

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KEITH CHRISLIP)	
Claimant)	
V.)	
)	
LSI CORP)	CS-00-0301-807
Respondent)	AP-00-0455-871
AND)	
)	
ZURICH AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent requests review of Administrative Law Judge (ALJ) Gary Jones' motion for penalties Order dated January 12, 2021.

APPEARANCES

Roger Riedmiller appeared for Claimant. Terry Torline appeared for Respondent.

RECORD

The record on appeal is the same as the record considered by the ALJ, and consists of the transcript of the January 11, 2021, motion for penalties hearing with exhibits, together with the pleadings contained in the administrative file.

ISSUE

Did the ALJ exceed his jurisdiction in assessing penalties against Respondent for the nonpayment of TTD?

FINDINGS OF FACT

Preliminary hearings were held on November 21, 2019, and May 7, 2020, regarding the issue of TTD. An Order dated June 24, 2020, awarded TTD to Claimant from January 3, 2018, until July 17, 2018. Claimant's counsel sent a Demand for Compensation, using the language in the Order, via OSCAR (Online System for Claims Administration Research/Regulation) and certified mail, return receipt requested, on September 8, 2020. It was received by Respondent's Insurance Carrier on September 14, 2020, and by Respondent's counsel on October 6, 2020.¹

¹ M.H. Trans., Ex. A-2.

Claimant's counsel received the first TTD check, dated September 23, 2020, in the amount of \$4,977.46, from Respondent on September 30, 2020. A second TTD check, in the amount of \$4,267.33, was issued and mailed to Claimant's counsel on October 1, 2020. Claimant's counsel did not receive the second check. When it was discovered the second check was lost or delayed in the mail, a replacement check was issued and received by Claimant's counsel on November 9, 2020.²

On October 23, 2020, Claimant filed an Application and Motion for Penalties via OSCAR for the unpaid TTD. A motion hearing was held January 11, 2021. The next day, the ALJ issued an Order assessing penalties against Respondent in the amount of \$100 per week for 19 weeks of nonpayment of ordered temporary total disability (TTD) benefits, for a total penalty of \$1,900.

PRINCIPLES OF LAW AND ANALYSIS

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.

(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. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

² *Id.* at 10, 12 and 19.

Respondent seeks reversal of the ALJ's Order, arguing Claimant's demand did not set forth with particularity the specific amount owed, thereby failing to comply with the requirements of 44-512a. Claimant's demand utilized the same language as the ALJ in his June 24, 2020 Order: payment of TTD "at the rate of \$331.83 per week beginning January 3, 2018, until July 17, 2018." Claimant's demand did not include a total amount due and owing. Respondent argues Claimant's failure to do the math and provide Respondent with a total specific amount of TTD due and owing falls short of the requirements contained in K.S.A. 44-512a. The ALJ in awarding penalties stated:

The Court finds that the demand for payment that contained the language from the court order did sufficiently set forth the TTD that was unpaid. K.S.A. 44-512a(a) does not require that a dollar amount be specified in the demand letter. The Respondent had not paid any TTD, so it was clear to the Respondent that some TTD was owed.

The Board agrees with the ALJ. The language contained in Claimant's demand meets the requirements contained in K.S.A. 44-512a regarding "setting forth with particularity" the amount due and owing. Claimant's demand put Respondent on notice of the specific amount ordered paid for each week and the time frame to be paid for Respondent to be in compliance with the Order.

Respondent cites four cases in support of their argument Claimant's demand did not meet the specifics required. All of the cited cases are easily distinguishable. In *Waln*,³ Claimant's demand failed to state a specific weekly amount to be paid and did not provide the time frame claimed to be due and owing. *Lamar*⁴ dealt with an Agreed Award where Claimant's demand requested "payment of any and all benefits ordered paid." The demand in *Lamar* failed to set forth the weekly amount ordered paid and sought by the claimant and the time frame claimant believed payments were owed. *Escalante*⁵ dealt with payment of medical mileage. Claimant's demand in *Escalante* was insufficient because it failed to set forth dates, miles driven and the purpose of the mileage seeking to be reimbursed. The demand in *Hurlburt*⁶ was found to be insufficient because "we have not received permanent partial disability checks since July 16, 2008" failed to set forth with particularity the amounts claimed to be due and owing.

³ *Waln v. Clarkson Const. Co.*, 18 Kan. App. 2d 729, 734, 861 P.2d 1355 (1993).

⁴ *Lamar v. Boeing Military Airplanes*, No. 177,822, 1995 WL 399838, at *1 (Kan. WCAB May 26, 1995).

⁵ *Escalante v. Creekstone Farms Premium Beef*, Nos. 1,019,213 & 1,021,888, 2008 WL 4149958 (Kan. WCAB Aug. 27, 2008).

⁶ *Hurlburt v. T-Mobile USA, Inc.*, No. 1,021,535, 2008 WL 5122306, at *3 (Kan. WCAB Nov. 25, 2008).

Respondent argues payment of the TTD ordered was timely paid notwithstanding the undisputed fact a second check was not received by Claimant’s counsel until November 9, 2020. The ALJ stated:

The Court is not sympathetic with the Respondent’s argument that the check was lost in the mail. The Respondent had several months after the June 24, 2020, order to make the payment. It chose not to attempt to pay until a formal demand was sent and a deadline was established under K.S.A. 44-512a.

The Board agrees. Respondent chose to send two checks for payment of TTD ordered by the Court. The second check was issued and mailed on October 1, 2020, within the 20-day time frame. When it was not received, a replacement check was issued and received by Claimant on November 9, 2020 – clearly past the 20-day deadline. The Order to pay TTD must be timely complied with. K.S.A. 44-512a does not contain a good faith effort to comply provision. Respondent’s argument payment should be considered timely because the second check was mailed within the 20-day deadline is without merit.

CONCLUSION

WHEREFORE, it is the finding, decision and order of the Board the Order of ALJ Jones dated January 12, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)
Roger Riedmiller
Terry Torline
Hon. Gary Jones