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No. 14-111417-A

**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

LESLIE NUESSEN

Employee/Appellee

vs.

SUTHERLANDS

Employer/Appellant

and

LUMBERMANS UNDERWRITING ALLIANCE

Insurance Carrier/Appellant

BRIEF OF APPELLEE

APPEAL FROM THE
APPEALS BOARD FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

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NATURE OF THE CASE

This case involves the appeal of an Order issued by the Appeals Board for the Kansas Division of Workers Compensation that denied a request for issuance of penalties. The employee/Appellant in the case is Leslie F. Nuessen, deceased (hereinafter "Nuessen") and the employer/Appellee is Sutherlands and their insurance carrier Lumberman's Underwriting Alliance (hereinafter collectively referred to as "Sutherlands.")

Nuessen was an employee for Sutherlands on December 21, 2010 when he suffered an accident at work that resulted in his death from head trauma. On December 12, 2012, Administrative Law Judge Avery issued an award determining that Nuessen was injured in the course and scope of his employment and awarded death benefits to Nuessen's two adult legal heirs, plus funeral expenses and medical expenses. The Award was timely appealed by Sutherlands to the Board of Appeals. On June 28, 2013, the Board, in a 3-2 decision, affirmed the Award of Administrative Law Judge Avery. Three days later, the heirs filed a Demand for Compensation and subsequently filed a separate Request for Penalties. Sutherlands timely appealed the Order and

Award of the Board of Appeals to the Kansas Court of Appeals.

While the appeal of Sutherlands was pending in the Kansas Court of Appeals, Administrative Law Judge Avery issued a subsequent order finding that Sutherlands owed penalties for failure to pay the Award of the Board of Appeals. Sutherlands appealed the Order of penalties to the Board of Appeals. The Board of Appeals vacated the Order for penalties finding that Nuessen's Demand for Compensation was premature and additionally finding that K.S.A. 2010 Supp. 44-556(b) stays payment of compensation due and owing while the Board's Order is on appeal to the Kansas Appellate Courts. Nuessen subsequently filed his appeal of the Board's Order to the Kansas Court of Appeals.

ISSUES ON APPEAL

- I. **WHETHER THE APPEALS BOARD PROPERLY RULED THAT NUESSEN WAS NOT ENTITLED TO PENALTIES BECAUSE K.S.A. 2010 SUPP. 44-556(b) STAYS PAYMENT OF COMPENSATION DUE AND OWING WHILE THE BOARD'S ORDER IS ON APPEAL TO THE KANSAS APPELLATE COURTS.**

- II. **WHETHER THE APPEALS BOARD PROPERLY RULED THAT NUESSEN WAS NOT ENTITLED TO PENALTIES BECAUSE HIS WRITTEN DEMAND FOR COMPENSATION WAS PREMATURE.**

STATEMENT OF FACTS

Leslie Nuessen was employed by Sutherlands in Lyon County, Kansas working in the tool department and on the sales floor. (ROA, V 3, Deposition of Jason Miller, p. 6)

On December 20, 2012, the 68 year old Nuessen, while working at Sutherlands, lost consciousness and fell. Nuessen suffered multiple skull fractures, extensive bilateral subdural hematomas, subarachnoid hemorrhaging and intracranial hemorrhaging which lead to his unfortunate death. (ROA, V8, Deposition of Dr. Bernard Abrams, p. 7)

The family of Nuessen brought a workers compensation claim alleging that Nuessen was injured and died as a result of injuries incurred in the course and scope of his employment with Sutherlands. (ROA, V1, p.1) A regular hearing was held in the claim in front of Administrative Law Judge Bradley Avery. The parties further stipulated that there are two adult children of the decedent, namely Marc Nuessen and Julie Wilson, no surviving spouse and no dependants. The parties agreed that Marc Nuessen is the duly and lawfully appointed Administrator of the estate of Leslie Nuessen. (ROA, V1, Award of

Judge Avery, p. 40)

The parties stipulated that there are medical bills in the amount of \$47,744.68 to treat the injuries of Nuessen and a funeral bill in the amount of \$11,341.40. Sutherlands disputed that Nuessen suffered an injury arising out of and in the course of employment. (ROA, V1, Award of Judge Avery, p. 40)

The Honorable Brad Avery issued an Award in this case on December 7, 2012. In his Award, Judge Avery found that the Claimant's accidental death was the result of an unexplained fall and was, accordingly, compensable as it was a neutral risk event. (ROA, V1, Award of Judge Avery, p. 45) Sutherlands subsequently filed its Application for Review before the Board of Appeals.

The Board of Appeals issued its Order on June 28, 2013. (ROA, V1, Order of the Board of Appeals) The Board, in a 3-2 decision, found that Nuessen fell as a result of a neutral risk and, therefore, his personal injury and resulting death arose out of and in the course of his employment with Sutherlands. (ROA, V1, Order of the Board of Appeals, p. 108)

On July 1, 2013, three days after the issuance of the Order from the Board of Appeals, Nuessen filed a Demand for Compensation. (ROA, V1, p. 99) Sutherlands subsequently filed its Notice of Appeal on July 24, 2013 contesting

the ruling of the majority of the Board. On August 12, 2013, Nuessen filed a Request for Penalties. (ROA, V.1, p. 113) A hearing was held on the Request for Penalties and on November 5, 2013, Administrative Law Judge Avery issued an Order requiring Sutherlands to pay penalties to Nuessen. (ROA, V1, p. 157) Sutherlands appealed the Order to the Board of Appeals. On February 24, 2014, the Board of Appeals issued its Order vacating the Order of penalties issued by Administrative Law Judge Avery. (ROA, V1, p. 199) The Board of Appeals found that Nuessen was not entitled to receive penalties because his written Demand for Compensation was premature and, further, that with the facts of this claim, K.S.A. 2010 Supp. 44-556(b) stayed payment of compensation due and owing while the Board of Appeal's Order was on appeal to the Kansas Appellate Courts. (ROA, V1, p. 206) Nuessen subsequently filed his appeal of this Order to the Kansas Court of Appeals.

Meanwhile, in the initial appeal, the Kansas Court of Appeals issued its Memorandum Opinion on April 18, 2014 affirming the Order and Award of the Board of Appeals that Nuessen fell due to a neutral risk and, therefore, his personal injury and resulting death arose out of and in the course of his employment with Sutherlands. Sutherlands then paid all awarded benefits

ordered by the Board of Appeals.

ARGUMENTS AND AUTHORITIES

STANDARD OF APPELLATE REVIEW

The standard of review of an appeal of a decision of the Workers Compensation Board is well settled under Kansas law and is set out in the Kansas Judicial Review Act, K.S.A. 77-601. The Board reviews questions of law and fact. The appellate court reviews questions of law. Whether a decision is supported by substantial competent evidence is a question of law. The term substantial evidence refers to such evidence as a reasonable person might accept as being sufficient to support a conclusion. *Herrera-Gallegos v H & H Delivery Service, Inc.*, 42 Kan.App 2d 360, 363, 212 P.3d 239 (2009). The appellate court does not re-weight the evidence or determine the credibility of the witnesses. *Id.*

WHETHER THE APPEALS BOARD PROPERLY RULED THAT NUESSEN WAS NOT ENTITLED TO PENALTIES BECAUSE K.S.A. 2010 SUPP. 44-556(b) STAYS PAYMENT OF COMPENSATION DUE AND OWING WHILE THE BOARD'S ORDER IS ON APPEAL TO THE KANSAS APPELLATE COURTS.

The family of Nuessen brought a workers compensation claim alleging

that Nuessen was injured and died as a result of injuries incurred in the course and scope of his employment with Sutherlands. A Regular Hearing was held in this matter on August 17, 2012. On December 7, 2012, the Honorable Judge Brad Avery issued his Order finding that the Claimant was injured in the course and scope of his employment and subsequently died from the injuries incurred. The Respondent appealed that Order to the Board of Appeals and, on June 28, 2013, the Board issued its Order affirming the decision of Judge Avery by a 3-2 decision. The Board Awarded the Claimant \$25,000 in a lump sum for death benefits and ordered the Respondent to pay medical bills in the amount of \$47,744.68 to treat the injuries of the Claimant and a funeral bill in the total statutory maximum amount of \$5,000 .

Sutherlands subsequently timely appealed the decision of the Board of Appeals to the Kansas Court of Appeals. However, on July 1, 2013, only three days after the entry of the Order from the Board of Appeals, the Claimant filed a demand for compensation pursuant to K.S.A. 44-512a and K.S.A. 44-556. On August 7, 2013, the Claimant filed a Request for Penalties in the claim alleging that since all benefits were due and owing, the Claimant was entitled to the issuance of penalties. On September 20, 2013, Judge Avery heard argument on

the Motion for Penalties. The parties subsequently filed briefs in regard to the penalties issues. On November 5, 2013, Judge Avery issued his Order finding that the entire amount assessed by the Court in the underlying claim was due and owing and assessed penalties for failure to timely pay the Award in the amount of \$4,747.76 representing 10% of the unpaid medical bills plus \$1,800 for the lump sum award representing \$100 per week since the issuance of the Award and ongoing penalties of \$100 per week until the Award was paid. The Respondent then timely appealed the Order of Penalties assessed by Judge Avery to the Board of Appeals. On February 24, 2014, the Board of Appeals issued its Order vacating the Order of penalties issued by Administrative Law Judge Avery. (ROA, V1, p. 199) The Board of Appeals found that Nuessen was not entitled to receive penalties because his written Demand for Compensation was premature and, further, that with the facts of this claim, K.S.A. 2010 Supp. 44-556(b) stayed payment of compensation due and owing while the Board of Appeal's Order was on appeal to the Kansas Appellate Courts. (ROA, V1, p. 206) Nuessen subsequently filed his appeal of this Order to the Kansas Court of Appeals.

In his Request for Penalties, the Claimant argues that K.S.A. 44-556 does

not grant a stay for compensation due and owing in death cases. K.S.A. 44-556

states in pertinent part:

a) Any action of the board pursuant to the workers compensation act, other than the disposition of appeals of preliminary orders or awards under K.S.A. 44-534a, and amendments thereto, shall be subject to review in accordance with the Kansas judicial review act by appeal directly to the court of appeals. Any party may appeal from a final order of the board by filing an appeal with the court of appeals within 30 days of the date of the final order. When an appeal has been filed pursuant to this section, an appellee may file a cross appeal within 20 days after the date upon which the appellee was served with notice of the appeal. Such review shall be upon questions of law.

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review....

The Board of Appeals, in vacating the Award of Judge Avery as to the penalties issue, noted that there were no benefits in the present claim that became due and payable during the ten weeks prior to the Board's Order. Specifically, the Board of Appeals found that the lump sum payment due to the heirs of \$25,000 plus the medical bills and funeral expenses were all due and payable upon Nuessen's death. Accordingly, no benefits became due during

the ten-week period next preceding the board's decision or for the period of time after the board's decision but prior to the decision of the court of appeals.

Nuessen argues that the plain language of K.S.A. 2010 Supp. 44-556(b) does not grant a stay of payment of compensation in death cases. However, what other meaning could be given to the phrase "any action of the board..." in section a of the statute. Certainly a decision in a death case would fall under the provisions of "any action of the board". With death cases clearly falling under the provisions of K.S.A. 44-556, the next questions is what does the statute intend by the phrase "commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review." If the statute does not stay the payment of any compensation upon appeal, as argued by Nuessen, then the entirety of section b is meaningless. The statute details specific benefits that must be paid upon the pendency of appeal which clearly delineates that benefits not falling in that category do not have to be paid until the appeal is decided.

The Board of Appeals, in its discussion of the case of Acosta v National

Beef Packing Co., 273 Kan. 385, 44 P.3d 330 (2002), noted that in that decision, benefits were due and owing during the ten weeks prior to the Board's award and were due and owing after the award. The Respondent in the Acosta case, in fact, did not even appeal the underlying award of the Board. Instead, it filed a Motion to Review and modify the underlying award. Thus, under K.S.A. 44-556(b), compensation was due and payable within the appropriate time frame and, under 44-556a, no appeal was even filed to support an argument that benefits were stayed. In the present case, if an appeal had not been taken from the decision of the Board of Appeals, all benefits would be due and owing and it would be appropriate to pursue penalties for failure to pay a final award that was not appealed. However, since the appeal was timely pursued by Sutherlands, it is inappropriate to pursue penalties.

The Board of Appeals has looked at this issue on a number of prior occasions since the issuance of the Acosta decision. In the case of Titterington, deceased, v. Brooke Insurance, Docket No. 270,414 (Kan. WCAB Apr. 30, 2004) the Board looked at the issue of what benefits were due and owing during an appeal from the Appeals Board to the Court of Appeals involving a death of an employee working within the course and scope of his employment. In the

Titterington claim, the respondent denied that the Claimant died as a result of injuries occurred in the course and scope of his employment. The ALJ found that the Claimant's death was caused by injuries received within the course and scope of his employment. The matter was appealed to the Board of Appeals. No benefits were paid at the time of the issuance of an Order by the Board of Appeals (which affirmed the underlying decision of the ALJ) except for weekly death benefits to the Claimant's heirs that came due in the 10 weeks prior to the issuance of the Award and the weekly on-going benefits. However, as in the present claim, the Claimant requested penalties for all benefits due and owing even though the matter was timely appealed to the Court of Appeals.

The Board of Appeals, in Titterington, found that the only benefits due and owing were for the 10 weeks that became due immediately prior to the decision and for the benefits that became due during the appeal to the Court of Appeals. The Board specifically found that the \$40,000 lump sum payment pursuant to K.S.A. 44-510b was controlled by K.S.A. 44-556 and that the stay provisions of the statute would apply.

K.S.A. 44-556 certainly applies to the present claim as was decided by the Board of Appeals and, pursuant to the clear language of the statute, no

benefits were due during the pendency of the appeal. Accordingly, the demand for penalties was in error.

WHETHER THE APPEALS BOARD PROPERLY RULED THAT NUESSEN WAS NOT ENTITLED TO PENALTIES BECAUSE HIS WRITTEN DEMAND FOR COMPENSATION WAS PREMATURE.

The Board of Appeals further ruled that Nuessen's written Demand for Compensation was premature and, accordingly, no penalties should be assessed. In support of its decision, the Board cited the cases of Hallmark v. Dalton Construction Co., 206 Kan. 159, 476 P.2d 221 (1970) and Michel v. National Beef Packing Company, Docket No. 270,798 (Kan. WCAB Dec. 6, 2005). In these cases, both the Kansas Supreme Court and the Board of Appeals, in following the precedent set by the Kansas Supreme Court, held that compensation awarded was not due until the time for filing an appeal had expired.

In the present case, Nuessen's Demand for Compensation was filed three days after the issuance of the Board's 3-2 decision and well before the expiration of the thirty day appeal time. Accordingly, even if there was no stay of benefits, which is vigorously disputed as noted above, Nuessen did not

timely file his Demand for Compensation as it was premature.

Nuessen failed to brief or argue this issue. This court has recently affirmed its long-standing rule that an issue not briefed on appeal is deemed waived or abandoned. Cooke v. Gillespie, 285 Kan. 748, 176 P.3d 144 (2008)

CONCLUSION

Nuessen is not entitled to penalties in this case because K.S.A. 2010 Supp. 44-556(b) stays payment of compensation due and owing his heirs while the Board's Order is on appeal to the Kansas Appellate Courts. Further, Nuessen is not entitled to penalties because his written Demand for Compensation was premature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15th, 2014, the original plus sixteen true and correct copies of the Brief of Appellee were mailed, postage prepaid to the Court of Appeals of the State of Kansas plus two true and correct copies of the Brief of Appellee were sent to counsel for the Appellant at:

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