

**SELF-INSURING EMPLOYERS EVALUATION BOARD
INFORMAL CONFERENCE FINDINGS AND ORDER TO TAKE CORRECTIVE ACTION
IN THE MATTER OF: Wheeling Pittsburg Steel Corp. (Employer), Risk No. 20003830
And
[REDACTED] (Injured Worker), Claim No. [REDACTED] and [REDACTED]
Complaint No. 15395**

[REDACTED]

Larrimer & Larrimer, L.L.C.
165 North High Street
Columbus, OH 42315

Wheeling Pittsburgh Steel Corporation
Attn: Elaine Pavlic, R.N.
1134 Market Street
Wheeling, WV 26003-2906

Vorys, Sater, Seymour & Pease
P.O. Box 1008
52 East Gay Street
Columbus, OH 43216-1008

Comp Services
P.O. Box 188
St. Clairsville, OH 43950

FOR THE INJURED WORKER: Gavin Larrimer and [REDACTED]
FOR THE EMPLOYER: Bradley Sinnott and Elaine Pavlic
FOR THE ADMINISTRATOR: Ken Cain

This matter was set for informal conference before the Self-Insuring Employers Evaluation Board (SIEEB) on February 20, 2007 on Complaint No. 15395, filed September 26, 2006. The complaint alleged that the employer improperly ceased payment of permanent total disability (PTD) compensation. After a review of the evidence on file and the arguments presented at conference, the Board makes the following findings:

In an order issued June 18, 2005, an Industrial Commission (IC) Staff Hearing Officer (SHO) granted PTD compensation to injured worker [REDACTED] in the above-referenced workers' compensation claims. The PTD award was based upon the medical reports of Dr. Timms, Dr. McFadden and Dr. Stanko as well as a review of the injured worker's disability factors. Following that hearing, the employer began paying PTD compensation and challenged the IC decision by filing a complaint for writ of mandamus in the 10th Appellate District Court of Appeals. The writ requested that the order awarding PTD compensation be voided and vacated and that the matter be remanded to the Commission for a new hearing and decision which corrects the deficiencies described by the employer in the complaint. On February 24, 2006 a Magistrate denied the requested writ. In the decision of State ex rel. Wheeling Pittsburgh Steel Corporation v. Industrial Commission, 2006-Ohio-3912, dated August 1, 2006, the Court of Appeals stated that the employer "filed this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("Commission"), to vacate its order awarding" PTD compensation to the injured worker, and to rehear the PTD application. The Court of Appeals granted the writ of mandamus and remanded the matter to the IC for rehearing with instructions that the Commission may not consider the report of Dr. Timms. The injured worker filed an appeal to the Supreme Court.

The employer stopped paying PTD compensation as of August 1, 2006. In a letter dated August 15, 2006 directed to the employer's legal counsel, the injured worker's legal counsel requested that the employer reinstate payment of the PTD compensation. The injured

worker's attorney referenced a previous IC order from a different claim as well as a 1990 IC Policy Statement to support the request for continued payment of compensation during the pendency of an appeal. In a letter dated September 6, 2006, the employer's workers' compensation administrator, Elaine Pavlic, refused reinstatement. Ms. Pavlic stated that the August 1, 2006 Court of Appeals decision found the Commission order awarding compensation unlawful and subject to correction through the writ of mandamus. The employer summarized that it discontinued payment of compensation because the IC order to pay compensation had been overturned. Ms. Pavlic concluded that the employer will not reinstate payment of compensation unless and until an order is issued awarding PTD compensation resulting from the court-mandated rehearing. After receipt of Ms. Pavlic's letter, the injured worker's counsel filed the self-insured complaint in this claim on September 26, 2006.

The self-insured complaint was forwarded to the employer on October 16, 2006 and the employer responded to the complaint in letters dated October 30, 2006 and December 6, 2006. Thereafter, in a letter dated December 7, 2006, the Self-Insured Department found the complaint valid and the employer in violation of Ohio Adm.Code 4123-19-03(K)(5). The Self-Insured Department found that compensation should continue for the following reasons: there is no clear order to vacate the order awarding PTD compensation; the IC has not put on an order vacating the PTD award; and the decision of the Court of Appeals has been appealed to the Ohio Supreme Court. The letter directed the employer to make payment of benefits within seven days of receipt of the letter and to provide confirmation of payment to the BWC. In a letter dated December 16, 2006, the employer objected to the finding of a valid complaint and requested a hearing before SIEEB. The employer provided further information and arguments in letters dated January 4, 2007 and January 19, 2007. The injured worker provided additional evidence and arguments in letters dated January 12, 2007 and February 15, 2007. The Administrator declined further review of this matter and requested it be referred to SIEEB. The matter was set for informal conference on February 20, 2007.

At the conference, after a summary of the facts presented by the BWC attorney, counsel for the injured worker reiterated the position set out previously in correspondence to the employer and BWC. Essentially, the injured worker argued that the final order of the IC is in full force and effect until a final court decision has been rendered. Stated otherwise, the injured worker's position is that because the Court of Appeals decision has been appealed to the Supreme Court, the self-insuring employer must continue payment based on the IC order. The injured worker's attorney based this position on long-standing policy, exemplified in IC findings mailed July 20, 1998 in claim number 398218-22 and in an IC Policy Statement dated December 27, 1990. The injured worker's attorney further argued that as a matter of law, the IC has no jurisdiction to issue any orders pertaining to a PTD award in a claim in which the PTD award is the subject of a mandamus action, citing State ex rel. Rodriguez v. Indus. Comm. (1993), 67 Ohio St.3d 210, in support of this position. Finally, the injured worker argued that the IC policy was fair because the employer could be made completely whole by reimbursement from the surplus fund for any amounts determined improperly paid by the final order of the Supreme Court.

The employer argued that the injured worker was attempting to enforce a non-existing order of the IC because the IC order had been vacated by the Court of Appeals. The employer further argued that the IC could not ignore a final order from the Court of Appeals, and that the matter was ripe for rehearing by the IC notwithstanding the injured worker's appeal to the Supreme Court. The employer urged the Board to reject the earlier Policy Statement as merely the preference of a prior sitting Commission. The employer pointed out that prior IC orders do not have precedential value. Also, the employer argued that the claim that was the subject of the prior order cited by the injured worker should be distinguished on grounds that the employer therein unnecessarily requested the IC to issue a new order addressing whether

or not the employer was required to pay PTD after receiving a favorable Court of Appeals decision. The employer concluded that the result requested by the injured worker in this case could be reached only by obtaining a “stay” of the Court of Appeals decision, which had not been requested by the injured worker.

The Board finds merit in the positions espoused by both parties. Nevertheless, after careful consideration, it is the Board’s decision that a self-insuring employer must continue payment of a PTD award notwithstanding receipt of a favorable Court of Appeals decision to a challenge of that award, when the Court of Appeals decision has been appealed to the Supreme Court.

The Board finds that in the decision and judgment entry in State ex rel. Wheeling Pittsburgh Steel Corporation v. Industrial Commission, 2006-Ohio-3912, dated August 1, 2006, the Court of Appeals did not order, direct, or authorize the employer to terminate PTD compensation or to take any other action. Instead, the Board finds that the Court’s order was directed to the IC. The Board further finds that the SHO order of June 18, 2005 has not been vacated by the IC. Neither the employer, nor SIEEB, has the authority to vacate an order issued by the IC or its Hearing Officers.

The Board further finds that Revised Code § 4123.512(H) provides the following, in pertinent part:

. . . any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

In this case, it is clear that an award of compensation has been made by the IC, and the nature of the award for PTD contemplates all time after the award be considered as “subsequent periods of total disability.” At issue here is the period of time compensation is to continue “during the pendency of the appeal.”

In view of the language of the last sentence of the portion of the statute cited above which provides reimbursement to the employer that ultimately prevails on appeal, it is the Board’s position that “pendency of the appeal” applies to the period of time to reach the final decision of the final appellate forum. If reimbursement to the employer depends on the final appellate decision, termination of compensation previously ordered paid by the IC should also depend on that final appellate decision.

While the Board is not aware of any case law specifically endorsing the IC’s policy, the Rodriguez case cited previously clearly supports the policy. In Rodriguez, the injured worker challenged an IC order denying PTD benefits by filing a writ of mandamus in the Court of Appeals. The Court of Appeals granted some relief, but the injured worker nevertheless appealed that decision to the Supreme Court. While that appeal was pending, the IC prepared a second PTD order incorporating the Court of Appeals’ instructions. The Supreme

Court ruled that the IC was without jurisdiction to issue the second order, because "continuing jurisdiction ceased once a mandamus action has been commenced." (Rodriguez at 214). Under the Rodriguez analysis, the IC has no jurisdiction to implement a Court of Appeals decision to vacate its prior order when that decision has been appealed.

The IC policy and Rodriguez decision are both consistent with the Supreme Court's reasoning in State, ex rel. Youghioghney & Ohio Coal Co. v. Kohler (1990), 55 Ohio St.3d 109. In Youghioghney, the employer stopped paying temporary total disability benefits upon receiving a favorable Court of Appeals decision as a result of the employer's mandamus action. The injured worker appealed the Court of Appeals decision to the Supreme Court. While the Court affirmed the Court of Appeals decision and returned the matter to the IC, the Supreme Court noted that "Y&O should not have terminated benefits after the Court of Appeals judgment," finding that the termination of payments matter was "not yet resolved." The Court then went on to direct the self-insuring employer to "pay currently and retroactively temporary total benefits to Kohler . . . until there is a final determination on appellant's application for permanent total disability benefits."

While this Board is well aware that the Youghioghney decision may be readily distinguished on its facts from the instant case, it is equally clear that the Supreme Court rejected the position espoused herein, that is, that a self-insuring employer may terminate payment of compensation after receipt of a favorable Court of Appeals decision that is not a final determination on the injured worker's eligibility for compensation.

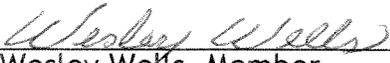
Based on the foregoing, upon motion made by Mr. Wells and seconded by Mr. Abrams, the Board finds Complaint No. 15395 valid as a violation of IC policy, and orders the self-insuring employer to reinstate payment of PTD compensation as of the date of its termination. The self-insuring employer is ordered to issue payment within seven days of receipt of this order, and provide proof of payment to the BWC's Self-Insured Department. If payment is not forthcoming in the time established by this order, the Self-Insured Department is directed to set this matter for a hearing to be conducted pursuant to Chapter 119. of the Revised Code and the rules of the BWC, after which the Board may recommend revocation of the employer's self-insured status or such other penalty as probation or civil penalty not to exceed \$10,000.00.

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

SELF-INSURING EMPLOYERS EVALUATION BOARD



Kevin R. Abrams, Chairman YES



Wesley Wells, Member YES

DISSENTING OPINION:

I respectfully dissent with the preceding opinion finding that Wheeling Pittsburgh Steel Corporation has committed a violation of its self insured privilege. This is a serious issue to both the injured worker and the employer. This dissent does not discount in any way my belief that my compatriots on this Board have given anything but the greatest of concern and consideration to both parties. The reasons for my dissent are as follows.

“policy statement” about an Industrial Commission order does not apply. The Court of Appeals in this case did not direct the Industrial Commission to enter any order at all on the termination of compensation for Permanent Total Disability (PTD). The Court vacated the order of the Commission and without a valid order of the Commission there is no basis to pay PTD compensation. The only order the Commission by inference has been told to issue is a new one granting or denying PTD.

I likewise do not believe that an application of O.R.C. Section 4123.512(H) supports the finding of a valid self insured complaint. The significant language seems to be “An appealor any other action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal.” First, I do not believe the purpose of the statute is to require the employer to keep paying compensation when it has won. Rather, I believe the purpose of the statute is to require the employer to continue paying when it has lost but is appealing or otherwise seeking relief. Again, technically and literally speaking, the employer’s appeal is no longer pending. The employer’s appeal has been resolved. This is best evidenced by the fact that the Supreme Court’s docket information identifies the Appellant as James Runyan, not Wheeling Pittsburgh Steel Corporation.

Last, I do not believe that either the Rodriguez case or the Youghioghney case supports a finding of a valid complaint. In the former, the issue was whether the Industrial Commission could issue an order addressing permanent total disability while the claimant’s appeal from the Court of Appeals was pending to the Supreme Court. Claimant had been granted a limited writ by the Court of Appeals with the case to go back to the Industrial Commission for further action. While the claimant’s appeal was pending to the Supreme Court, the Commission issued a second order again denying permanent total disability compensation. The history gets confusing but it seems that while the appeal to the Supreme Court was pending in the mandamus action on the first Commission order, the claimant raised and the parties also argued the issue of the continuing jurisdiction of the Commission to issue the second order and the sufficiency of that order as well. Ultimately, the Supreme Court said that the Commission was deprived of jurisdiction at the filing of the action in mandamus, that the order of the Court of Appeals granting the limited writ was reversed, and that the second order of the Commission issued when it lacked jurisdiction actually stands since it cures the defects found in the first order (returning the whole thing to the Commission just to reissue that same order would be useless). If anything, it seems that this case would stand for the proposition that jurisdiction of the present claim now lies with the Court and that the ability of the State, whether it be the Commission or a Board, to compel the payment of compensation for permanent total disability is suspect. In Youghioghney, the relief requested in mandamus according to the underlying Court of Appeals decision was that the Court order “respondent, Industrial Commission of Ohio, to vacate its order granting co-respondent, Robert D. Kohler (“claimant”), temporary total disability compensation, and to issue an order finding that claimant was not entitled to said compensation because his disability has become permanent.” The relief requested was that the Industrial Commission be told to do something via an Industrial Commission order. The Court in that case did not vacate the order of the Industrial Commission but rather told the Commission to vacate its order. Clearly, the underlying Commission order remained in full force and effect until the Commission complied with the order of the Court. In the present case, as I have said previously, the Court vacated the order of the Commission. It also told the Commission to do some additional work but the Court is clear that the requested relief, that the Commission order be vacated, has been granted. In Youghioghney, the Court was correct in saying that compensation should not have been stopped. It was correct because there was an order, not yet vacated although ordered to be vacated, compelling the payment of compensation.

The Self Insured Department originally found that the employer had failed to follow Ohio Administrative Code Rule 4123-19-03(K)(5) but I do not believe anyone now believes that to be correct. Rather reliance is placed on a 1990 “policy statement” signed by three of the then five members of the Industrial Commission of Ohio and a reading of Ohio Revised Code Section 4123.512(H).

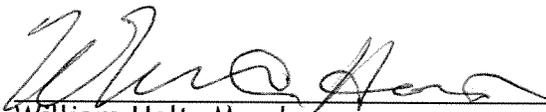
The “policy statement” states in relevant part that “It is the longstanding policy of the Industrial Commission that in cases in which a final Commission order had issued awarding compensation to an injured worker, and subsequently an appeal was filed pursuant to Section 4123.519 O.R.C. or of an action in mandamus or of any other action was filed in court challenging a Commission decision, shall not stay the payment of compensation and in addition payment of compensation shall continue during the pendency of the appeal. Should a final court judgment direct that the Industrial Commission issue an order to terminate payment of such compensation, that neither the Bureau of Workers’ Compensation nor a self-insured employer have authority to unilaterally terminate such compensation until the Industrial Commission complies with the court direction by the publication of an order in accordance with the final court judgment.” According to the discussion as I understand it in the filed documents and at conference, this “policy statement” would seem to do two things. First, it would operate as an automatic stay of a Court of Appeals decision in mandamus that is favorable to an employer where compensation had previously been ordered paid so long as the injured worker has filed an appeal to the Supreme Court. This employer received a favorable decision in the 10th District Court of Appeals. In an original action, the employer filed a complaint requesting that the Court vacate an order of the Industrial Commission and refer the matter to the Commission for rehearing. The opinion of the court granted the employer’s writ completely. Rule 1(B) of the 10th District Court of Appeals indicates that original actions are governed by the Ohio Rules of Civil Procedure. Ohio Rule of Civil Procedure 62 provides a means by which a judgment of the court may be stayed. Supreme Court Rule II, Section 2(A)(3)(a) also provides a means by which an order of the Court of Appeals may be stayed. In this case, the injured worker did not follow either of those rules to seek a stay of the decision of the Court of Appeals pending his appeal to the Supreme Court. Instead, reliance is placed on a “policy statement” of the Industrial Commission of Ohio. In State ex rel. Saunders v. Indus. Comm., 101 Ohio St.3d 125 (2004), the Supreme Court said that the “pivotal issue in determining the effect of a document is whether it enlarges the scope of the rule or statute from which it derives rather than simply interprets it.” I would think shrinking the scope of a statute or rule would be similarly viewed as pivotal. Enlarging (and I think shrinking) requires a formal rule, not a “policy.” The 1990 “policy statement” to the extent it automatically stays a decision of the Court of Appeals seems to me to be pretty clearly inconsistent with both of the Rules I have mentioned and I am not even sure what statute it purports to enlarge. I would also mention that the actual identification of this “policy statement” as a true policy that one may be fairly expected to follow seems a bit dubious. There is no evidence that this “policy statement” is in general circulation in the State of Ohio. There is some indication that the Industrial Commission does not consider the “policy statement” to be a policy. If one were to refer to the Industrial Commission’s own internet web page (ICON), one would find a “policies” tab. Upon clicking that tab, one would find that the Industrial Commission’s policies include a Hearing Officer’s Manual, IC Resolutions, IC Rules, and a Medical Examination Manual. None of these documents includes the 1990 “policy statement” in any form at all.

Additionally, with respect to the 1990 “policy statement,” I am unclear on the authority to assert that an order of a court is not final until the Industrial Commission issues an order. I see no support for that position in the Ohio Revised Code or the Rules of Civil Procedure. I would note that, even if one gets past the issue of authority, the plain language of the

Youghiogheny also is a bit of an aberration in that it fell in a time when the Commission was trying to remedy an unpleasant situation involving how long it took for PTD applications to be determined. In State, ex rel. Eaton, v. Lancaster, 40 Ohio St.3d 404 (1988), (Youghiogheny was already in the works but not resolved), the Supreme Court found another Industrial Commission "policy" to be invalid with the upshot being a special process to try to avoid the disjuncture of temporary total disability and permanent total disability in deserving cases. In any event, there are multiple exceptions to the blanket statement the Court made and Youghiogheny does not support the conclusion that a valid self insured complaint has occurred.

This is a difficult situation. It seems to show the need for something to be done to close a gap in the system. Maybe a Rule would help. Maybe simply changing the pleading and practice before the Court of Appeals and the Supreme Court would solve the issue. A request for a stay under the Rules could have avoided this altogether. I do not think that upholding a valid self insured complaint is the right way to close the gap.

For the reasons stated above, I cannot conclude that there is a basis to find that this employer has violated the standards of its self insured privilege.



William Holt, Member

DATE MAILED: 14th DAY OF March, 2007