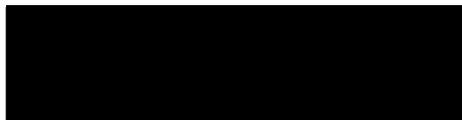


ORDER

SELF-INSURING EMPLOYERS EVALUATION BOARD
INFORMAL HEARING FINDINGS

IN THE MATTER OF: SEALY MATTRESS COMPANY (EMPLOYER); Risk No. 20003818-0
AND
[REDACTED] (INJURED WORKER); CLAIM No. [REDACTED]
Complaint No. 14873



Kendis & Associates, Co., L.P.A.
Attn: Sheldon E. Baskin
614 West Superior Ave., Floor 15
Cleveland Ohio 44113

Sealy Mattress Company
Attn: Workers' Comp. Administrator
1 Office Parkway Road #2806
Trinity, NC 27370

Buckingham, Doolittle & Burroughs, LLP
Attn: Barbra A. Knapic, Esq.
4518 Fulton Drive, NW
Canton, Ohio 44735-5548

Sealy Mattress Company
Attn: Colleen Flanagan
P.O. Box 726
Medina, Ohio 44258

Gallagher & Bassett Services
545 Metro Place South – Suite 250
Dublin, Ohio 43017-5367

CNA CNA Claimplus, Inc.
Attn: Shonara Jones
P.O. Box 182846
Columbus, Ohio 43218

FOR THE EMPLOYER: Barbara Knapic

FOR THE INJURED WORKER: Sheldon Baskin

FOR THE ADMINISTRATOR: Jean Krum

This matter came before the Board for an informal conference on 08/30/2006, on Complaint No. 14873, alleging that the self-insuring employer did not respond to the injured worker's request for vocational rehabilitation. The complaint, filed 11/03/2005, requested that "the claimant be referred and authorized for vocational rehabilitation," and that the employer "has not responded as of this date."

On behalf of BWC's Self-Insured (SI) Department, Ms. Krum summarized the complaint, noting that the injured worker's attorney, Sheldon Baskin, filed a complaint on behalf of the injured worker on 11/03/2005 alleging the injured worker's 08/25/2005 request for the employer to review the injured worker's eligibility and feasibility to participate in a BWC sponsored rehabilitation program had not been responded to as of the date of the filing of the complaint.

At the outset, Chairman Abrams inquired as to whether Ms. Krum believed that the employer was in violation of a specific rule or statute. While Ms. Krum acknowledged that some facts may have been assumed that are now in dispute, it was the SI Department's position that the timeframes set out in OAC 4123-19-03(K) for requests for medical treatment apply to requests for an employer to review an injured worker's eligibility and feasibility to participate in a vocational rehabilitation program. Ms. Krum concluded that the employer should have responded within 10 days of the request.

After a review of the file materials and arguments at the conference, the Board finds the following relevant facts:

By letter dated 01/03/2006, the SI Department found the complaint valid on grounds that the employer was in violation of OAC 4123-18-03. Specifically, the SI Department found that the employer did not give evidence of the required evaluation of eligibility and feasibility in response to the request for rehabilitation services, did not respond to the injured worker or his attorney with the reason for the denial of vocational rehabilitation services, and did not provide the injured worker with notification of the appeals process.

By letter dated 01/28/2006, the employer's attorney, Barbara Knapic, appealed the finding of a valid complaint asserting that it responded to the request and that the denial was forwarded to the injured worker's attorney. Additionally, the employer argued that it was under no legal obligation to undertake an evaluation of the eligibility and feasibility of the request because the parties were engaged in settlement negotiations. Furthermore, the employer asserted that the injured worker had been scheduled for a vocational evaluation pursuant to the 01/03/2006 letter finding the complaint valid.

By letter dated 05/22/2006, the Administrator's Designee, Jeff Redman, upheld the finding of a valid complaint on grounds that the employer did not timely respond to the request. Mr. Redman further noted that settlement negotiations do not suspend the employer's obligation to respond to the request. In support of this position, Mr. Redman cited R.C. §4121.65 and OAC 4123-18-16(A) which require a self-insuring employer to provide vocational rehabilitation services. Mr. Redman further stated that the response time requirements under OAC 4123-19-03(K) regarding requests for medical treatment should be applied to requests for vocational rehabilitation services. Finally, Mr. Redman stated that OAC 4123-19-03(I) requires self-insuring employers to assist injured workers in applying for benefits.

By letter dated 06/05/2006, the employer's attorney requested a hearing before SIEEB, and asserted that, although not dated, the response to the request for vocational evaluation was given in a timely manner. The employer disputed the application of the rules and statute cited by the Administrator's Designee. The employer argued that vocational rehabilitation has never been approved on the basis that the employer's evaluator found that the injured worker retains skills that are currently transferable to the workplace. The employer also stated that while an injured worker may remain eligible for vocational rehabilitation until the date of a settlement that does not automatically mean the injured worker is accepted into a vocational rehabilitation program.

At the conference, Mr. Baskin argued that the request for the employer to review the injured worker's eligibility and feasibility to participate in a vocational rehabilitation program was sent to BWC on 08/25/2005, and as late as 10/31/2005, the injured worker had not received a response from the employer. Mr. Baskin emphasized that the employer's failure to respond to the request was the basis for the complaint. Mr. Baskin refuted the employer's assertions regarding settlement negotiations, stating that there was no negotiation of a settlement; rather, the employer merely sent a letter with a settlement offer. Mr. Baskin stated that the bottom line is that 52 days is too long before an employer responds to a request.

Ms. Knapic responded that a request for vocational rehabilitation is not subject to the response requirements for medical treatment because it is not the same as medical treatment. Therefore, vocational rehabilitation is not controlled by the 10-day response time for treatment requests pursuant to OAC 4123-19-03(K). Ms. Knapic further explained that the employer did respond to the request, through its TPA, by faxing a denial to MedVoPro as requested by the injured worker via the request form for the vocational rehabilitation. A copy of the fax denial was in the file. Ms. Knapic also pointed out that the request for vocational rehabilitation should have been filed with the employer, not BWC.

After questioning by the Board, Mr. Baskin conceded that the request filed was an in-house form used by his firm for vocational rehabilitation requests. He explained that he chose to file this matter with BWC because of difficulty in obtaining a response from self-insuring employers. He further argued that the form's directive for the employer to respond directly to MedVoPro did not excuse the employer from notifying the injured worker of its decision.

After a review of the materials on file and the arguments at the conference, the Board finds there has been no statute or rule violated by the self-insuring employer, and the complaint is not valid.

The Board finds that the grounds and rationale cited by BWC in finding a valid complaint do not apply to requests for the employer to review the injured worker's eligibility and feasibility to participate in a vocational rehabilitation program. Specifically, OAC 4123-18-03 applies to guidelines for referral to and acceptance into vocational rehabilitation once eligibility has been determined. It includes no notice provisions. The Board further finds that the Designee's reliance on OAC 4123-18-16(A) and 4123-19-03(K) is ill-placed. OAC 4123-18-16(A) states that self-insuring employers must furnish vocational rehabilitation services equal to or greater in quality than services provided by BWC; however, the rule does not include time lines regarding response times. OAC 4123-19-03(K) states that employers must approve or deny claims within 30 days, must respond to requests for medical treatment within 10 days and pay compensation within 21 days; however, no evidence has been submitted to suggest the rule applies to requests for vocational rehabilitation.

The Board is also compelled to make the following observations.

The injured worker's request for vocational rehabilitation was sent to BWC on a form devised by the injured worker's attorney that may have served well in a state-fund claim. In this case, however, the request should have been sent to the self-insuring employer and the employer's representatives. After eventually receiving the request, the employer did respond as instructed, to MedVoPro; however, the Board notes that a copy of this response was not sent to the injured worker's attorney. The Board also notes there was correspondence between the parties concerning a potential settlement of the underlying claim, but that any such negotiations do not preclude the opportunity for the injured worker to participate in vocational rehabilitation.

Ultimately, the Board finds that the injured worker's request for vocational rehabilitation is an issue for the IC hearing process. It is unfortunate that the parties did not directly communicate with each other. The request should have been filed directly with the self-insuring employer, and any denial or failure to respond should have been followed by a motion with the IC, not an SI complaint. Furthermore, the complaint could have been treated as a request for vocational services, again, forwarded to the IC for resolution.

The Board also notes that a telephone call early on should have eliminated countless hours of effort expended by BWC, the injured worker, the employer, this Board, and the respective representatives, which effort has really resulted only in starting over.

The Board finds there has been no statute or rule that has been violated and therefore, finds the complaint invalid. The Board hereby dismisses the complaint and requests the SI Department to forward this matter to the IC for hearing on the issue of the injured worker's request for vocational services.

For all of the above reasons, upon motion made by MR. SHARPE, seconded by MR. ABRAMS, the Board finds Complaint No. 14873 is hereby dismissed.

A copy of this order shall be placed in the Self-Insured Department's file.

SELF-INSURING EMPLOYERS EVALUATION BOARD

Kevin R. Abrams
Kevin R. Abrams, Chairman

YES/NO

Wesley Wells
Wesley Wells, Member

YES/NO

James Sharpe
James Sharpe, Member

YES/NO

DATE MAILED: 20th DAY OF November, 2006