

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

CLARENCE LEE HORTON)
Claimant)
VS.)
CADWELL'S COUNTRY MART)
Respondent)
AND)
NORTH RIVER INSURANCE COMPANY)
Insurance Carrier)

Docket No. 220,168

ORDER

Respondent and its insurance carrier (respondent) request review of the June 6, 2005 Order and the June 10, 2005 Order Nunc Pro Tunc awarding penalties entered by Administrative Law Judge (ALJ) Thomas Klein.

RECORD AND STIPULATIONS

The Appeals Board (Board) considered the June 2, 2005 Transcript of Motion Hearing, together with the exhibits, pleadings and other documents contained in the administrative file.

ISSUES

The ALJ ordered respondent to pay \$936 in penalties for unpaid medical bills and other related medical expenses as set out in the Motion Hearing, Claimant's Exhibit 1, and \$392.91 for unpaid medical bills and other related medical expenses as set out in the Motion Hearing, Claimant's Exhibit 2. The ALJ also ordered respondent to pay penalties in the amount of \$1,500 for unpaid permanent total disability benefits. The award of attorney fees was neither appealed nor raised as an issue by either party.

The respondent argues the ALJ exceeded his jurisdiction in ordering respondent to pay penalties for unpaid permanent total disability benefits because claimant did not apply for a civil penalty regarding that unpaid amount. In the alternative, respondent contends its insurance carrier has paid out the entire Award due claimant, minus the Social Security

retirement offset provided by K.S.A. 44-501(h). The respondent further argues the ALJ exceeded his jurisdiction in ordering it to pay penalties for nonpayment of medical bills and other related medical expenses, claiming that any nonpayment of medical bills within the 20-day demand period was because respondent had not received the medical reports required by the Act to substantiate the bills.

Claimant argues that respondent was provided notice of the issues addressed at the June 2, 2005 hearing and, therefore, both the statute and the elements of due process of law were satisfied, and the ALJ had jurisdiction to assess respondent penalties for nonpayment of permanent total disability and medical benefits. Claimant claimed the last disability compensation he received was the payment through October 16, 2004; and, therefore, at the time of the Motion Hearing, respondent owed 32.71 weeks of benefits. Claimant also contends that respondent's claim that it had not received medical billing reports as required by the Act is not supported by the evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board concludes the Order of the ALJ awarding penalties should be reversed and remanded to the ALJ for further proceedings.

The Board's standard of review of a final order awarding penalties is de novo, and its jurisdiction to review the ALJ's findings, conclusions and orders is unlimited.¹

K.S.A. 44-512a states in part:

(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.

On July 9, 2004, Special ALJ Jeff K. Cooper entered a Post-Award Medical Award, stating:

¹K.S.A. 44-551 and K.S.A. 44-555c.

After reviewing the record in its entirety, the Court finds Claimant's pain and symptoms were direct, natural, and probable consequences of his work-related injuries from the December 4, 1996 accident. Further, the Court finds the treatments sought and received by Claimant at Jane Philips [*sic*] Medical Center were reasonable and necessary to relieve the effects of Claimant's work-related injury.

The Court orders Respondent to reimburse Claimant all costs and fees incurred in securing medical treatment at Jane Philips [*sic*] Medical Center and all treatments subsequent to the same. Additionally, the Court orders Respondent to provide further authorized care to Claimant in the hands of Dr. [James] Zeiders.

The Court orders Respondent to pay Claimant \$6,360.57 in accordance with this Award.²

Respondent and its insurance carrier appealed the Post-Award Medical Award to this Board. In its October 28, 2004, Order, this Board stated:

The Board finds that the medical care provided to claimant was reasonable and necessary under these circumstances, and the Order requiring respondent to reimburse claimant for the costs of that medical treatment is affirmed.³

Thereafter, claimant sent respondent two demand letters. The first was dated December 20, 2004 and stated in part:

[D]emand is hereby made, pursuant to K.S.A. 44-512a, for payment of the following within 20 days:

1. Authorization of Dr. Zeiders to provide medical care and treatment.
2. Payment to Claimant in the amount of \$6,360.57, representing reimbursement and payment of outstanding medical expense;
3. Payment to Claimant's counsel in the amount of \$7,650.00, representing post award attorney fees;
4. Payment to Claimant's counsel in the amount of \$251.39, representing post award litigation expense/costs;
5. Payment to Claimant in the amount of \$192.39, representing reimbursement for medications prescribed by Dr. [M. R.] Morenas, pursuant to the prescription receipts dated September 22, 2004, and November 1, 2004, copies of which are enclosed as Exhibit "C", (Claimant was referred to Dr. Morenas by Dr. Zeiders, see office

²Post-Award Medical Award (July 9, 2004) at 3.

³Appeals Board Order (Oct. 28, 2004) at 4.

dictation of Dr. Zeiders dated February 28, 2003, and August 17, 2004, copy contained within Exhibit "C".

6. Payment to Jane Phillips Medical Center in the amount of \$1,160.00, representing payment of outstanding medical expense regarding dates of service of August 19, 2004, and September 16, 2004, copies of which are enclosed as Exhibit "D";

7. Payment to James W. Zeiders, M.D. in the amount of \$206.20, representing payment of outstanding medical expense regarding dates of service of August 17, 2004, and September 28, 2004, as set forth on the statements of the same dates, copies of which are enclosed as Exhibit "E";

8. Payment to Anesthesiologists of Bartlesville (Dr. Morenas) in the amount of \$1,200.00, representing payment of outstanding medical expense regarding dates of service of August 19, 2004, and September 8, 2004, as set forth on the statements dated September 17, 2004, and October 26, 2004, copies of which are enclosed as Exhibit "F";

9. Payment to Claimant in the amount of \$240.50, representing reimbursement for medical mileage incurred from August 19, 2004 through December 6, 2004, pursuant to the Mileage Reimbursement form a copy of which is enclosed as Exhibit "G";

10. Payment to Claimant in the amount of \$101.19, representing reimbursement for medications prescribed by Dr. Morenas, pursuant to the prescription receipt dated December 14, 2004, copy of which is enclosed as Exhibit "H"; and

11. Payment to Jane Phillips Medical Center in the amount of \$596.00, representing payment of outstanding medical expense regarding a date of service of December 6, 2004, a copy of which are enclosed as Exhibit "I";

Demand is also made for compliance with all other provisions in the enclosed Order and Award.⁴

The second demand letter was dated January 31, 2005, and stated in part:

Pursuant to . . . K.S.A. 44-512a, please consider this letter as a twenty (20) day demand for:

1. Payment to Anesthesiologists of Bartlesville in the amount of \$3,150.00, per the enclosed outstanding statement regarding dates of service of March 20, 2003 through September 8, 2004, a copy of which is enclosed.

⁴Motion Hearing Trans. (June 2, 2005), Cl. Ex. 1 at 2-3.

2. Reimbursement of \$101.19 to Claimant, regarding medication prescribed by Dr. Morenas, per the enclosed prescription receipt dated January 18, 2005.

3. Reimbursement of \$529.10 to Claimant, per the enclosed mileage forms totaling 1,430 miles @ .37¢ [sic] per mile.

Demand is also made for compliance with all other provisions of the Order and Award.⁵

Respondent first argues it should not have been assessed a penalty of \$1,500 for nonpayment of permanent total disability compensation, claiming that claimant did not make a written application for penalty for the alleged unpaid permanent total disability compensation. The Application for Penalties filed by claimant on February 22, 2005, stated that claimant was applying for sanctions against respondent pursuant to K.S.A. 44-512(a) for “failure to make payments pursuant to the Award of the Appeals Board dated October 28, 2004, and the Award of Special Administrative Law Judge Jeff K. Cooper dated July 9, 2004.”⁶

Respondent asserts that at no time during the post-award medical proceedings was the issue of nonpayment of permanent total disability compensation raised. When the issue was raised at the Motion Hearing, respondent objected, stating that the issue was never noticed up for a penalty hearing and, therefore, he was not prepared to discuss the issue. Claimant’s attorney responded by stating: “I don’t know whether there’s any requirement that we specifically have to set forth exactly which 20-day demand we are going to argue about.”⁷ Claimant’s attorney then referred to Claimant’s Exhibit 3, a Demand for Compensation filed with the Division on February 23, 2000. In reviewing the administrative file, the Board finds that an Application for Penalties was filed April 24, 2000, requesting sanctions for respondent’s failure to comply with the Board’s Order of April 30, 1999, the Court of Appeals’ decision of February 18, 2000, and the Supreme Court Order of March 22, 2000. There is nothing in the file to indicate claimant’s attorney requested a setting to hear arguments on the Application for Penalties at that time. However, claimant also entered as exhibits copies of letters dated December 8, 2004⁸, and April 15, 2005⁹, both concerning nonpayment of permanent total disability benefits since October 13, 2004. Claimant argues that respondent was well aware of the issues to be addressed at the penalty hearing.

⁵*Id.*, Cl. Ex. 2 at 2.

⁶Application for Penalties (Feb. 22, 2005).

⁷Motion Hearing Trans. at 17.

⁸*Id.*, Cl. Ex. 3 at 1.

⁹*Id.* at 2.

K.S.A. 44-512a(b) states in part:

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.

In the alternative, respondent and its insurance carrier claim that they have paid out the entire Award due claimant, minus the Social Security retirement offset provided by K.S.A. 44-501(h). That statute states:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Respondent claims it deducted the Social Security retirement offset and paid claimant until the difference was completely paid. It then ceased payment of permanent total disability benefits. Respondent, therefore, argues that it is not subject to penalties in this instance.

Claimant, in his brief, stated that respondent's alternative argument is presented with no factual or evidentiary basis and should not be considered by the Board. At the Motion Hearing, claimant's attorney admitted claimant was on social security retirement so his weekly benefits should be reduced. However, claimant claims that respondent needs to make payments until the full amount of the award is reached. At the Motion Hearing, the ALJ stated: "[T]he remedy is not to unilaterally stop payment. The remedy is to seek a modification of the order."¹⁰ Unfortunately, the record is silent as to when claimant began receiving Social Security retirement benefits and the amount of those payments.

The Board finds that respondent was provided adequate notice concerning the subject matter of the penalties hearing, including that one of the issues was the nonpayment of permanent total disability compensation. Accordingly, respondent was not denied due process of law. Counsel for claimant sent respondent's counsel letters on December 8, 2004, and on April 15, 2005, concerning the alleged underpayment of permanent total disability compensation and stated claimant's intent to seek penalties for

¹⁰Motion Hearing Trans. at 37.

respondent's alleged failure to pay these ordered benefits.¹¹ Therefore, in context, that claimant's Application for Penalties, which referenced the Board's October 28, 2004 Order, served February 21, 2005, and heard on June 2, 2005, included the issue of permanent total disability compensation should have come as no surprise to respondent. As for respondent's defense that it has fully paid all of the permanent total disability compensation owed, less the offset for Social Security retirement payments, this was not proven. The record does not contain the dates nor the amount of Social Security benefits claimant was paid. The ALJ awarded penalties in the amount of \$1,500 for unpaid permanent total disability compensation. The ALJ's Order does not indicate how the ALJ arrived at this amount. K.S.A. 44-512a(a) allows for a civil penalty "in an amount of not more than \$100 per week for each week any disability compensation is past due." Permanent total disability payments ceased on October 16, 2004. The Board's April 30, 1999 award provided:

As of May 15, 1999, there is due and owing claimant 23.14 weeks of temporary total disability compensation at the rate of \$293.35 per week or \$6,788.12, followed by 104.29 weeks of permanent total disability compensation at the rate of \$293.35 per week in the sum of \$30,593.47, for a total of \$37,381.59 which is ordered paid in one lump sum less any amounts previously paid. The remaining \$81,530.77 is to be paid for 277.93 weeks at the rate of \$293.35 per week, until fully paid or further order of the Director.¹²

Adding 277.93 weeks to May 15, 1999, results in an ending date of September 10, 2004. This is the date permanent total disability benefits would have been fully paid. In his brief, claimant stated that respondent ceased paying benefits on October 16, 2004. October 16, 2004, is 283.14 weeks after May 15, 1999. Therefore, if respondent paid the disability compensation until October 16, 2004, then the award was not only paid in full, but there was an overpayment. Accordingly, claimant has failed to prove an entitlement to penalties.

The record does not reflect how much disability compensation respondent paid in total. Nevertheless, it is apparent from respondent's brief that it paid something less than the \$118,912.36 that was awarded.

In the alternative, respondent's insurance carrier has paid out the entire Award due claimant, minus the Social Security retirement offset provided by K.S.A. 44-501(h). It ceased paying claimant when the maximum Award was paid after calculating the retirement offset credit. Claimant's attorney argued that the retirement offset only served to diminish the weekly amount of the Award but that claimant was entitled to the entire \$118,000.00+, albeit over a longer period of time. Claimant's attorney is in error.¹³

¹¹*Id.*, Cl. Ex. 4.

¹²Appeals Board Order (April 30, 1999) at 8.

¹³Respondent's brief at 3 (filed June 29, 2005).

Finally, with regard to claimant's argument that he is entitled to the entire \$118,912.36 and that any credit or offset should be applied only to the amount of the weekly benefit and not to the total amount of compensation, that argument, likewise, fails. First, the Board reduced the \$125,000 permanent total disability award by applying a K.S.A. 44-501(c) credit in its April 30, 1999 Order, and that Order is final. Respondent correctly cites the Board's decision in *McIntosh*¹⁴ for the proposition that the majority of the Board would apply a Social Security offset against a permanent total disability award in the same manner, that is, by reducing the maximum award, not simply by prolonging the pay-out period. However, as counsel knows, *McIntosh* is on appeal to the Court of Appeals, so the method of calculating the Social Security offset could change. But unless and until it does, the Board's method as explained in *McIntosh* is controlling and should be utilized in this case. Unfortunately, the record is inadequate to do so. Therefore, the matter of penalties for the late payment of disability compensation, if any, is remanded to the ALJ for further proceedings and determination, including a determination of what respondent has paid and respondent's entitlement to a Social Security offset.

Regarding the attorney fees, respondent claimed that those had not been paid earlier because claimant's attorney had failed to provide respondent with IRS Form 90. The amount of \$7,650 was paid by respondent before the Motion Hearing, but after the 20-day period following receipt of the demand letters had expired. Respondent had no explanation for why the sum of \$251.39 in litigation expenses and costs had not been paid.

Respondent next requests the Board reverse the ALJ's decision regarding penalties for unpaid medical bills. In respondent's brief, it noted that regarding the penalties for nonpayment of medical bills and expenses listed in Claimant's Exhibit 1, the ALJ did not delineate in his Order exactly which medical bills were the subject of penalties and which were not. Respondent claims that the medical bills not paid within the 20-day demand period were bills for which the insurance carrier had not received medical reports as required by the Act to substantiate them.¹⁵

In the Board's Order of October 28, 2004, it stated: "At the time of the post-award hearing, claimant presented medical bills totaling \$6,360.57, some of which had been paid, some of which remained due and owing."¹⁶ At the Motion Hearing, respondent's attorney stated that he had requested an itemization of those medical bills that are due and owing from claimant's attorney. Respondent claims that the bills he received included some duplicate medical bills from Dr. James Zeiders, Jane Phillips Medical Center and Anesthesiologists of Bartlesville.

¹⁴*McIntosh v. Sedgwick County*, Docket No. 245,635 (filed December 13, 2004).

¹⁵See K.A.R. 51-9-10.

¹⁶Order (Oct. 28, 2004) at 4.

Respondent argued that the prescription bills of claimant had not been paid because it had not received medical records to substantiate that Gabitril, an anti-seizure medicine, was prescribed by Dr. Morenas for claimant's back pain. Claimant testified at the Motion Hearing that Gabitril also works for pain.

In reviewing the mileage requests by claimant, it does appear that most of claimant's list attached as Claimant Exhibit 1 at 32 are also listed and requested in Claimant's Exhibit 2 at 7. The only nonduplicated request attached to Claimant's Exhibit 1 is mileage on September 7, 2004, for a visit to Dr. Zeiders, but the record does not include a corresponding bill from Dr. Zeiders for an office appointment on that date. It also appears that some of the mileage requested in Claimant's Exhibit 2 at 7 are duplicates of mileage requested as part of the \$6,360.57 being requested, specifically February 26, 2003; February 27, 2003; March 5, 2003; March 20, 2003 and April 17, 2003.

As this matter is being remanded on the question of what disability compensation is due and owing, as part of the remand, the ALJ is directed to clarify and explain the penalty award "in the amount of \$936.00 for the items contained in Claimant's exhibit 1"¹⁷ by specifying which medical bills were found to be past due, the amount which was past due and how the penalties in the amount of \$936 were calculated. As for the award of penalties in the amount of \$392.91 for the items contained in claimant's Exhibit 2, there is no question as to how this amount was calculated, as it is the full amount requested. Nevertheless, as delineated above, these expenses may duplicate expenses listed in Exhibit 1 and, therefore, clarification is needed.

WHEREFORE, it is the finding, decision and order of the Board that the Order and Order Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated June 6, 2005, and June 10, 2005, respectively, are reversed and remanded to the ALJ for further proceedings and orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

BOARD MEMBER

BOARD MEMBER

¹⁷Order Nunc Pro Tunc (June 10, 2005).

BOARD MEMBER

- c: Charles W. Hess, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director