

- (1) Whether the Appeals Board has jurisdiction to hear an appeal from an award of penalties pursuant to K.S.A. 44-512(a);
- (2) Whether the appeal from the Administrative Law Judge's Preliminary Hearing Order of February 17, 1994, is out of time;
- (3) Whether the claimant is entitled to temporary total disability benefits provided for in the February 17, 1994, Preliminary Hearing Order; and
- (4) Whether the claimant is entitled to the \$100.00 per week penalty assessed against the respondent in the February 28, 1994, Preliminary Hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The Appeals Board has jurisdiction to hear this appeal as it is an appeal from a final order, not a Preliminary Hearing Order. An award of penalties pursuant to K.S.A. 44-512a is not a preliminary award. It is a separate proceeding and is subject to de novo review on the record as a final order on written request made within 10 days from entry of the order. See Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185 rev. denied 251 Kan. 942 (1992).
- (2) Two orders have been entered by Administrative Law Judge John D. Clark concerning this appeal. The first order dated February 17, 1994, orders temporary total disability benefits, continuing medical care and penalties pursuant to K.S.A. 44-512(a). However, the Administrative Law Judge in this order took the amount of the penalties under advisement for 10 days. He then assesses penalties against the respondent in the amount of \$100.00 per week in an order dated February 28, 1994. The respondent filed its Application for Review within 10 days of the February 28, 1994, order as provided for in K.S.A. 44-551. However, the respondent did not appeal the order dated February 17, 1994, within the required 10 day period of time.

The Appeals Board finds that in regard to the penalty provision of the February 17, 1994, order, it is not a final order until the Administrative Law Judge assessed the amount of penalties in the order dated February 28, 1994. Accordingly, with respect to the issue of penalties, the Appeals Board finds that the order dated February 28, 1994, which specified the amount of the penalties is a continuation of the February 17, 1994, order. This finding only is applicable to the penalty provisions of both orders.

- (3) In regard to the question as to whether or not the claimant is entitled to temporary total disability benefits as provided for in the February 17, 1994, order, the Appeals Board finds that such order was not appealed within 10 days as provided by K.S.A. 44-551(b)(1) and is, therefore, out of time.
- (4) The respondent in this case was under an order of the Administrative Law Judge dated October 12, 1993, to provide temporary total disability benefits to the claimant upon the claimant's unemployment benefits being terminated. The claimant notified the respondent that her unemployment benefits terminated on December 15, 1993. Respondent without filing a motion to terminate such benefits did not commence paying temporary total benefits on that date. Claimant filed the necessary demand for compensation and motion for penalties because of the respondent's refusing to pay

temporary total benefits as ordered.

The Administrative Law Judge found, after hearing the testimony of the claimant at the preliminary hearing and exhibits attached thereto, that the temporary total benefits as ordered on October 12, 1993, had not been paid when due from the respondent. The Administrative Law Judge is given the authority to assess a civil penalty against the respondent in an amount of not more than \$100.00 per week for each week any disability compensation is past due. See K.S.A. 44-512a(a).

The Appeals Board finds that the Administrative Law Judge ordered the respondent to pay temporary total disability benefits to the claimant beginning at the time her unemployment benefits were terminated. The claimant notified the respondent in the first part of December her unemployment benefits would terminate December 15, 1993, and made demand thereafter for such benefits. The benefits were not paid and the Administrative Law Judge pursuant to K.S.A 44-512a(a) assessed a civil penalty against the respondent in favor of the claimant in a weekly amount of \$100.00 per week for all temporary total disability compensation past due. The Appeals Board finds that the amount of the penalty assessed by the Administrative Law Judge is reasonable under the facts and circumstances of this case.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Preliminary Hearing Orders of Administrative Law Judge John D. Clark dated February 17, 1994, and February 28, 1994, ordering temporary total disability, continuing medical and penalties are hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Steven L. Foulston, PO Box 48128, Wichita, Kansas 67210
David J. Morgan, 100 S Main, Ste 600, Wichita, Kansas 67202
John D. Clark, Administrative Law Judge
George Gomez, Director