

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

RICHARD STONE)	
Claimant)	
VS.)	
)	Docket No. 250,031
ATCHISON CASTING CORPORATION)	
Respondent,)	
Self-Insured)	

ORDER

Respondent appealed the July 30, 2002 Order for Penalties entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on March 4, 2003.

APPEARANCES

Patrick E. Henderson of Atchison, Kansas, appeared for claimant. John B. Rathmel of Prairie Village, Kansas, appeared for respondent.

RECORD

The record consists of the October 11, 2001 preliminary hearing transcript, the March 7, 2002 penalties hearing transcript and the administrative file compiled by the Division of Workers Compensation.

ISSUES

In the July 30, 2002 Order for Penalties, Judge Foerschler ordered respondent to pay \$1,100 in penalties for delays in paying ordered temporary total disability benefits. The Judge apportioned the penalties, as follows:

for the weeks of November 6, 2001 through December 18, 2001, \$700 for 7 delayed payments;

for the weeks of January 8, 2002 through January 15, 2002, \$200 for 2 delayed payments[;]

for the weeks of February 4, 2002 through February 19, 2002, \$200 for 2 delayed payments[.]¹

Respondent contends Judge Foerschler erred. Respondent argues that penalties should not be assessed as claimant failed to comply with K.S.A. 44-512a as claimant failed to make a proper demand for payment for the weeks of temporary total disability compensation in question. In the alternative, respondent argues the \$1,100 in penalties is not justified by the circumstances and, therefore, the amount is excessive.

Conversely, claimant contends the Order for Penalties should be affirmed. Claimant argues that he sent an initial demand for payment when earlier weeks of temporary total disability benefits had accrued and, therefore, he was not required to serve respondent with a later demand. Claimant also argues there is no evidence in the record to support respondent's contention that the delay in paying claimant was merely due to a misunderstanding.

The only issues before the Board are whether penalties should be assessed against respondent for late payment of the temporary total disability benefits in question and, if so, in what amount. The parties do not contest the Judge's finding of the weeks of temporary total disability benefits that respondent failed to pay on a timely basis.

FINDINGS OF FACT

After reviewing the file compiled to date, the Board finds as follows:

1. Claimant alleges an April 3, 1998 injury to his right foot, tendinitis or bursitis in his right elbow with symptoms commencing in June 1998, and a September 2, 1998 injury to the right rotator cuff. At the October 11, 2001 preliminary hearing, respondent did not dispute the compensability of claimant's accidents. The only issue presented to the Judge at that hearing was whether claimant's medical condition entitled him to receive additional temporary total disability benefits.
2. After the October 2001 preliminary hearing, the Judge granted claimant's request for benefits. The Judge's Preliminary Decision, which was signed October 16, 2001, stated:

Following a preliminary hearing October 11, 2001 on claimant's request for resumption of temporary total disability, previously paid at \$275 weekly, it is ordered resumed as of this date payable directly to claimant based on his restrictions by Alexandra Strong, M.D. on

¹ Order for Penalties (July 30, 2002).

October 9th, to sitting work only. It is doubted that such accommodation can be reasonably made in the work setting described by claimant.

3. Following the Judge's October 16, 2001 Preliminary Decision, claimant demanded payment. According to the exhibits presented at the March 7, 2002 penalties hearing, claimant sent a demand for payment to respondent on October 31, 2001, at which time \$1,100 was due and owing in accrued temporary total disability benefits. Claimant's demand read, in part:

Demand is hereby made, pursuant to K.S.A. 44-512a, that all compensation and medical expenses due and owing to the claimant in the above-captioned case pursuant to Administrative Law Judge Foerschler' [sic] October 16, 2001, Order, be paid within twenty (20) days from the receipt of this demand. If said demand is not satisfied, claimant shall seek the appropriate statutory penalties and attorney's fees.

A copy of the Order is attached hereto showing the temporary total disability compensation due to the claimant.

On November 5, 2001, respondent paid claimant \$1,100, which represented the weeks from September 9, 2001, through November 5, 2001. Consequently, that payment satisfied all of the temporary total disability benefits that were due and owing at the time claimant sent the demand letter.

4. According to the spreadsheet presented at the penalties hearing, after the November 5, 2001 payment, respondent did not pay claimant any additional temporary total disability benefits until December 27, 2001, when respondent paid \$1,925 for seven weeks. Later, respondent made other payments.
5. Claimant did not serve respondent with another demand for payment but on March 7, 2002, the parties appeared before Judge Foerschler in a penalties hearing.

CONCLUSIONS OF LAW

The Order for Penalties should be set aside. The Board concludes that claimant failed to serve respondent with a proper demand for payment for the weeks of temporary total disability benefits in question as required by K.S.A. 44-512a.

The penalties statute, K.S.A. 44-512a, provides, 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.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. **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. . . . (Emphasis added.)

Claimant failed to serve a demand upon respondent for the temporary total disability benefits that were due and owing. Consequently, claimant's request for penalties must fail. The Board rejects claimant's argument that he was not required to make another demand following the initial October 2001 demand. Because claimant was seeking to enforce a preliminary hearing order as opposed to a final award, the penalty statute requires a worker to make multiple demands for payment as benefits accrue.

AWARD

WHEREFORE, the Board reverses and sets aside the July 30, 2002 Order for Penalties.

IT IS SO ORDERED.

Dated this ____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Patrick E. Henderson, Attorney for Claimant
- John B. Rathmel, Attorney for Respondent
- Robert H. Foerschler, Administrative Law Judge
- Director, Division of Workers Compensation