

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CODY DUKE)
Claimant)
V.)
) Docket No. 1,071,840
AGCO CORPORATION)
Respondent)
AND)
)
ZURICH AMERICAN INSURANCE)
Insurance Carrier)

ORDER

Respondent and its insurance carrier (respondent) requested review of the April 2, 2015, Order¹ by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Joni J. Franklin, of Wichita, Kansas, appeared for the claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Preliminary Hearing transcript of January 6, 2015, with exhibits attached, and the Preliminary Hearing transcript of April 2, 2015, with exhibits attached.

ISSUES

The ALJ ordered respondent to pay \$153.40 in penalties for the late payment of three bills from J. Mark Melhorn M.D., the authorized treating physician.

Respondent appeals, arguing the ALJ's Order for penalties should be reversed because claimant failed to satisfy the service requirements of K.S.A. 44-512a(a), specifically by not serving written demand on respondent and/or its insurance carrier. Should the Board find there was proper service, respondent argues claimant is not entitled to penalties under K.S.A. 44-512a(a) because the ALJ's January 6, 2015, Order did not specifically award

¹ The Order was for penalties.

payment of medical compensation as required by statute. Respondent argues in order to receive penalties, an employee must show that an award for compensation exists that is owing and past due.

Claimant contends the ALJ's Order should be affirmed. Claimant argued at the April 2, 2015, preliminary hearing that respondent counsel instructed that all communication go through him and respondent and its insurance carrier were not to be contacted directly. Claimant's counsel did not question this instruction which she presented as a common practice in respondent's firm, and there is nothing in the statute prohibiting respondent's counsel from accepting service for respondent and/or its carrier. Finally, claimant contends that there was attached to the demand letter bills from Dr. Melhorn that were late and unpaid and for which penalties were requested.

Respondent's appeal questions whether the Order of the ALJ is supported by the law and facts. The issues listed in claimant's brief to the Board are as follows:

1. Does claimant's service of Demand for Payment satisfy the requirements of K.S.A. 44-512a(a)(1)?

2. Does the ALJ's January 6, 2015, Order constitute an award of medical compensation under K.S.A. 44-512a(a)?

FINDINGS OF FACT

On January 6, 2015, the ALJ appointed Dr. Melhorn to be claimant's authorized treating physician for "claimant's upper extremities for all conditions in which Dr. Melhorn believes the prevailing factor in the need for treatment is claimant's work activity."

On January 30, 2015, claimant sent respondent counsel a demand letter for medical treatment. Respondent's counsel admits receiving the letter on February 4, 2015. Attached to the letter were three medical bills for treatment provided by Dr. Melhorn in October and November 2014, that remained unpaid.

On February 19, 2015, claimant's counsel mailed respondent's counsel an application for penalties and sanctions due to respondent's failure to timely pay for the medical bills attached to the January 30, 2015, letter.

On April 2, 2015, a hearing was held to handle certain preliminary hearing matters and to address the application for penalties and sanctions. The ALJ ordered respondent to pay \$153.40 in penalties for late payment of three bills due and owing to Dr. Melhorn.

There is nothing in the record indicating claimant sent respondent or its insurance carrier a demand letter specifically spelling out he wanted payment of the three medical bills plus penalties. However, exhibits attached to the letter sent to respondent's attorney included the medical bills in dispute.

During the preliminary hearing, it was determined that both of claimant's upper extremities were part of the claim and that Dr. Melhorn was now authorized to treat the left upper extremity along with the right upper extremity.

Claimant argued three bills from Dr. Melhorn were not paid in a timely fashion including: a bill from October 13, 2014 for \$181.64; a bill from October 15, 2014 for \$400; and a bill from November 13, 2014 for \$167, all of which were not paid until March 10, 2015. Claimant contends those payments should have been paid no later than February 24, 2015. The three bills were attached to the January 30, 2015, demand letter sent to respondent's counsel.

Respondent argues claimant did not provide proper service per the statute to either the employer or its insurance carrier and did not specify with particularity the items of medical compensation claimed to be unpaid and past due, which would justify penalties be paid. Therefore, claimant should not be entitled to any penalties.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-512a states:

(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.

(c) The remedies of execution, attachment, garnishment or any other remedy or procedure for the collection of a debt now provided by the laws of this state shall apply to such action and also to all judgments entered under the provisions of K.S.A. 44- 529 and amendments thereto, except that no exemption granted by any law shall apply except the homestead exemption granted and guaranteed by the constitution of this state.

Respondent first argues claimant's service was defective as neither the employer nor the insurance company were served with the demand as is required by the statute. When claimant argued at the hearing that this particular law office restricted contact with its clients, respondent had no response. The Board has been asked to address this argument in prior cases. In *Arana*², demand to respondent's counsel, but not copied to either the employer or its carrier, was deemed insufficient to satisfy the requirements of the statute. The Board stated that the actions of the ALJ made a portion of the language of the statute at issue meaningless. The statute requires the demand for payment be made personally on ***the employer or insurance carrier and its attorney of record***. (Emphasis added). The Board went on to state that if notice to the attorney was sufficient notice to the attorney's clients, then the statute would not require the additional sending of notices to those entities.

The legislative mandate requires multiple notices be sent and specifies to whom those notices are to include. In this instance, claimant has failed to follow the instructions of the legislature by serving notice on the attorney only. Claimant's contention that respondent's attorney's restricted contact with its client in some way justified the avoidance of the statutory requirements fails. Neither claimant's attorney, nor respondent's attorney are sufficiently empowered to alter the mandate of the Kansas Legislature.

The Board finds claimant's service on respondent's counsel fails to satisfy the service requirements of the statute in this instance.

Respondent next argues claimant failed to show an award for compensation exists that is owing and past due and the demand was not specific enough to satisfy the statutory requirement of particularity with regard to medical compensation which has been awarded under the Workers Compensation Act (Act). The demand letter sent by claimant's counsel had attached the medical bills to be paid. Additionally, the note from the doctor's office identifies the difficulties encountered in collecting the payments. It is clear from Claimant's Exhibit 2 to the April 2, 2015, preliminary hearing which bills remain unpaid and just how long those bills have been in existence. However, the statute identifies medical compensation as that which has been awarded under the Act. There is nothing in the ALJ's Order which awards the medical bills of Dr. Melhorn. The Order of the ALJ authorizes the treatment by Dr. Melhorn, but the Order makes no mention of current or past medical bills.

² *Arana v. United Contractors, Inc.*, No. 1,038,686, 2009 WL 1996477 (Kan. WCAB June 10, 2009).

The Board finds claimant did not satisfy the requirements of K.S.A. 2013 Supp. 44-512a(a), and the award of penalties by the ALJ should be reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed. Claimant did not satisfy the statutory requirements for both the service of written demand and in identifying with particularity the items of medical compensation which remain unpaid and past due and which "have been awarded."

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated April 2, 2015, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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