief, again requests approval of its supersedeas bond, filed with the Division on March 1, 2016. Respondent argues that the ALJ erred in not approving the bond. The Board issued an Order on March 29, 2016, denying respondent's request for approval of a supersedeas bond based upon the Board's lack of jurisdiction to approve a bond. The Board previously denied respondent's requests for a stay based on K.S.A. 77-616, by Order dated December 11, 2015, and respondent's request for approval of a bond and a stay under K.S.A. 44-530, by Order dated March 26, 2016.

Notwithstanding the prior denials, the Board will address specific arguments raised by respondent, including:

- *Nuessen v. Sutherlands*¹² was wrongly decided;
- The Kansas Rules of Civil Procedure apply in workers compensation proceedings and either the ALJ should have authorized respondent's supersedeas bond and issued a stay under K.S.A. 60-2103(d), K.S.A. 60-

¹² *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 352 P.3d 587 (2015).

262(d) and/or K.S.A. 44-530 or the Board should authorize respondent's supersedeas bond and issue a stay under any or all such statutes.

Nuessen states K.S.A. 44-556 contains no automatic stay of workers compensation benefits on appeal of an award to the appellate courts. While the Board understands respondent's frustration with *Nuessen*, and the Board obviously lacks authority to invalidate a Court of Appeals ruling, respondent's concerns with *Nuessen* warrant discussion. Respondent argues *Nuessen* conflicts with *Page v. General Motors Corp.*, which states:

The sole question before us is whether payment of the medical expenses, which were incurred more than ten weeks prior to the director's decision, was stayed by respondent's perfection of an appeal to the district court. The answer is found in the pertinent proviso of K.S.A. 1971 Supp. 44-556 which reads:

' . . . Provided, however, That the perfection of an appeal to the district court shall not stay the payment of compensation due for the ten-week period next preceding the director's decision, and for the period of time after the director's decision and prior to the decision of the district court in such appeal: . . . '

Under 44-556 an employer's appeal from the workmen's compensation director's decision awarding an injured workman compensation, including weekly payments and medical expenses, stays payment for all compensation except the weekly payments due for, and the medical expenses incurred during, the ten-week period next preceding the director's decision, and a period of time after the director's decision and prior to the decision of the district court in such appeal. An award for medical expenses is, of course, an award of compensation under many decisions of this court, but since the medical expense award here was not made for the nonstay period set out in the proviso to 44-556; it follows that the payment thereof was stayed by respondent's appeal and thus nonpayment thereof cannot serve as a basis for a lump sum redemption action under 44-512a.¹³

Respondent focuses on the only portion of K.S.A. 1971 Supp. 44-556 quoted in *Page*, observing that similar language exists in the current version of K.S.A. 44-556. Respondent argues that because there is similar language in both statutes, they should lead to the same result. *Nuessen* is not in conflict with *Page*; the cases interpret different versions of K.S.A. 44-556. The version applicable when *Page* was decided, K.S.A. 1971 Supp. 44-556, stated:

Any party to the proceedings may appeal from any and all decisions, findings, awards or rulings of the director to the district court of the county where the cause of action arose upon questions of law and fact as presented and shown by a transcript of the evidence and proceedings as presented, had and introduced before the director. Such appeal shall have precedence over all other hearings except

¹³ *Page v. General Motors Corp.*, 210 Kan. 699, 700, 504 P.2d 153 (1972).

those of like character, and shall be heard not later than the first term of said court after the appeal has been perfected[.] . . .

On any such appeal the district court shall have jurisdiction to grant or refuse compensation, or to increase or diminish any award of the director as justice may require. Such appeal shall be taken and perfected by the filing of a written notice of appeal with the director within twenty (20) days after the decision, finding, award or ruling appealed from shall have been made and filed by the director[.] . . .

Provided, That no compensation shall be due or payable until the expiration of such twenty (20) day period and then the payment of past due compensation awarded by the director shall not be payable, if within such twenty (20) day period notice of appeal to the district court has been filed and the right to appeal shall include the right to make no payments of such compensation until the appeal has been decided by the district court if the employer is insured for workmen's compensation liability with an insurance company authorized to do business in this state or, if the employer is a self-insurer, and has filed a bond with the district court in accordance with section 44-530: *Provided, however*, That the perfection of an appeal to the district court shall not stay the payment of compensation due for the ten-week period next preceding the director's decision, and for the period of time after the director's decision and prior to the decision of the district court in such appeal[.]

Unlike the current version of K.S.A. 44-556, the version applicable in *Page* explicitly included a stay (“the right to appeal shall include the right to make no payments of compensation until the appeal has been decided by the district court”) other than as provided in the last sentence quoted in the above-paragraph. Focusing on only part of K.S.A. 1971 Supp. 44-556, while eschewing the remainder of the statute, does not account for the differences in the different versions of the statutes, in addition to not interpreting provisions of the act *in pari materia*. The current version of K.S.A. 44-556 does not explicitly state that the right of appeal includes the right to make no payments until the appeal has been determined. In *Page*, there was an automatic stay, save “the ten-week period next preceding the director's decision, and for the period of time after the director's decision and prior to the decision of the district court in such appeal.” Because the payments at issue in *Page* were incurred outside such time frame, they were stayed.

As for K.S.A. 60-262 and K.S.A. 60-2103, the Legislature indicated Chapter 60 controls in the district courts and for all original proceedings in the Supreme Court of Kansas. There is no mention of any coverage extending into the Kansas Workers Compensation Act (KWCA), nor over any ALJ or the Board. Additionally, the Legislature has designated the Act as the exclusive remedy for work-related accidents and injuries.¹⁴

The KWCA has been held to be complete and exclusive within itself in establishing procedures covering every phase of the right to compensation and such procedures are

¹⁴ See generally K.S.A. 2013 Supp. 44-501b.

not subject to supplementation by rules borrowed from the Rules of Civil Procedure.¹⁵ The provisions of Chapter 60 are not applicable to matters brought pursuant to Chapter 44 unless specifically designated by the Legislature or an appellate court.

The civil statutes cited by respondent in favor of a bond and a stay are applicable to district courts. K.S.A. 60-2103 concerns appeals from a district court to an appellate court. K.S.A. 60-262 concerns stays of proceedings to enforce judgments arising from the Kansas Rules of Civil Procedure and does not pertain to ALJs or the Board. The statutes, based on their plain language, do not concern appeals stemming from workers compensation decisions.

Respondent cites cases concerning K.S.A. 60-262 and K.S.A. 60-2103. In *Huet-Vaughn v. Board of Healing Arts*,¹⁶ a physician appealed a March 4, 1997, ruling of the Kansas State Board of Healing Arts (KSBHA) that her military conviction was comparable to a felony conviction in the State of Kansas, and she was therefore subject to discipline by the KSBHA. The discipline included a monetary fine. The district court affirmed, and Dr. Huet-Vaughn appealed to the Kansas Court of Appeals. Dr. Huet-Vaughn asked the KSBHA for a stay, which it denied after it lost jurisdiction to grant a stay under K.S.A. 77-528. Only the Kansas Court of Appeals had jurisdiction to grant a stay. Dr. Huet-Vaughn did not ask the appeals court to issue a stay. Instead, Dr. Huet-Vaughn paid the fine.

The case was transferred to the Supreme Court of Kansas. The sole question was whether her military conviction constituted a felony under the Kansas Healing Arts Act.¹⁷ It was held Dr. Huet-Vaughn acquiesced in the judgment by paying the fine when she could have posted a supersedeas bond or asked the Court of Appeals (the only court having jurisdiction when the administrative fine was paid) for a stay.

In *DeBerry v. Board of Accountancy*,¹⁸ the appellant, an accountant, was censured and fined by the Kansas State Board of Accountancy (KSBA). He did not ask the KSBA for a stay, but appealed the ruling and asked a district court for a stay. Next, DeBerry paid the fine. The district court denied the stay request. On appeal, the Kansas Court of Appeals indicated DeBerry could have asked the KSBA for a stay using K.S.A. 77-528, or after seeking judicial review, could have asked the KSBA for a stay under K.S.A. 77-616,

¹⁵ See *Johnson v. Brooks Plumbing, LLC*, 281 Kan. 1212, 1214, 135 P.3d 1203 (2006); *Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 831, 104 P.3d 378 (2005); and *Kelly v. Phillips Petroleum Co.*, 222 Kan. 347, 566 P.2d 10 (1977).

¹⁶ *Huet-Vaughn, M.D. v. Kansas State Bd. of Healing Arts*, 267 Kan. 144, 978 P.2d 896 (1999).

¹⁷ *Huet-Vaughn*, 267 Kan. at 145. Dr. Huet-Vaughn did not appeal the KSBHA denial of her belated request for a stay after the KSBHA had already lost jurisdiction to grant a stay.

¹⁸ *DeBerry v. Kansas State Bd. of Accountancy*, No. 99,003, 2008 WL 5075234 (Kansas Court of Appeals unpublished opinion filed Nov. 26, 2008), *rev. denied* 289 Kan. 1277 (2009).

but he failed to follow either avenue of relief, thus depriving the district court of jurisdiction to consider his request for a stay. The Kansas Court of Appeals further noted that even if DeBerry asked the KSBA for a stay, he acquiesced in the judgment by paying the fine, instead of asking the Board for a stay or attempting to post a supersedeas bond.

Even if K.S.A. 60-262 and K.S.A. 60-2103 provide alternative avenues for a stay in administrative hearings in cases such as *Huet-Vaughn* and *DeBerry* (which are not workers compensation appeals), the Board has two concerns. First, as noted above, the appellate courts have often indicated the KWCA is complete and exclusive and it should not be supplemented by the Rules of Civil Procedure.

Second, even if the civil statutes apply, the Board would have denied respondent's request for a stay,¹⁹ seeing nothing in the statutes that require a stay in these circumstances. The Board's authority to deny a stay is discretionary. The record does not justify a stay. Also, the Legislature has determined that if any "compensation" is paid during the pendency of review under K.S.A. 44-556, yet such amount ends up being reduced or totally disallowed, the respondent shall be reimbursed from the Kansas Workers Compensation Fund.

As previously held by the Board, K.S.A. 44-530, which is in the KWCA, allows stays in workers compensation cases when a district court judge has approved a bond. Perhaps due to legislative oversight, references to the district court were not replaced with references to the Board or an ALJ. However, we are bound by the directives of the appellate courts to apply plain and unambiguous statutes as written.²⁰ K.S.A. 44-530, as written, does not empower the Division of Workers Compensation to approve a bond and issue a stay. If the Legislature intended an ALJ or the Board to have such power, it has the power to make it so. Additionally, insofar as respondent noted a petition for judgment was filed in Leavenworth County District Court, perhaps a request could be made to that district court to approve a bond and issue a stay.

Respondent argues language in K.S.A. 60-2103(d) and K.S.A. 44-530 that require approval of a bond by a district court do not preclude the ALJ or the Board from having jurisdiction to approve a bond and issue a stay under such statutes.

¹⁹ As an aside, the Board notes K.S.A. 77-616(c) does not apply to the Board, differing from what had been indicated by the Board on December 14, 2015. Such section applies restrictive caveats to a reviewing court "[i]f the agency found its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety or welfare." The reviewing court is the Court of Appeals, not the Board.

²⁰ See *Cady v. Schroll*, 298 Kan. 731, 738-39, 317 P.3d 90 (2014); *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

From July 1, 1993, and forward, the Board assumed the role of the district court.²¹ “[C]hanges to the workers compensation code were designed to shift the de novo review of the district court to the . . . Workers Compensation Board of Appeals.”²² Respondent notes the Board has assumed the role of the district court in assessing an injured worker’s disability²³ and in resolving discovery disputes.²⁴ It appears respondent argues the Division of Workers Compensation, through the Board, has the powers previously vested to the district courts before the 1993 change.

Respondent notes that the Board recently ruled that *Tovar v. IBP, Inc.* allows it to weigh the evidence and determine an injured worker’s functional impairment. *Tovar* states, “It is the function of the district court to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability.”²⁵ This is not a recent phenomena; from the inception of the Board, it has frequently cited *Tovar* as indicating the Board, in lieu of the district court, has the authority to determine a worker’s disability. The Kansas Court of Appeals has ruled that the fact finding and weighing of evidence that was performed by the district court is now the Board’s province.²⁶

Hernandez v. Tyson Fresh Meats, Inc., a workers compensation case partially involving a discovery dispute, states the Supreme Court of Kansas broadly construed K.S.A. 2007 Supp. 44-551(i)(l) “to envision procedures in a workers compensation case parallel to that permitted by our code of civil procedure and to position an ALJ in a workers compensation case as having the supervisory authority equivalent to a district judge.” Respondent takes this statement as allowing the broad applicability of civil procedure in workers compensation cases.

The Board disagrees with respondent’s arguments. The Board is supposed to follow the law as written. The Board is not a district court. Simply because the Board may follow similar legal principles as a district court – adjusting or weighing evidence to arrive

²¹ *Hall v. Roadway Express, Inc.*, 19 Kan. App. 2d 935, 939, 946, 878 P.2d 846 (1994) (“After July 1, 1993, the legislature substituted the Workers Compensation Appeals Board for the district court.”).

²² See *Hall*, 19 Kan. App. 2d at 939; see also *Riedmiller v. Harness*, 29 Kan. App. 2d 941, 34 P.3d 474 (2001).

²³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

²⁴ *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347 (Kansas Court of Appeals unpublished opinion filed June 13, 2008).

²⁵ *Tovar*, 15 Kan. App. 2d at 786.

²⁶ See *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (unpublished Kansas Court of Appeals opinion filed June 26, 2015).

at findings regarding impairment or disability, as in *Tovar*, or that the Division of Workers Compensation may resolve discovery disputes – does not transform the Board into having powers otherwise limited by plainly-worded statute to a district court. Additionally, K.S.A. 44-551, as noted in *Hernandez*, explicitly states that an ALJ has the same power as a district court to enforce discovery. *Hernandez* does not stand for the proposition that the code of civil procedure applies across the board in workers compensation matters.

The power of the Board is limited by statute. *Acosta* states:

. . . “Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.” *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998). Further, the Workers Compensation Act is substantial, complete, and exclusive, covering every phase of the right to compensation and of the procedure for obtaining it. See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).²⁷

Following *Acosta*, we cannot create authority where none exists. The ALJ is not a district court judge. The Board is not a district court. This last distinction was explicitly noted by the Kansas Court of Appeals in *Rogers v. ALT-A&M JV*.²⁸

CONCLUSION

Claimant is entitled to penalties pursuant to K.S.A. 44-512a(a). The penalties ordered by the ALJ are appropriate and not excessive. Approval of the bond and a stay continue to be denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated March 12, 2015, is affirmed.

IT IS SO ORDERED.

²⁷ *Acosta*, 273 Kan. at 396.

²⁸ *Rogers v. ALT-A & M JV LLC*, ___ Kan. App. 2d ___, 364 P.3d 1206, 1212 (2015).

Dated this _____ day of May, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members agree with the majority that the ALJ correctly found claimant was entitled to penalties pursuant to K.S.A. 44-512a(a) because of respondent's failure to pay weekly compensation and medical expenses. K.S.A. 44-512a(a) requires that the ALJ award \$25 for each unpaid medical bill or 10 percent of the total unpaid medical expenses, whichever is greater. Once it was determined claimant was entitled to benefits, per K.S.A. 44-512a(a), the ALJ correctly imposed the required penalty of \$10,688.69, or 10 percent of claimant's \$106,886.98 unpaid medical expenses.

We dissent with the ALJ's imposition of a \$100 per week penalty for respondent's failure to pay weekly compensation benefits and would reduce that penalty to \$50 per week. While K.S.A. 44-512a(a) grants the ALJ the authority to impose a penalty of **up to** \$100 per week, the undersigned Board Member believes the imposition of the maximum \$100 per week penalty, in addition to the \$10,688.69, is excessive. The \$100 per week penalty should be reduced for several reasons.

First, although claimant sent his demand on October 5, 2015, respondent did not learn until January 5, 2016, that respondent's final Motion for Stay before the Kansas Court of Appeals was denied. Until then, respondent had reason to believe its Motion to Stay might be granted.

Second, until the Kansas Court of Appeals made its ruling in *Nuessen* on June 12, 2015, it was widely assumed that when an Order of the Board was appealed to the Kansas

Court of Appeals, under K.S.A. 44-556(b), a claimant was limited to 10 weeks of benefits next preceding the Board's Order and benefits thereafter until the appellate court issued its ruling, but the rest of the award was stayed. That assumption was shared by the Board. Obviously, *Nuessen* changed that belief.

Finally, \$10,688.69, in and of itself, is a significant penalty. If respondent would prevail on its appeal to the Kansas Court of Appeals, it will have paid a \$10,688.69 penalty for a medical bill that it ultimately was not ordered to pay. To the undersigned Board Members, \$10,688.69 is ample penalty for respondent's actions, given the circumstances.

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Hon. Steven J. Howard, Administrative Law Judge