

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>ROBIN MATTSON</b>	)	
Claimant	)	
V.	)	
	)	CS-00-0078-608
<b>PROACTIVE HOME CARE INC.</b>	)	AP-00-0457-439
Respondent	)	
AND	)	
	)	
<b>RIVERPORT INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the April 5, 2021, Order for Penalties issued by Administrative Law Judge (ALJ) Gary K. Jones.

**APPEARANCES**

Brad E. Avery appeared for Claimant. Michael D. Streit appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board considered the following record: Preliminary Hearing Transcript of September 21, 2020, with exhibits; four Orders issued by the ALJ dated September 21, 2020; February 3, 2021; and April 5, 2021. Submission letters, briefs to the Workers Compensation Appeals Board and pleadings including motions and applications for hearing, filed with the Division of Workers Compensation were also considered.

**ISSUE**

Did the ALJ err and exceed his jurisdiction by denying penalties for an alleged failure to timely pay temporary partial disability and temporary total disability benefits?

**FINDINGS OF FACT**

On February 3, 2021, the ALJ ordered temporary partial disability to be paid at the rate of \$101.20 per week from October 17, 2020, through December 31, 2021; temporary

total disability to be paid at the rate of \$184.64 per week beginning January 1, 2021, and continuing until the Claimant is released to return to substantial and gainful employment, has been offered accommodated work within the temporary restrictions or has reached maximum medical improvement; Dr. Eva Henry's bills attached as Exhibit 1 to the February 3, 2021, Preliminary Hearing to be paid per the Kansas Fee schedule. Dr. Henry remained authorized in accordance with the terms of the Court Order filed on February 4, 2019; and prescriptions attached as Exhibit 2 to the Preliminary Hearing were ordered reimbursed to the Claimant. The Claimant's request for penalties was denied.

There was no transcribed record made of the proceeding held on February 3, 2021. Contained in the Order dated February 3, 2021 reference is made to two exhibits. There is no record of admission of these exhibits either by transcribed record or by written stipulation.

On March 3, 2021, Claimant uploaded to the Division's electronic records system (OSCAR) her February 6, 2021, Demand for Payment letter and designated it as Motion for Penalties. Claimant asked for penalty payment for the late payment of the temporary partial disability benefits, temporary total disability benefits; payment of outstanding bill from Dr. Henry, and reimbursement for prescription expenses

On April 5, 2021, the ALJ ordered Respondent to pay a penalty of \$7.59 for nonpayment of prescriptions. Additional penalties were denied. Dr. Eva Henry remained an authorized physician with prescriptions from Dr. Henry to be authorized and paid by Respondent and its insurance carrier. Dr. Justin Strickland was designated as an additional authorized physician. Respondent was ordered to pay an appearance fee.

There was no transcript made of the proceedings held on April 5, 2021. No exhibits were entered either by transcribed record or by written stipulation.

In Claimant's submission to the Board, Claimant references Exhibit 1 designated as "demand" and then Exhibit 5 "Checks". Attached to the submission is Exhibit 1 notice of Demand for Payment, with the February 3, 2021, Order and some documents appearing to be from the postal service; two prescriptions from Dillons; a letter from Dr. Eva Henry to Monica; a HCFA form; treatment records from Dr. Eva Henry dated July 15, 2020; and three checks marked as Exhibit 5.

#### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant argues the ALJ should have also assessed penalties for Respondent's failure to timely pay temporary partial disability and temporary total disability benefits. Claimant contends the ALJ did not have discretion whether to assess a penalty once it was determined the checks did not arrive within the 20 day period established by K.S.A. 44-

512a. Claimant requests the Board remand this matter to the ALJ to assess additional penalties.

Respondent argues the ALJ's Order should be affirmed. Respondent contends the language "not more than" gives the ALJ discretion to assess a penalty of anywhere between zero and \$100.00 as the Court deems applicable. Here, Judge Jones did assess a penalty on certain items of Claimant's motion but denied others. Judge Jones' decision to do so is well within his discretion. The fact at the February 3, 2021, hearing the parties agreed to the indemnity amounts payable is irrelevant, despite Claimant's contention, as to whether statutory penalties are applicable. Respondent contends not only does Judge Jones have the discretion to assess a penalty or not, he also has full authority and discretion to run his docket and his courtroom as he deems fit. Judge Jones observed at the outset of the April 5, 2021, Penalty Motion Hearing, the ink was not yet dry on his February 3, 2021, preliminary Hearing order when Claimant filed her Demand dated February 6, 2021.

The Board is reluctant to take up issues not raised by the parties. However, this Board is statutorily charged with "reviewing questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."<sup>1</sup>

There is no record on which to determine whether penalties should be assessed. Simply attaching documents to briefs and placing them in OSCAR does not constitute admission of exhibits or the making of a record. There is no record of demand being made for penalties, checks being paid and when, and the basis for assessing a \$7.59 penalty.

Therefore, the Order of April 5, 2021, is vacated.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Order for Penalties of the ALJ should be vacated.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order for Penalties of Administrative Law Judge Gary K. Jones dated April 5, 2021, is vacated.

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<sup>1</sup> K.S.A. 44-555c(a)

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2021.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Brad E. Avery, Attorney for Claimant  
Michael D. Streit, Attorney for Respondent and its Insurance Carrier  
Gary K. Jones, Administrative Law Judge