

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SCOTT BURTON

Deceased

v.

TOW SERVICE, INC.

Respondent

AP-00-0472-106

CS-00-0207-852

and

AMERICAN INTERSTATE INS. CO.

Insurance Carrier

ORDER

Respondent and Insurance Carrier request review of the November 15, 2022, Order issued by Administrative Law Judge (ALJ) Bruce E. Moore. The Appeals Board heard oral argument on March 23, 2023.

APPEARANCES

Scott J. Mann appeared for Claimants. Terry J. Torline appeared for Respondent and Insurance Carrier. Board Member Chris A. Clements was recused from this matter, and Mark E. Kolich was appointed Board Member *pro tem*.

RECORD AND STIPULATIONS

The Board adopted the stipulations and considered the record presented to ALJ Moore, consisting of the transcript of Proceedings, held November 10, 2022, and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Do the ALJ and the Appeals Board possess authority to order reapportionment of death benefits among eligible minor children upon the termination of benefits to the surviving spouse after the maximum death benefit was paid?
2. If the Appeals Board possesses authority to order reapportionment among the eligible minor children, what is the weekly benefit?
3. Is Claimants' counsel entitled to post-award attorneys fees?

FINDINGS OF FACT

The facts of this matter are not disputed. On November 5, 2013, the decedent was killed in an accident arising out of and in the course of his employment with Respondent. The decedent left a spouse and wholly dependent minor children. The matter was accepted by Respondent as compensable, and determining the eligible dependent children was the primary issue. On October 19, 2015, a settlement was approved by Special Administrative Law Judge (SALJ) Junke. Under the terms of the settlement, half of the initial lump-sum payment was apportioned to the spouse and half was apportioned to four dependent children. Similarly, half of the \$560.84 weekly benefit was apportioned to the spouse and half was apportioned to four dependent children. A Nunc Pro Tunc Order correcting the compensation paid to the children individually was subsequently approved by SALJ Junke.

On May 26, 2022, one of the children became ineligible to collect death benefits. On June 7, 2022, an Agreed Reapportionment Order was approved by ALJ Moore. Half of the weekly benefit continued to be apportioned to the spouse, and the other half was apportioned among the remaining three dependent children.

On September 26, 2022, Respondent paid death benefits totaling \$300,000. Respondent stopped paying half of the weekly death benefit apportioned to the spouse. Respondent continued paying half of the weekly benefit apportioned to the three children. On October 24, 2022, the children filed a motion seeking payment of the entire \$560.84 weekly benefit to the three children jointly as the remaining minor children. A hearing on the motion for reapportionment took place on November 10, 2022.

ALJ Moore issued the Order on the motion for reapportionment on November 15, 2022. ALJ Moore stated the Workers Compensation Act was silent on the Division's authority to order reapportionment upon payment of the full \$300,000 death benefit. ALJ Moore also noted, however, the Act provided for the continued payment of death benefits to minor children, notwithstanding payment of the full \$300,000 benefit. ALJ Moore also ruled the statute contemplated payment to any minor children at the full weekly benefit rate. ALJ Moore granted the motion and ordered Respondent to pay \$560.84 per week to the three remaining children during their minority. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Order granting the Motion is erroneous because the Act does not grant the authority to reapportion death benefits to eligible minor children upon the payment of the full death benefit to the spouse. Respondent also argues the Order is erroneous because the maximum weekly benefit the minor children can receive is half of

the weekly death benefit. On the other hand, Claimants argue the Order was decided correctly and should be affirmed.

1. The ALJ and the Board possess authority to order reapportionment of death benefits among eligible minor children upon payment of the maximum death benefit.

Respondent argues the ALJ and the Board do not possess authority to reapportion death benefits because K.S.A. 44-510b(g) does not allow reapportionment where the maximum death benefit was paid to the spouse and children. Respondent also argues K.S.A. 44-510b(h) does not expressly provide for reapportionment.

According to K.S.A. 44-510b:

(g) The marriage or death of any dependent shall terminate all compensation, under this section, to such dependent except the marriage of the surviving legal spouse shall not terminate benefits to such spouse. Upon the death of the surviving legal spouse or the marriage or death of a dependent child, the compensation payable to such spouse or child shall be reapportioned to those, among the surviving legal spouse and dependent children, who remain eligible to receive compensation under this section.

(h) Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section, including the initial payment in subsection (a) to any and all dependents by the employer shall not exceed a total amount of \$300,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age.¹

The Act also states:

The administrative law judge, except as otherwise provided in this section, shall have the power and authority to apportion and reapportion the compensation allowed under this section, either to wholly dependent persons or partially dependent persons, in accordance with the degree of dependency as of the date of the injury, except that the weekly payment of compensation to any and all

¹ K.S.A. 44-510b(g), (h).

dependents shall not exceed the maximum nor be less than the minimum weekly benefits provided in subsection (a).²

Where the language of a statute is clear and unambiguous, a court is obligated to apply the statute as written without engaging in judicial blacksmithing.³ Under the plain language of K.S.A. 44-510b(e), the ALJ has the general authority to apportion and reapportion compensation to wholly and partially dependent persons. The Act states, notwithstanding the total payment of \$300,000 for death benefits, the employer shall continue paying minor children weekly compensation during their minority. Additionally, in a case involving an earlier version of K.S.A. 44-510b, the Board ruled K.S.A. 44-510b(h) permitted reapportionment of the weekly benefit to the remaining dependent children after the maximum death benefit was paid by the employer.⁴ The version of K.S.A. 44-510b(h) considered in *Mason* is substantially similar to the version of K.S.A. 44-510b(h) used here, and is applicable precedent. Under Respondent's interpretation, K.S.A. 44-510b(h) would be rendered superfluous, despite its clear mandate to continue paying compensation to minor children. The ALJ and the Board have the authority to order the payment of compensation to the remaining minor children under the plain language of K.S.A. 44-510b.

2. The correct compensation rate for the minor children is \$560.84 per week.

According to the Act:

Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section, including the initial payment in subsection (a) to any and all dependents by the employer shall not exceed a total amount of \$300,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age.⁵

² K.S.A. 44-510b(e).

³ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

⁴ See *Mason v. James Mason Enterprises, Inc.*, No. 109,354, 1996 WL 103840, at *3 (Kan. WCAB Feb. 27, 1996).

⁵ K.S.A. 44-510b(h).

Respondent argues the “weekly rate” for the minor children is half of the weekly benefit apportioned to the children, or \$280.42. Respondent also argues the other half of the weekly benefit previously paid to the spouse remains apportioned to the spouse despite its termination, and requiring Respondent to pay the full weekly benefit to the children constitutes payment of the spouse’s death benefit in excess of \$300,000.

The Act defines the weekly compensation for the surviving legal spouse and wholly dependent children as 66 2/3% of the average weekly wage, computed under K.S.A. 44-511, subject to the maximum weekly benefit rate provided in K.S.A. 44-510c and the minimum weekly benefit rate of 50% of the state’s average weekly wage.⁶ If the employee leaves a surviving spouse or dependent children eligible for benefits, then all death benefits shall be paid to the surviving spouse or children, or both, and no benefits shall be paid to any other dependent persons.⁷ “Where the employee leaves a surviving legal spouse and dependent children who were wholly dependent upon the employee’s earnings and are eligible for benefits under this section 50% of the maximum weekly benefits payable shall be apportioned to such spouse and 50% to such dependent children.”⁸ The plain language of the statute does not provide separate compensation rates for the spouse and children, but rather a single compensation rate apportioned among eligible dependents. The Board previously ruled “weekly rate” refers to 66 2/3% of the average weekly wage calculated under K.S.A. 44-511, and interpreting “weekly rate” otherwise would require re-wording of the statute.⁹

Based on the decedent’s average weekly wage, the weekly compensation rate is \$560.84. The decedent left a surviving legal spouse and wholly dependent children. Under K.S.A. 44-510b(b), half of the weekly compensation was apportioned to the spouse and half was apportioned to the children during their eligibility. The statute did not create two weekly compensation rates. Upon payment of \$300,000, the spouse was no longer eligible to receive half of the weekly compensation, but the remaining minor children were entitled to continued payment of compensation at the weekly rate in effect when the maximum \$300,000 benefit was paid. As of September 26, 2022, the weekly rate was \$560.84. Under K.S.A. 44-510b(a)(1) and (h), the minor children are entitled to receive, jointly, \$560.84 per week from Respondent during their minority.

⁶ See K.S.A. 44-510b(a).

⁷ See K.S.A. 44-510b(a)(1).

⁸ K.S.A. 44-510b(b).

⁹ See *Mason*, 1996 WL 103840, at *4.

3. The issue of post-award attorney fees is remanded to the ALJ.

Claimants’ counsel reserved the issue of post-award fees, but the issue was not addressed in the Order due to the possibility of review proceedings before the Board. Because the issue was not addressed by the ALJ, the Board declines to comment on the request for post-award attorney fees at this time. The issue of post-award attorney fees is remanded to the ALJ for further proceedings if the parties cannot resolve the issue.

AWARD

WHEREFORE it is the ruling, decision and order of the Appeals Board the Order issued by ALJ Bruce E. Moore, dated November 15, 2022, is affirmed. The issue of post-award attorney fees is remanded to ALJ Moore for further proceedings, pursuant to K.S.A. 44-536.

IT IS SO ORDERED.

Dated this _____ day of April, 2023.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: (Via OSCAR)

Scott J. Mann
Terry J. Torline
Hon. Bruce E. Moore