

**SELF-INSURING EMPLOYERS EVALUATION BOARD
INFORMAL CONFERENCE FINDINGS**

IN THE MATTER OF:

P.H. Glatfelter Company (Employer), Risk No. 200054740

[REDACTED] (Injured Worker), Claim No. [REDACTED]

Complaint No. 16111



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P.H. Glatfelter Company
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FOR THE INJURED WORKER: No Appearance
FOR THE EMPLOYER: Donald Beck and Angie Ward
FOR THE ADMINISTRATOR: Jean Krum

This matter was set for informal conference before the Self-Insuring Employers Evaluation Board on November 18, 2008 on Complaint No. 16111, dated March 27, 2008. The complaint alleged that the self-insuring employer refused to pay temporary total disability compensation. After review of the correspondence on file, and the arguments made at the conference, it is clear that the complaint actually concerns the self-insuring employer's termination of temporary total disability compensation without a hearing.

The relevant history begins with the injured worker's submission of a C-84 form on or about December 19, 2007, requesting temporary total disability compensation from July 31, 2007 to January 15, 2008. The employer's third party administrator responded that a decision on the compensation would be made after the employer's independent medical examination, scheduled for January 31, 2008. On or about January 22, 2008, the injured worker submitted another C-84 form, requesting temporary total disability compensation from January 21, 2008 to February 18, 2008. By letter dated January 31, 2008, the third party administrator again responded the C-84 would be addressed after an independent medical examination scheduled that same date. Apparently, during this period, Dr. Otten, the injured worker's treating physician, was in communication with Dr. Hill, the plant physician, regarding the injured worker's return to work in a restricted capacity. In an addendum to an office note dated January 29, 2008, Dr. Otten stated the following: "It is my opinion that at this time a trial of return to work with the restriction of sedentary work only and no mandatory overtime is indicated."

On February 6, 2008, the employer sent the injured worker a certified letter stating that the injured worker was notified by the Time Office to report to work on February 6, 2008 for a return to work assignment defined as sedentary in nature and within the physical restrictions set forth by the treating physician. The letter referenced the January 29, 2008 statement of Dr. Otten, asserting that Dr. Otten had released the injured worker to begin training in the Shipping Department as a shipping clerk for relief purposes only. The letter concluded by giving the injured worker twenty-four hours to provide an explanation for not reporting to work and stated that failure to provide an acceptable and reasonable explanation will result in discipline up to and including termination of employment.

Despite the employer's apparent attempts to return the injured worker to light duty employment, by letter dated February 19, 2008, the employer's third party administrator released payment of temporary total disability compensation to the injured worker. Payment was based on the employer's independent medical examination, and the C-84 forms that certified temporary total disability if the employer was unable to meet the outlined restrictions. The Board takes particular notice that payment was made after the February 6, 2008 job offer.

In a letter to the injured worker's attorney dated February 22, 2008, Dr. Otten stated the following:

"On 7/31/07 I recommended that he be placed off work. Subsequently on 11/7/07 and 12/18/07 I recommended that he could return to work with restrictions, sedentary work level, no fork lift driving. He was not returned to work. On 1/21/08 I recommended that he be off work due to decreased activity tolerance at home and medication related adverse effects. After discussion of this case with the company physician, I did change that recommendation on 1/29/08 to return to work sedentary work level and no mandatory overtime. On 2/13/08 he had not returned to work and I recommended that he be off work pending medication adjustments. On 2/18/08 I did recommend return to work sedentary work level and no forklift or ladders. It therefore remains my opinion that this patient is a candidate for return to work with restrictions, and that his restrictions do arise from his injury related conditions."

On March 12, 2008, the employer sent the injured worker a certified letter stating that on March 3, 2008, Dr. Otten released the injured worker to return to sedentary work with restrictions of no climbing ladders and no driving forklift trucks. The letter further referenced the February 6, 2008 "return to work assignment." The injured worker was further instructed to return to work on March 17, 2008 for a work assignment in the Shipping Department, Shipping Clerk classification on the basis of "relief purpose only." The letter stated it was an official notification of a return to work assignment offer and provided the injured worker twenty-four hours to accept or reject the offer in writing. The letter concluded by stating that failure to report as scheduled without an acceptable and/or reasonable explanation would result in termination of employment.

When the injured worker did not return to work on March 17, 2008, the third party administrator sent a letter to the injured worker dated March 19, 2008 informing him that no further temporary total disability compensation would be processed. Thereafter, on March 27, 2008, the self-insured complaint was filed.

As the facts illustrate, the issue initially addressed by the employer concerned the injured worker's eligibility for temporary total disability compensation as requested by C-84 forms from his treating physician. That issue, as established by the facts herein, is not one over which this Board has jurisdiction. Eligibility for an initial disputed period of temporary total disability compensation, or a subsequent disputed period after temporary total disability compensation has stopped, is a matter wholly within the jurisdiction of the Industrial Commission and its hearing process. In this claim, the issue of eligibility for temporary total disability compensation was resolved when the employer released payment for compensation by letter dated February 19, 2008, for all but about 12 days of the period extending from July 31, 2007 to February 24,

2008. Temporary total disability compensation payments continued uninterrupted until March 16, 2008. The compensation was based on C-84 forms that included language suggesting the injured worker could return to work if certain restrictions were accommodated, and after the employer had made a light duty job offer of sorts by letter dated February 6, 2008.

The specific issue before this Board is not one of eligibility for temporary total disability compensation, but whether or not the self-insuring employer properly terminated temporary total disability compensation without a hearing, as set forth in the correspondence to the injured worker dated March 19, 2008 referenced above. The parties properly land on Ohio Admin. Code 4121-3-32(B) as the controlling provision in this area. That provision, in relevant part, is as follows:

- (1) Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:
 - (a) The employee returns to work.
 - (b) The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.
 - (c) The employee's treating physician finds the employee has reached maximum medical improvement.
- (2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a hearing as follows:
 - (a) Upon the finding of a district hearing officer that either the conditions in paragraph (B)(1)(a) or (B)(1)(b) of this rule has occurred.
 - (b) Upon the finding of a district hearing officer that the employee is capable of returning to his/her former position of employment.
 - (c) Upon the finding of a district hearing officer that the employee has reached maximum medical improvement.
 - (d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

The parties' interpretation of these provisions, particularly paragraph (B)(1)(b), varies widely. The Administrator argues that a hearing is necessary if the parties cannot agree on the position to which the injured worker is to return. Further, the Administrator argues that no response, or a "no" response to the offer by the injured worker constitutes a dispute that requires the self-insuring employer to continue payment of temporary total disability compensation until the matter is resolved at a hearing. The injured worker's representative agreed, and further made clear his position that the job offer in question was not within the restrictions set forth by the injured worker's treating physician. The injured worker relied on *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, to support his argument that unless the treating physician opines that the injured worker has reached maximum medical improvement or actually returned to work, a hearing was necessary to terminate temporary total disability compensation. The injured worker addressed eligibility for temporary total disability compensation by arguing that the light duty job offer was inadequate pursuant to *State ex rel. Ganu v. Indus.*, 2005-Ohio-2296 and *State of Ohio ex rel. Coxson v. Dairy Mart Stores of Ohio* (2000), 90 Ohio St.3d 428.

The employer argued that R.C. 4123.56 permitted termination without a hearing because the employer did not dispute the treating physician's report which included the restrictions. The employer further responded that the arguments of the Administrator and injured worker result in a scenario in which a self-insuring employer may never terminate temporary total disability compensation without a hearing unless the injured worker and his attorney (not the treating physician) agree that the injured worker is capable of returning to other suitable employment, and the injured worker actually returns to the employment. Such interpretation,

the employer argued, eliminates any distinction between paragraphs (B)(1) and (B)(2) and renders paragraph (B)(1)(b) meaningless. The employer argued that Ohio Admin. Code 4121-3-32(B)(1) clearly permits termination, without a hearing, when "the employee's treating physician finds that the employee is capable of returning to...other available suitable employment."

The Board agrees with the employer's argument that the Ohio Admin. Code Rule provides that under appropriate circumstances, a self-insuring employer may terminate temporary total disability compensation without a hearing and without agreement of the injured worker. Clearly, a self-insuring employer may terminate temporary total disability compensation without a hearing when the injured worker's treating physician finds that the injured worker is capable of returning to "other available suitable employment." What is not so clear is how such a determination is made. The Board is unaware of any case law construing this provision. It is true that the treating physician offered general restrictions, and the employer asserted that its offer would satisfy the restrictions. But just as the injured worker's assertion that he cannot perform the work does not necessarily defeat the employer's ability to terminate compensation without a hearing, neither does the self-insuring employer's assertion that the injured worker can perform the work satisfy the rule's requirements for termination without a hearing. At issue here is the opinion of the injured worker's treating physician, not that of the parties. This Board finds that termination without a hearing cannot be supported under Ohio Admin. Code 4121-3-32(B)(1) unless, at the very least, the treating physician has reviewed the light duty job offer. In this case, it is undisputed that the treating physician never reviewed the job offer. The employer acknowledged this fact in correspondence to the Self-Insured Department dated May 7, 2008.

Based on the foregoing, this Board finds that the self-insuring employer failed to satisfy the requirement of Ohio Admin. Code 4121-3-32(B)(1) for termination of temporary total disability compensation without a hearing on or about March 17, 2008, and the complaint is hereby found valid.

SELF-INSURING EMPLOYERS EVALUATION BOARD



Kevin R. Abrams, Chairman YES



William Holt, Member YES



Wesley Wells, Member YES

DATE MAILED: 13th DAY OF January, 2008⁹