SELF-INSURING EMPLOYERS EVALUATION BOARD

IN THE MATTER OF:

Ball Corporation (Employer), Risk No. 3543-00

and

[redacted] (Claimant), Claim No. [redacted]

Complaint No. 17510

[redacted]

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On December 12, 2011, [redacted] (Claimant) filed Complaint No. 17510 against Ball Corporation (Employer). On January 4, 2012, the Self-Insured Department of the Bureau of Workers' Compensation (BWC) found the complaint to be invalid. On January 17, 2012, Claimant filed a request for reconsideration. On February 28, 2012, BWC's Employer Programs Supervisor upheld the finding that the complaint was invalid.

On March 6, 2012, the Claimant filed an appeal of BWC's finding of an invalid complaint. The Claimant requested that the BWC determination of February 28, 2012, be vacated and that the Self-Insuring Employers Evaluation Board (SIEEB) sanction the Employer for its actions herein. On March 27, 2012, a "Notice of Presentation to the Self-Insuring Employers Evaluation Board" was sent to the parties. This matter then came before the Self-Insuring Employers Evaluation Board on May 21, 2012, for an informal conference, but all members were not present at that informal conference. As a result, the complaint was rescheduled for

an informal conference with all SIEEB members present on October 29, 2012; discussions on this matter were concluded at SIEEB's next meeting on May 3, 2013.[1]

Relevant History of the Complaint:

On February 4, 2011, the Claimant, using a forklift, was lifting 2 units of cans, which were stretch-wrapped, all the way up in the warehouse. When he went to go forward, the top unit slid back; at the same time, he jerked his head backwards and to the right. As he was pulling out and working the levers of the forklift, he began to feel pain in his shoulder and back. He then called for a supervisor to the shipping area. Ultimately, his claim was allowed by the Industrial Commission of Ohio, and he began to receive temporary total disability compensation ("TTDC") beginning February 7, 2011.

Claimant returned to work pursuant to the Employer's light-duty program on or about July 25, 2011. This program, aka "Modified Work Program" in the collective bargaining agreement between the Employer and the United Steelworkers from March 16, 2011 through March 15, 2014, is set forth as follows:

> The Company may make available the Modified Work Program consisting of up to a maximum of 60 working days for a work related injury or illness.
>
> Employees must provide the Company with medical documentation, a completed Physicians Certificate and Work Restriction Form to be eligible for up to the maximum of 60 days.
>
> All employees in this program will stay on their shift, cannot bid or bump as long as they remain in the program. All wages and benefits will remain as they were before entering the program. All employees will be eligible for overtime.

When Claimant entered the Employer's light-duty program, his TTDC payments ceased, and he was paid his regular wages. He continued to receive his regular wages until his light-duty program ended on October 31, 2011. During the period of time when he was participating in the light-duty program, Claimant's physician-of-record, John Dunne, D.O., continued to provide evidence of ongoing disability. Following the end of the light-duty program, Claimant requested reinstatement of TTDC, but it was denied.

The issue identified in Complaint No. 17510 is whether the Employer was under a continuing order to pay TTDC and therefore obligated to continue payments upon the end of the light-duty program. **For the following reasons, we find that R.C. 4123.56(A) and Ohio Adm.Code 4121-3-32(B) do not establish a continuing order to pay TTDC after the expiration of an employer's light-duty program. Consequently, the Employer was not obligated to reinstate TTDC when it ended on October 31, 2011.**

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[1] On September 6, 2013, a "Self-Insured Joint Settlement Agreement and Release" [SI-42 form] and an "Acknowledgement of the Self-Insured Joint Settlement Agreement and Release" [SI-43 form] were filed with BWC. Paragraph 4 of the SI-42 form stated: "All pending workers' compensation claims against Ball Corporation/U.S. Can Company are included this settlement." The joint settlement agreement does not expressly refer to the Complaint herein. Therefore, the settlement of the underlying claim does not impact any pending action brought by way of a complaint as set forth in Ohio Adm.Code 4123-19-09. Hence, we must proceed accordingly.

R.C. 4123.56(A) and Ohio Adm.Code 4121-3-32(B):

R.C. 4123.56(A) provides in relevant part as follows:

> * * * Payments [of temporary total disability compensation] shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled. (Emphasis added.)

R.C. 4123.56(A) is amplified by Ohio Adm.Code 4121-3-32(B), which provides 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.

Claimant's representative contended that the light-duty assignment began on August 15, 2011, and the light-duty assignment was extended to October 31, 2011. He contended that the payment of TTDC should have resumed once the light-duty assignment ended, and TTDC should have been paid until at least the date of hearing before the Industrial Commission. Claimant's representative argued that once the light-duty work disappeared, the defense to TTDC disappeared, too. See *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

Employer's representative maintained that under the Employer's collective bargaining agreement, an employee with a light-duty assignment was paid full wages. As a result, the Claimant was not receiving TTDC at the time his light-duty assignment ended. He contended that a self-insuring employer can unilaterally terminate TTDC under one of four conditions: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another

employer; or (4) claimant has reached maximum medical improvement. [See *State ex rel. Nestle USA- Prepared Foods Div., Inc. v. Indus. Comm.*, 2003-Ohio-413.] Employer's representative contended that the Employer met the third condition and that if the Claimant was still disabled after the light-duty assignment ended, he should have applied for a new period of disability at that time.

The Employer was within its right to terminate TTDC as long as it followed *Ramirez* and Ohio Adm.Code 4121-3-32. Although there is insufficient evidence to show that Claimant was capable of returning to his former position of employment, Claimant was capable of returning to "other available suitable employment," i.e., the Modified Work Program, as required by Ohio Adm.Code 4121-3-32(B)(1)(b). The program ended after 60 days under the negotiated terms of the collective bargaining agreement.

DETERMINATION:

Therefore, based on the foregoing, the Self-Insuring Employers Evaluation Board hereby denies the appeal filed by the Claimant [redacted] on March 6, 2012, and dismisses as invalid Complaint No. 17510 filed by Claimant [redacted] against the Employer [Ball Corporation] on December 12, 2011.

SELF-INSURING EMPLOYERS EVALUATION BOARD

Karen L. Gillmor, Ph.D., Chairman YES

Gary E. Lucas, Member NO

Christopher J. Royer, Member YES

DATE MAILED: 11th **DAY OF** December **, 2013**