BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDREW M. McGEE, JR.	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 206,931 & 210,663
CAPITAL ELECTRIC CONSTRUCTION OF	)	
KANSAS, INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS ASSOCIATION SELF-INSURERS FUND	)	
Insurance Carrier	)	

ORDER

Respondent appealed the Order of Administrative Law Judge Robert H. Foerschler dated September 12, 1996. The Appeals Board heard oral argument in Kansas City, Kansas, on February 18, 1997.

APPEARANCES

The claimant appeared by his attorney, Mark E. Kolich of Kansas City, Kansas. The respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Lenexa, Kansas.

RECORD

The Appeals Board considered the transcript of the preliminary hearing held on May 16, 1996, the transcript of proceedings held on September 12, 1996, and the documents contained in the file of the Administrative Law Judge and in the file of the Division of Workers Compensation.

ISSUES

Respondent requested the Appeals Board to review the following issues:

(1) Whether the Administrative Law Judge exceeded his jurisdiction in appointing a neutral health care physician to examine the claimant pursuant to K.S.A. 44-516.

(2) Whether the Administrative Law Judge erred in ordering respondent to pay a penalty pursuant to K.S.A. 44-512a.

(3) Whether the Administrative Law Judge exceeded his jurisdiction in ordering respondent to pay temporary total disability compensation to the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

This matter came before the Administrative Law Judge on an Application for Civil Penalties filed by the claimant on August 1, 1996, and an Application to Enforce Preliminary Hearing Order filed by the claimant on August 12, 1996. Both of the applications were filed in reference to the May 16, 1996, preliminary hearing Order entered by Assistant Director Brad E. Avery. Following a May 16, 1996, preliminary hearing, Assistant Director Avery ordered respondent to pay temporary total disability compensation to the claimant and authorized the Dickson-Diveley Midwest Orthopaedic Clinic, Inc. of Overland Park, Kansas, to provide medical treatment for claimant's injuries.

The respondent timely appealed that preliminary hearing Order to the Appeals Board. The Appeals Board in an Order dated July 30, 1996, dismissed respondent's application for review finding it did not have jurisdiction to review the preliminary hearing Order.

Claimant filed a demand pursuant to K.S.A. 44-512a, for payment of the temporary total disability compensation benefits and for respondent to provide treatment of claimant's injuries as ordered by the Assistant Director in the May 16, 1996, preliminary hearing Order. The respondent paid temporary total disability compensation benefits to the claimant from the date of the preliminary hearing Order, May 16, 1996, but did not pay the temporary total disability compensation ordered paid before the date of the preliminary hearing Order. The respondent also, in compliance with the preliminary hearing Order, had claimant examined on June 4, 1996, by Dale E. Darnell, M.D., a physician associated with the Dickson-Diveley Midwest Orthopaedic Clinic, Inc.

After the Appeals Board dismissed respondent's appeal of the May 16, 1996, preliminary hearing Order, respondent paid the temporary total disability compensation ordered paid to the claimant for the period before May 16, 1996. The claimant acknowledges that he received the payment on August 13, 1996.

After the hearing was held on September 12, 1996, in reference to the two applications filed by the claimant, the Administrative Law Judge in an Order dated September 12, 1996, made the following orders:

> 1. Appointed the Rehabilitation Institute as a neutral health care provider to examine the claimant and report on the question of whether claimant's back and hip complaints were related to claimant's November 1996 accident at work and to determine whether claimant was in need of further medical treatment.
>
> 2. Assessed a penalty against the respondent pursuant to K.S.A. 44-512a in the amount of $50 per payment for 10 weeks of temporary total disability compensation accrued prior to the appeal.
>
> 3. Ordered respondent to resume payment of temporary total disability compensation to claimant effective August 29, 1996.

(1) The respondent argues the Administrative Law Judge exceeded his authority when he appointed a neutral physician to examine the claimant. The thrust of respondent's argument was that the Administrative Law Judge essentially made a change in the authorized treating physician instead of appointing a neutral physician. The Appeals Board disagrees and finds the Administrative Law Judge made the appointment of a neutral physician for the purpose of determining a dispute as to claimant's injuries. Such an appointment was not made to change the claimant's authorized treating physician. The Appeals Board finds that K.S.A. 44-516 grants the Administrative Law Judge the authority to make such an appointment. Therefore, the Appeals Board concludes the Administrative Law Judge acted within his authority as granted by the statute.

(2) The respondent further contends the Administrative Law Judge erred in assessing a penalty of $50 per payment for 10 weeks of temporary total disability compensation that accrued before the appeal. The respondent argues that at all times it complied with the statutory provisions contained in K.S.A. 44-534a, as amended, and therefore the Administrative Law Judge erred in assessing the penalty.

The claimant, on the other hand, argues that a penalty was appropriate because the respondent's appeal taken from the preliminary hearing Order dated May 16, 1996, was a frivolous appeal. Claimant asserts the only reason the respondent appealed the preliminary hearing Order was to stay the payment of the temporary total disability compensation ordered paid for the period before the date of the Order.

The Appeals Board finds that the respondent's appeal of the May 16, 1996, preliminary hearing Order, although dismissed as nonjurisdictional, was not a frivolous appeal. The Appeals Board finds there was an arguable issue of whether the dispute was nature and extent of claimant's injuries or whether the injuries arose from the accident. The Appeals Board also finds there is no evidence in the record to support the claimant's allegation that the respondent's only purpose for such appeal was to stay the payment of the temporary total disability payments ordered paid before the date of the Order.

The Appeals Board concludes that the payment of the temporary total disability compensation benefits for the period before the date of the preliminary hearing Order, was stayed by the appeal and respondent had no obligation to pay those payments until the Appeals Board Order dated July 30, 1996. *See* K.S.A. 44-534a(a)(2), as amended. The Appeals Board finds those stayed weeks of temporary total disability compensation were not due and payable as contemplated by K.S.A. 44-512a until the Appeals Board's Order dated July 30, 1996. Therefore, the Appeals Board finds claimant's written demand served on the respondent on May 20, 1996, was ineffective to predicate an action for penalties under K.S.A. 44-512-a. *See* Hallmark v. Dalton Construction Co., 206 Kan. 159, Syl. ¶ 2, 476 P.2d 221 (1970). The written demand was effective for compensation awarded after the date of the preliminary hearing Order but was not effective for the compensation awarded before the date of the Order. As previously noted, the respondent timely paid all compensation awarded after the date of the preliminary hearing Order. The Appeals Board concludes a penalty should not be assessed against the respondent. Therefore, the Appeals Board reverses that particular portion of the Order entered by the Administrative Law Judge on September 12, 1996.

(3) Respondent contends the Administrative Law Judge erred in ordering the respondent to resume payment of temporary total disability compensation to the claimant effective August 29, 1996. Respondent asserts the September 12, 1996, hearing was only held in response to claimant's applications filed for civil penalties and to enforce the preliminary hearing Order. The hearing was not a preliminary hearing held pursuant to K.S.A. 44-534a, as amended. Procedural requirements found in the preliminary hearing statute, K.S.A. 44-534a, as amended, were not followed. Thus, the respondent argues the Administrative Law Judge exceeded his jurisdiction when he ordered temporary total disability compensation without complying with the procedures required of demand, application for hearing, and notice.

In contrast, the claimant asserts the Administrative Law Judge, after the first preliminary hearing was held, retains continuing jurisdiction over preliminary hearing orders. In support of that argument, the claimant cites the case of Conti v. IBT, Inc./Sunrise Systems, Inc., Docket No. 162,310 (May 1994) where the Appeals Board found the Administrative Law Judge had jurisdiction to conduct a hearing on a motion to terminate temporary total disability benefits without first following all the procedural requirements of a new preliminary hearing. The reason a new preliminary hearing was not

required in Conti was because it was in the nature of a continuation of the original preliminary hearing.

The Appeals Board agrees with the claimant's argument that under some facts and circumstances the Administrative Law Judge does retain jurisdiction over the original preliminary hearing order. However, the Appeals Board finds that in Conti the claimant had notice of the specific issue to be addressed at the hearing on respondent's motion to terminate temporary total disability compensation awarded at the original preliminary hearing. In this case, the Appeals Board finds the respondent did not have notice that new medical evidence would be offered and admitted on the issue of claimant's eligibility for temporary total disability compensation. Therefore, the Appeals Board finds, under these facts and circumstances, the Administrative Law Judge should have held another preliminary hearing on the issue of claimant's eligibility for temporary total disability compensation after the necessary procedural requirements were followed by the claimant.

The September 12, 1996, hearing was held only in reference to the two applications filed by the claimant. The Appeals Board acknowledges that claimant's Application to Enforce Preliminary Hearing did request payment of temporary total benefits as ordered in the May 16, 1996, preliminary hearing Order. In that Order, the respondent was required to pay temporary total disability compensation commencing March 4, 1996, for the duration of the total disability. The Assistant Director also ordered claimant to undergo medical treatment with the Dickson-Diveley Midwest Orthopaedic Clinic, Inc. Respondent complied with this order. Dale E. Darnell, M.D., examined the claimant and found that the claimant had met maximum medical improvement and returned claimant to work without restrictions in a report dated July 22, 1996. The respondent, in compliance with the May 16, 1996, Order, then discontinued temporary total disability compensation.

At the September 12, 1996, hearing on claimant's two applications, the claimant admitted medical reports into evidence from another examining and treating physician, Dr. Prostic. Both of those reports indicated that claimant was in need of future medical treatment. Based on that evidence, the Administrative Law Judge ordered the respondent to resume payment of temporary total disability benefits from August 29, 1996, the date claimant was first examined by Dr. Prostic.

The Administrative Law Judge, during the September 12, 1996, hearing on the claimant's two applications, received new medical evidence into the record that the respondent had no opportunity to contradict. Specifically, the respondent at a preliminary hearing is given the opportunity pursuant to statute to present evidence on disputed issues. In this case, the respondent could only assume from the applications filed by the claimant that the Administrative Law Judge would confine the hearing to the issue of whether the respondent complied with the orders contained in the May 16, 1996, preliminary hearing Order. Respondent had the evidence to show its compliance with that Order but did not have the notice and the opportunity to dispute new medical evidence submitted by the claimant in that hearing.

The Appeals Board concludes the finding of the Administrative Law Judge that respondent should pay claimant temporary total disability compensation commencing August 29, 1996, should be reversed. If claimant claims he remains temporarily and totally disabled he should follow the necessary procedures contained in the preliminary hearing statute and then a preliminary hearing should be held on this disputed issue.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Robert H. Foerschler dated September 12, 1996, should be affirmed in regard to ordering claimant examined by a neutral physician, but should be reversed in regard to ordering respondent to pay penalties, and ordering respondent to pay temporary total disability compensation.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. Kolich, Kansas City, KS
Wade A. Dorothy, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director