

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

NANCY C. LIVERS)	
Claimant)	
VS.)	
)	
TRANS UNION CORPORATION)	Docket No. 162,178
Respondent)	
AND)	
)	
SELF-INSURED)	
Insurance Carrier)	

ORDER

ON the 8th day of March, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge John D. Clark on February 8, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through her attorney, James B. Zongker of Wichita, Kansas. The respondent, a self-insured, appeared by and through its attorney, Michael T. Harris of Wichita, Kansas. There were no other appearances.

ISSUES

Claimant contends the Administrative Law Judge erroneously interpreted and applied the penalty provisions of K.S.A. 44-512a. Specifically, claimant contends the Administrative Law Judge did not properly determine the number of weeks "past due." Claimant contends that after an award is entered and payment is not made within 20 days after proper written demand, the Administrative Law Judge should calculate the number of weeks compensation "past due" by calculating the number of weeks back to the last date of compensation paid or, in the alternative, the date claim is filed. In this case it appears the Administrative Law Judge calculated the number of weeks "past due" by beginning 20 days after the date of the demand and calculating forward to the date payment is made. In this particular case the difference between the method followed by the Administrative Law Judge and that proposed by the claimant results in a difference in the potential penalty from the \$200.00 awarded by the Administrative Law Judge to in excess of \$18,000.00 which could be awarded under the method proposed by the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board holds that, for purposes of penalties pursuant to K.S.A. 44-512a, benefits ordered by an award not appealed, should be considered due after the ten (10) days for appeal of the award has run. Penalties may be awarded for each week thereafter benefits are not paid.

The relevant dates for purposes of this decision begin with the November 17, 1993, date the award was entered in favor of claimant and against respondent awarding benefits for a twenty-nine percent (29%) permanent partial general body disability for an accident on June 26, 1990. No appeal was taken and the award of the Administrative Law Judge was approved by Order of the Appeals Board dated November 30, 1993. On December 2, 1993, claimant's attorney made written demand for payment of the benefits and advised the respondent that claimant would seek the penalties if payment was not made within 20 days. On December 29, 1993, claimant then served its application for penalties and sanctions. Respondent then did make payment of the benefits due and owing on January 4, 1994. Based upon these facts the Administrative Law Judge determined that he had authority to determine the benefits were two weeks past due and awarded \$100.00 for each week.

As indicated, the claimant contends that the Administrative Law Judge could and should have considered the penalties for weeks that were due and owing prior to the date the award was entered. In this case it would have been a total of 183 weeks. The Administrative Law Judge concluded that he did not have authority to award such penalties and the Appeals Board agrees. In K.S.A. 44-512b the Legislature has provided a method for assessing interest when there has been no just cause or excuse for the failure of the employer or insurance carrier to pay prior to an award. K.S.A. 44-512a, on the other hand, creates penalties assessable once an award has been made or benefits ordered. That statute provides in pertinent part:

"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..., the employee shall be entitled to a civil penalty...in an amount of not more than \$100 per week for each week any disability compensation is past due...if: (1) Service of written demand for payment...has been made

personally or by registered mail...and (2) payment of such demand is thereafter refused or not made within 20 days from the date of service of such demand." (Emphasis added.)

Based upon the above quoted statute the Administrative Law Judge concluded, that the calculation of weeks past due begins twenty (20) days after the demand is made.

The Appeals Board concludes, however, the date used for the penalty statute, K.S.A. 44-512a, should be the day after the ten (10) days for appeal has run. Pursuant to K.A.R. 51-18-2, the award becomes effective the day after the date noted on the award. The award may be appealed by filing notice within ten (10) days of the effective date of the award, and in cases where compensability is an issue, the payment of benefits is stayed until thirty (30) days after hearing on the appeal. Where, as here, no appeal is taken within that ten (10) day period, the benefits should be considered due once the appeal time has run. Each week thereafter they become past due the demand letter acts to begin enforcement of the penalty period and gives a twenty (20) day grace period to correct the failure to pay. The period for the penalty does not depend, however, on when demand is made. Where no appeal is taken, the calculation of the number of weeks past due should begin the day after the time for appeal has run.

As applied to the facts of this case, the beginning date for calculating the number of weeks of penalties would be November 29, 1993. Payments were not made under the award until January 4, 1994. The Administrative Law Judge could have awarded up to five weeks of penalties. The statute authorizes penalties of up to \$100.00 per week but does not require that the maximum be awarded in all cases. Here, the dispute between the parties concern the difference between 183 weeks requested by claimant and the two weeks awarded. While the Appeals Board uses a different date than that used by the Administrative Law Judge, and believes the higher penalty would have been permitted, the \$200.00 awarded is reasonable under the circumstances and will not be disturbed.

AWARD

WHEREFORE, the decision of the Administrative Law Judge entered February 8, 1994, awarding penalties in the amount of \$200.00 against Trans Union Corporation and in favor of Nancy C. Livers should be and the same is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James B. Zongker, PO Box 47370, Wichita, Kansas 67201-7370
Michael T. Harris, 125 N Market, Suite 1416, Wichita, Kansas 67202
John D. Clark, Administrative Law Judge
George Gomez, Director

MEMORANDUM

TO: APPEALS BOARD MEMBERS
FROM: DON RAMSAY
DATE: APRIL 11, 1994

This Order includes an aspect of the decision not discussed in conference. The issue discussed in conference was whether the determination of "past due" benefits begins prior the award or only after the award. The Administrative Law Judge uses the date demand is made to calculate past due. Other possible dates are, of course, the date the award is entered, or the date the Appeals Board approves the decision. This Order approves the use of date demand is made. This, of course, puts the burden on the claimant's attorney to get the ball rolling. No penalties would be awarded if claimant's attorney has not made a demand. I might personally feel more comfortable with using the date the award is approved by our 10-day Order, but do not have strong feelings about it.

I would appreciate your comments.

DCR:ms