

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

CARMEN FERNANDEZ)	
Claimant)	
)	
VS.)	
)	
SAFELITE AUTO GLASS)	
Respondent)	Docket No. 244,854
)	
AND)	
)	
WAUSAU UNDERWRITERS INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the Order granting claimant's request for penalties entered on October 17, 2003, by Administrative Law Judge Jon L. Frobish.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the Motion Hearing transcript held before the Administrative Law Judge (ALJ) on October 16, 2003, and the documents contained in the Division of Workers Compensation's administrative file.

ISSUES

This is an appeal from the ALJ's Order granting claimant's request for penalties against the respondent for failure to pay for a mobility assistive device in a timely manner.

The sole issue raised by the respondent is whether the ALJ erred in granting penalties pursuant to K.S.A. 44-512a. Respondent notes that there were no bills attached

to the claimant's demand letter, instead the itemizations attached to the demand letter were merely cost estimates. Consequently, the respondent argues there were no past due medical bills to support the request for penalties. The respondent further argues there was no HCFA form presented in order for respondent to determine compliance with the medical fee schedule. Lastly, respondent argues that if the estimates attached to the demand letter are considered bills then the demand was premature because a medical bill is not considered past due until 30 days after the service is provided and/or the bill is received by the respondent.

Conversely, claimant argues the submitted billing statements contain the same information that is required by an HCFA form and were not simply cost estimates. Claimant argues that if he cannot afford to purchase the ordered items then under respondent's argument penalties could never be assessed for respondent's failure to comply. Claimant concludes respondent's delay in providing the ordered equipment should not be allowed and the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

On June 23, 2003, the ALJ ordered the respondent to provide claimant a mobility assistive device. The respondent requested Board review of that order.

On July 31, 2003, claimant's counsel sent respondent's counsel a 20-day demand letter pursuant to K.S.A. 44-512a. Attached to the letter were handwritten estimates, dated July 25, 2003, of the costs, including sales tax, for the two items. The letter made demand for payment for a scooter and lift and provided in pertinent part:

Pursuant to the Court's Order dated June 23, 2003, please consider this letter as a twenty (20) day demand for payment of a scooter in the amount of \$2,120.69 and a lift in the amount of \$2,450.22.

On September 2, 2003, the Board dismissed the appeal of the June 23, 2003 Order because it did not have jurisdiction to address the issues raised on the appeal from a preliminary hearing.

At the penalty hearing held on October 16, 2003, the respondent argued that there was never a past due medical bill to support a K.S.A. 44-512a demand for penalties. Respondent argued that it began trying to get the equipment in September and that it was paid for sometime that month and then delivered to claimant on October 3, 2003. Conversely, claimant argued that respondent was ordered to provide the equipment and respondent's appeal of that decision did not stay the ALJ's Order. Claimant noted that

even after the demand and cost estimates were given to respondent it further delayed providing the equipment.

After hearing the arguments of counsel, the Judge entered an order assessing penalties against respondent in the amount of \$457.09. The Judge reasoned:

Apparently, the Respondent believed that the Court's order was stayed with its appeal to the Workers Compensation Board. This reliance was incorrect and misplaced. The appeal to the Workers Compensation Board had no effect on the Court's Order to provide medical treatment. Their second argument that there was no medical bill is also misplaced. The statute talks about "compensation" which has been awarded including medical compensation. The scooter was a form of medical compensation for the Claimant's injury. There was no bill due and owing as it was the responsibility of the Respondent to provide the scooter. Therefore, the Court finds the Claimant is entitled to penalties under K.S.A. 44-512a and will order penalties in the amount of \$457.09.¹

This is an appeal from the ALJ's decision which granted claimant's request for penalties against the respondent. An award of penalties under K.S.A. 44-512a is not a preliminary award, but instead is a final order.² It is subject to de novo review on the record as a final order provided written request for review is filed within ten days from the order's effective date.³

K.S.A. 44-512a(a) provides:

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. (Emphasis added)

¹ ALJ Order (Oct. 17, 2003) at 1-2.

² *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993); *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, *rev. denied* 251 Kan. 942 (1992).

³ K.S.A. 44-551(b)(1); K.S.A. 44-555c(a).

The penalty statute, K.S.A. 44-512a, does not provide for the assessment of penalties against respondent when the ordered medical compensation has not been provided. K.S.A. 44-512a provides for assessment of penalties against the employer or its insurance company for failure to pay any past due compensation, including medical compensation, which has been awarded. In this case, however, there were no outstanding medical bills that were past due and not paid because the medical compensation had not yet been provided. As noted by the ALJ, there was no bill due and owing because it was the respondent's responsibility to provide the equipment.

The Board shares the ALJ's as well as the claimant's frustration with respondent's delay in complying with the June 23, 2003 preliminary hearing Order to provide the equipment. Nonetheless, the Board finds the penalty statute only provides for a civil penalty to be assessed against the respondent in regard to medical compensation previously provided as evidenced by medical bills that are past due and not paid by the respondent. The penalty statute does not provide for a penalty to be assessed against the respondent for the failure to provide the medical equipment. The remedy provided by the legislature for respondent's delay or failure to provide court-ordered medical equipment is contained in the Fraud and Abuse statute found at K.S.A. 44-5,120 et seq.

The Board, therefore, reverses the ALJ's October 17, 2003 Order that assessed a penalty against respondent and finds that claimant's request for penalties under K.S.A. 44-512a should be denied.

AWARD

WHEREFORE, Administrative Law Judge Jon L. Frobish's Order dated October 17, 2003, is reversed and claimant's request for penalties is denied.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Richard J. Liby, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director