

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

RUSSELL R. WRIGHT)
Claimant)

VS.)

LIES READY MIX & PAVING)
Respondent)

AND)

EMPLOYERS MUTUAL CASUALTY COMPANY)
Insurance Carrier)

Docket No. 237,557

ORDER

Claimant appeals from an Order entered by Administrative Law Judge Jon L. Frobish on March 25, 1999. The Appeals Board heard oral argument on September 10, 1999.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared on behalf of claimant. P. Kelly Donley of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

ISSUES

The ALJ's Order denied claimant's application to impose penalties for late payment of medical expenses. The Order also denied claimant's request for attorney fees in connection with the application for penalties. On appeal, claimant asks that we impose penalties and award attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Order denying penalties and denying attorney fees should be affirmed.

Penalties

This appeal requires that we examine the relationship between claimant's statutory right, under K.S.A. 44-512a, to enforce payment of medical expenses and the billing requirements of the fee schedule adopted pursuant to K.S.A. 1998 Supp. 44-510. Claimant contends he is entitled to penalties under K.S.A. 44-512a for late payment of medical bills

the ALJ had ordered to be paid. Respondent contends the bills were not owed because the billings were not in a form required by the fee schedule. The statements did not comply with the fee schedule because they were not on an HCFA 1500 form or its equivalent. The 1500 form is intended, at least in part, to ensure that the billing statement provides the information necessary to determine whether the billing complies with the fee limits set in the fee schedule.

On November 5, 1998, the ALJ ordered respondent to pay outstanding medical expenses related to claimant's hernia repair. The Order did not identify specific expenses or amounts. The Order stated only: "The outstanding medical is ordered paid as authorized medical." The then outstanding medical expenses included statements from the Wichita Clinic for medical services provided in September and October 1998. On November 10, 1998, shortly after the Order, claimant's counsel sent respondent a demand letter which itemized the medical expenses. Copies of the bills were attached. The letter demanded payment of the attached bills within 20 days pursuant to K.S.A. 44-512a. At approximately the same time, respondent appealed the Order for payment of the medical expenses to this Board. On December 24, 1998, the Board affirmed the Order. Claimant's counsel then sent a second written demand for payment. This second demand was a remailing of the original demand.

On January 4, 1999, the insurance carrier sent the medical bill to its offices in Iowa for payment. The Iowa office in turn asked the medical provider to send the billings on an HCFA 1500 form. The Wichita Clinic did not respond to the first request, and the insurance carrier sent a second request. The Wichita Clinic provided the HCFA 1500 form on February 19, 1999. The insurance carrier paid the bills by March 2, 1999. The bills were, therefore, paid in less than 20 days after the insurance carrier received the HCFA 1500 form but were not paid within 20 days after the written demand.

On March 18, 1999, the ALJ held a hearing to consider claimant's application for penalties. At the hearing, respondent argued that the bills were not submitted according to requirement of the fee schedule adopted by the Division because they were not on an HCFA 1500 form or its equivalent. The ALJ agreed with respondent's argument and on March 25, 1999, entered an Order denying claimant's application for penalties. With reference to the medical bills, the ALJ's Order quotes provisions of the fee schedule relating to timing of payment:

As a further attempt to avoid controversy arising between the provider and the payer for failure to make timely payments for any medical services provided, it is recommended that the insurance company or self-insured employer make payment for any medical services that were provided either: 1) within thirty days of receiving the bill submitted and any necessary documentation required by the fee schedule, or; 2) within thirty days of it being determined that the medical services provided is the result of an injury that is compensable under the Workers Compensation Law.

Although not expressly stated, the quoted provisions probably intend that payment be within 30 days of the later of the two alternatives. That is, the payment is to be made within 30 days of receiving the necessary documentation required by the fee schedule or within 30 days after it is determined the injury is compensable, whichever is later. With this interpretation, the payments were not due until after the provider submitted the proper documentation.

But the quoted provisions of the fee schedule, found in the introduction, are a recommendation to avoid controversy, not a binding requirement. More pertinent provisions are found in the Workers Compensation Act itself. K.S.A. 44-510(a)(5) provides that medical fees that are not in accordance with the schedule are "void and unenforceable." K.A.R. 51-9-7 adopts by reference the 1997 fee schedule. The 1997 fee schedule requires providers to use the HCFA 1500 form or its equivalent. The statements at issue were not on a 1500 form and the Board also concludes the statements initially submitted were not on a form equivalent to a 1500 form. We conclude that to be equivalent, the form must provide the information necessary to determine whether the billing complies with the limits set in the fee schedule. In this case, some of the necessary information was missing. We note, for example, that the anesthesia charges did not include the time units ("TM") and those units are necessary to calculate the proper amount of the bill. The Wichita Clinic's original bill totalled \$3,711.25 but was reduced to \$2,417.87 in accordance with the fee schedule

The fee schedule provisions of the Act arguably conflict with the penalty provisions. The penalty statute, K.S.A. 44-512a, provides a procedure for the claimant to enforce payment of benefits which the ALJ has ordered to be paid. If payment is not made when due, a demand letter is sent and the respondent is given 20 days to make the payment. If the payments are not made within the 20 days, penalties are assessed for all past due amounts. In the case of medical bills, the penalty is 10 percent of the past due medical bill. The penalty statute arguably conflicts with the fee schedule statute because nothing in the penalty statute makes payment of the bills or penalties for nonpayment of those bills in any way contingent on the fee schedule. The penalty statute, on its face, only requires an order for payment, an appropriate demand for payment of the bills ordered to be paid, and a subsequent 20-day delay in payment. On the other hand, K.S.A. 44-510 makes any medical bill which does not comply with the fee schedule void and unenforceable.

These provisions can be read together in at least two ways. First, one can assume that any order for payment of medical expenses incorporates the fee schedule and is, in effect, an order for payment according to the provisions of the fee schedule. This reading gives full effect to the fee schedule provisions but impedes substantially claimant's right to enforce payment of the medical bills. With this construction nothing prevents an insurance carrier from delaying payment by simply standing silent in response to medical bills which do not comply with the fee schedule.¹ Even if all parties are acting in good faith, the right to

¹ The Board notes the insurance carrier responded promptly in this case and immediately asked for the statement to be submitted on the HCFA 1500 form.

enforce payment is, by this construction, taken out of the claimant's hands and turned over to the communication between the provider and the insurance carrier. Claimant is not able to enforce payment of any statement so long as there is a dispute about compliance with the fee schedule.

Second, the provisions can be read together by construing an order for payment of medical expenses as an order that the bills be paid as submitted without regard to the fee schedule. The order for payment would then make the bills due as of the time of the order.² If written demand is made, the insurance carrier would then be obligated to pay the bills within 20 days or penalties would be assessed. The insurance carrier could later request reimbursement of any overpayment in the utilization and peer review proceedings which are also mandated by K.S.A. 44-510. This construction gives full effect to the claimant's right to enforce payment of the expenses but ignores the provisions relating to the fee schedule.

The fee schedule provisions expect there will be an attempt to resolve any fee schedule issues before payment is made. K.S.A. 44-510(6) provides that in cases where there is a dispute, the dispute shall not delay payment of amounts which are not in dispute. This, of course, assumes there may be some delay for the bills which are in dispute. The fee schedule requires an insurance carrier to explain why it has paid less than the amount charged on an "Explanation of Benefits" form. The introduction to the fee schedule also recommends the parties attempt to resolve any disputes before the matter is referred to the Director for resolution:

In the event a controversy arises between the provider and the payer, an attempt should be made by the involved parties to resolve said issue(s). Issues which cannot satisfactorily be resolved should then be referred to the Director of Workers Compensation for review.

If the two portions of the Act are read to give the claimant the right to force prompt payment, without regard to compliance with the fee schedule provisions, the insurance carrier is required to make payment and seek reimbursement or is allowed to negotiate the fee schedule issues depending on whether or not this particular claimant elects to pursue penalties.

Although neither alternative appears to be a perfect problem-free solution, the Board concludes that an ALJ's order for payment of medical expenses must be treated, even where it does not expressly so state, as an order for payment according to the fee schedule. The language of the fee schedule seems to foreclose other possible resolution. Medical fees which are not in accordance with the schedule are void and unenforceable. If they are unenforceable they must be unenforceable by the ALJ. In addition, penalties only apply to

² Consistent with provisions in the introduction to the fee schedule, the Board has held that where an ALJ has ordered payment of future medical expense, the bills are not past due until 30 days after the date of the medical bill. *Jackson v. Boeing Military Airplanes*, WCAB Docket No. 176,169 (June 1995).

payments which are past due. Medical bills which are void and unenforceable cannot be considered past due. Finally, we note the claimant has protection from collection actions. Once claimant initiates the workers compensation action, K.S.A. 44-510(b) prohibits filing or further prosecuting any action against the claimant to collect medical bills.

Since the bills in this case were void and unenforceable until the proper documentation was sent and since the bills were not due to be paid until the proper documentation was sent, respondent paid the bills promptly and no penalties apply. The Board, therefore, agrees with and affirms the decision to deny claimant's application for penalties.

Attorney Fees

This is a hernia case and claimant's counsel argues that once the permanent disability benefits have been paid, further legal work should be treated as post-award and attorney fees awarded under K.S.A. 44-536(g). Even if what claimant's counsel asks might be fair, the Board does not believe the statute authorizes an award of fees, other than those paid under the contract with the claimant, until after the final resolution of the initial claim. The time spent by claimant's counsel in this case was part of, not after, resolution of the initial claim. Claimant's request for attorney fees is, therefore, denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Jon L. Frobish on September 10, 1999, denying penalties and denying attorney fees, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Dissent

I disagree with the majority. The majority's holding erodes the administrative law judges' authority and extracts the teeth from the Workers Compensation Act's penalty statute. Under their holding, employers and insurers can ignore with impunity an order requiring them to pay medical bills until they are satisfied that the billings comply with the medical fee schedule. That should not be the law.

A better interpretation of the Act is to require the parties to comply with the orders issued. If there are defenses or questions regarding unpaid medical bills, those should be presented to the judge before payment is ordered. The judge can then determine whether the bills should be referred to the medical administrator for utilization review³ or whether they should be ordered paid. If the bills are ordered paid, the employer and its insurance carrier are not prejudiced as they retain the right to seek utilization review and reimbursement.

The majority has erred.

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
P. Kelly Donley, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

³ See K.S.A. 44-510 which creates utilization review for disputes regarding medical expenses.