

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

**IN THE MATTER OF:**

**Danis Building Construction Company (Employer), Risk No. 20005135-00  
[REDACTED] (Injured Worker), Claim No. [REDACTED]  
Complaint No. 16792**



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Danis Building Construction Company  
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Miamisburg, OH 453442-5422

Dunlevey, Mahan & Furry  
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Hunter Consulting  
Attn: Jamie Vires  
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Cincinnati, OH 45244-4028

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**FOR THE INJURED WORKER:** No Appearance  
**FOR THE EMPLOYER:** Gary Auman, Karen Applegarth, Jamie Vires  
**FOR THE ADMINISTRATOR:** Jean Krum

This matter was set for informal conference before the Self-Insuring Employers Evaluation Board on April 6, 2010 on Complaint No. 16792. The complaint alleged that the employer would not pay temporary total disability compensation pursuant to a C-84 dated November 9, 2009 and Staff Hearing Officer order, issued October 24, 2009. The relevant history giving rise to this issue is set out below.

By C-86 motion filed June 24, 2009, the employer requested the Industrial Commission to terminate temporary total disability compensation based upon a finding of maximum medical improvement. Although the motion was initially granted, a Staff Hearing Officer order issued October 24, 2009 vacated the underlying District Hearing Officer order and denied the employer's C-86 motion. The Staff Hearing Officer found that the reports of Michael J. Rozen, M.D. submitted in support of the employer's motion did not take into consideration all of the allowed conditions, specifically post operative capsulitis, which was allowed by separate Staff Hearing Officer order issued the same date. The Staff Hearing Officer further found that there was no medical evidence on file that indicated all of the allowed conditions had reached maximum medical improvement. On file at the time of the Staff Hearing Officer hearing was a letter dated August 19, 2009 from the physician of record, Brian Cohen, M.D. The August 19, 2009 letter stated that the injured worker had reached a treatment plateau and that a functional capacity evaluation should be performed

to determine the injured worker's permanent restrictions. Upon receipt of the Staff Hearing Officer order, the employer reinstated payment of temporary total disability compensation including payment retroactive to August 11, 2009, the date the District Hearing Officer had found the injured worker to be at maximum medical improvement.

Sixteen days after the issuance of the Staff Hearing Officer order, Dr. Cohen completed a C-84 dated November 9, 2009 which certified disability from November 8, 2009 through an estimated return to work date of November 30, 2009. Listed as the conditions being treated which prevent return to work were 840.4 (left rotator cuff tear), 840.9 (left sprain shoulder), and 840.7 (SLAP tear left shoulder). The newly allowed 726.0 (post operative capsulitis) was not listed. The C-84 further indicated that the injured worker could not return to the former position of employment. In response to the question of whether the injured worker can return to other employment, the physician checked "Yes" and for the explanation wrote, "Permanent restrictions." In response to the question as to whether the allowed conditions have reached maximum medical improvement, Dr. Cohen checked "No." The next C-84 on file from Dr. Cohen, dated November 25, 2009, extended disability to an estimated return to work date of February 8, 2010. The only difference in this C-84 and the November 9, 2009 C-84 was that the newly allowed post operative capsulitis was listed as a condition being treated which prevented a return to work.

Upon receipt of the November 9, 2009 C-84, the employer ceased payment of temporary total disability compensation. In response to the termination of compensation, the injured worker filed the instant complaint on November 17, 2009. In a letter issued December 4, 2009, the Self-Insured Department determined that the complaint was valid and found the employer in violation of R.C. 4123.56(A) and Ohio Adm.Code Rule 4121-3-32(B)(1). The letter ordered the employer to make payment of benefits within seven days of receipt of the letter and to submit confirmation of payment to BWC. The letter advised the employer that failure to comply would result in the matter being referred to the Self-Insuring Employers Evaluation Board. When payment confirmation was not received, the Self-Insured Department referred the complaint to the Self-Insuring Employers Evaluation Board for consideration.

In its Position Statement and at hearing, the employer acknowledged that while it may not have provided confirmation of payment to BWC, the employer reinstated payment on December 8, 2009, four days after BWC's finding of a valid complaint. The employer further pointed out that payment of compensation continues.

The employer next argued that C-84 forms submitted by Dr. Cohen after the Staff Hearing Officer hearing that refused to find the injured worker had reached maximum medical improvement now required such a finding. The employer stated that the C-84 forms signed by Dr. Cohen on November 9, 2009 and November 25, 2009 indicated that the injured worker cannot return to the former position of employment, and included the notation of "Permanent Restrictions," amounting to a clear statement from the physician of record that all conditions had become permanent, or reached a treatment plateau. The employer pointed out that the two C-84 forms followed shortly after Dr. Cohen's August 19, 2009 finding the injured worker had reached a treatment plateau. The employer asserted these statements from the physician of record equate to a finding the injured worker is permanently unable to return to the former position of employment and therefore

temporary total disability compensation is not payable. The employer relied on R.C. 4123.56, State ex rel. Adams v. Teledyne OhioCast (1993), 71 Ohio St.3d 182, Kenner Products v. Industrial Commission, 193 Ohio App. LEXIS 4033, and State ex rel. Miller v. Industrial Commission (1988) 36 Ohio St.3d 58.

The employer further argued that the facts giving rise to the instant complaint are distinguishable from State ex rel. Daimler Chrysler Corp. v. Indus. Comm. (2009), 21 Ohio St.3d 341, relied upon by the Self-Insured Department. In Daimler Chrysler the Court held that the injured worker was entitled to temporary total disability compensation because all of the medical evidence indicated that the allowed conditions had not reached maximum medical improvement. The employer argued that unlike the injured worker in Daimler Chrysler, all evidence in this claim indicates the injured worker has reached maximum medical improvement, referring to the August 19, 2009 letter from Dr. Cohen. No physician described any disability resulting from the newly allowed, yet four-year-old, post operative capsulitis condition.

While not present at the Informal Conference, the injured worker submitted a Memorandum in Response to the Employer's Position Statement. The injured worker asserted that the unilateral termination of compensation was inappropriate, and that unless the physician of record clearly states that the injured worker has reached maximum medical improvement, an employer can only pursue termination of temporary total disability compensation through the hearing process. The injured worker also pointed out that the C-84 at issue clearly indicates on its face that the injured worker has not reached maximum medical improvement. Furthermore, the injured worker noted the Staff Hearing Officer found the injured worker had not reached maximum medical improvement just two weeks prior to the employer's action. In reaching this decision, the Staff Hearing Officer rejected the arguments raised by the employer in defense of its unilateral termination of compensation. Finally, the injured worker pointed out that the employer's argument that "permanent restrictions" is akin to maximum medical improvement has been repeatedly rejected by Ohio courts, including State ex rel. Gen. Am. Trans. Corp. v. Indus. Comm. (1990), 49 Ohio St.3d 25, 26, and Daimler Chrysler. The injured worker concluded that the employer ignored the appropriate procedures for termination of compensation and instead discontinued payments based on its own judgment. While the employer ultimately resumed payment of compensation after receipt of the Self-Insured Department's findings, the employer's actions were to the detriment of the injured worker and the injured worker was without compensation for a number of weeks.

The Board agrees with the injured worker's position. R.C. 4123.56 and Ohio Adm.Code 4121-3-32 list three circumstances under which a self-insuring employer may terminate temporary total disability compensation without a hearing: (1) the employee returns to work; (2) the employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment; or (3) the employee's treating physician finds the employee has reached maximum medical improvement.

The Board finds that Dr. Cohen's notation of "permanent restrictions" is not tantamount to a statement that the injured worker has reached maximum medical improvement, particularly when the physician of record also specifically indicates on the C-84 form that the injured

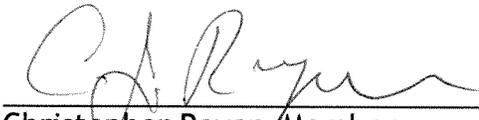
worker has not reached maximum medical improvement. This position is supported by Daimler Chrysler. On motion made by Mr. Abrams, seconded by Mr. Royer, the Board hereby upholds the finding of a valid complaint by BWC's Self-Insured Department. The Board takes notice that no other self-insured complaints have been filed against this employer since January 1, 2008.

**SELF-INSURING EMPLOYERS EVALUATION BOARD**



Kevin R. Abrams, Chairman YES

Wesley Wells, Member NOT PRESENT



Christopher Royer, Member YES

DATE MAILED: 15<sup>th</sup> DAY OF July, 2010