

SELF-INSURING EMPLOYERS EVALUATION BOARD

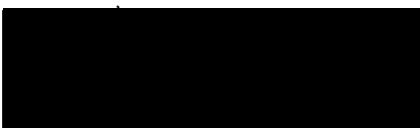
Karen L. Gillmor, Ph.D., *Chairman*
Carol A. Wilson, *Member*
Tommie Jo Brode, *Member*

Mike DeWine, *Governor*

IN THE MATTER OF:

**Children's Hospital of Cincinnati (Employer), Risk No. 20003154
and**

Complaint No. 1001174083



Brent Martini
119 E. Court Street, Suite 102
Cincinnati, OH 45202-1203

Children's Hospital Medical Center Cincinnati
3333 Burnet Avenue, #9008
Cincinnati, OH 45229-3026

Frost, Brown, Todd, LLC
301 E. 4th Street, Suite 3300
Cincinnati, OH 45202-4257

CareWorks
550 Glendon Court, Suite 300
Dublin, OH 43016-3246

Complaint

In a complaint, dated May 5, 2019, the Injured Worker alleged the Employer did not provide medical records prior to a C-92 hearing held on March 6, 2019. Attached to the complaint was a letter from the Injured Worker's representative, Brent Martini, to CareWorks dated April 28, 2019 requesting a printout of all medical payments made to date in the claim, a printout of all indemnity payments made in the claim, and all other documents in the Employer's possession related to the work injury and not already in the claim file. The letter asked that the documents be faxed to Mr. Martini. The complaint noted that instead of faxing the documents, the Employer mailed documents including physical therapy notes from a December 31, 2018 date of service received by CareWorks on January 22, 2019 and physical therapy notes from a January 28, 2019 date of service received by CareWorks on February 25, 2019. The complaint alleged that these documents were never placed in the claim file. Attached to the complaint were copies of the listed records. The listed physical therapy records were placed into the claim file on May 5, 2019.

The complaint cited to a prior Self-Insuring Employers Evaluation Board (SIEEB) decision involving the same parties, issued June 19, 2018. The prior complaint alleged the Employer did not submit medical records to the Industrial Commission (IC) prior to a hearing held on September 7, 2017, despite numerous requests and being reminded to do so by the hearing notice. On June 29, 2017, the Injured Worker requested medical and claim documents. The documents were forward to the counsel on July 5, 2017, more than 72 hours after the request was made. In addition, on the morning of the September 7, 2017 hearing on the issue of approval of a C-9, the Employer's counsel provided the Injured Worker's counsel an independent medical examination report, but not the associated medical records discussed in the report. The Employer's counsel filed the medical records in the claim file later in the day on the date of hearing. The Board found the complaint valid. The Board found the Employer in violation of Ohio Adm.Code 4123-19-03(K)(9) because requested records were not made available within 72 hours of the request. The Board further found the Employer in violation of Ohio Adm.Code 4121-3-09(A)(1) and 4121-3-13(D) for not providing the medical records prior to hearing.

Relevant History

On May 24, 2019, the Bureau of Workers' Compensation (BWC) Self-Insured Department sent the complaint to the Employer.

In a letter dated June 12, 2019, Julie Bruns of Frost, Brown, Todd, responded to the complaint. Ms. Bruns asserted the March 6, 2019 hearing involved reconsideration of a District Hearing Officer order granting a permanent partial disability award and that all evidence relevant to the issue of permanent partial disability had been previously filed, including the reports from the medical examinations conducted on behalf of the Employer on the issue of permanent partial disability. The physical therapy notes referenced in the complaint occurred after the Employer examinations on the issue of permanent partial disability and therefore were not part of the examining doctors' impairment ratings. The physical therapy notes had no bearing on the March 6, 2019 hearing. Ms. Bruns concluded by asserting the only relevant evidence at the hearing were examining doctors' opinions on impairment.

In a letter dated June 28, 2019, Self-Insured Auditor [REDACTED] found the complaint invalid. [REDACTED] noted the Staff Hearing Officer, who affirmed the District Hearing Officer, based her decision on five reports/reviews and the hearing did not involve contested issues such as treatment, claim allowance, or wages, etc. [REDACTED] noted the items that must be filed prior to hearing pursuant to Ohio Adm.Code 4123-3-13(D) and (E). [REDACTED] found it did not appear additional information or physical therapy notes were requested prior to the hearing on the permanent partial award by the opposing party and the Employer was not required to file the physical therapy notes prior to hearing. The Board notes that [REDACTED] cited the incorrect Ohio Administrative Code provision. In her letter, [REDACTED] referenced Ohio Adm.Code 4123-3-13. The provision alleged to have been violated was Ohio Adm.Code 4121-3-13.

In a letter dated July 9, 2019, Mr. Martini requested reconsideration of the finding the complaint was invalid. Mr. Martini asserted the Employer was required to file the physical therapy notes prior to hearing. Ohio Adm.Code 4121-3-09 sets forth the requirement for filing information that is to include, but not be limited to, medical reports received by the parties or their representatives from the treating physician and physicians who have seen the Injured Worker in consultation for the allowed injury. Mr. Martini asserted the Employer possessed the physical therapy notes prior to the hearing and it was a violation of the rule for the Employer to have not filed those records prior to the hearing. Mr. Martini again cited to the prior SIEEB decision.

In a letter dated September 11, 2019, Karen Thrapp, the Administrator's Designee, noted that all parties agreed the cited physical therapy notes were not provided to the Injured Worker's representative by the Employer prior to the March 6, 2019 hearing. Therefore, Ms. Thrapp found the issue to be whether those notes were relevant to the determination of the Injured Worker's right to a permanent partial award. Ms. Thrapp noted that *Adjudications Before the Ohio Industrial Commission* Memo E2 clearly limits the scope of IC permanent partial disability hearings to doctors' reports on the issue of permanent partial disability and found that such reports were available to the Injured Worker. Ms. Thrapp found the physical therapy notes identified in the complaint were not necessary for the permanent partial disability determination. Citing to *State ex rel. Cambridge Home Health Care, Inc. v. Indus. Comm.*, 124 Ohio St.3d 477, 478 (2010), Ms. Thrapp found that a physical therapist's opinion alone cannot be used to establish the existence of disability. Ms. Thrapp also distinguished the previous SIEEB decision referenced by Mr. Martini. The previous SIEEB determination involved missing evidence that was necessary and relevant to the determination of the issue at hearing. Specifically, the evidence was reviewed by the Employer's examining physician in rendering an opinion on the issue in controversy. The physical therapy notes referenced in this complaint were not reviewed by the examining physicians, the dates of service occurred after the physicians relied upon in the IC order examined the Injured Worker, and the IC's analysis of the issue of permanent partial disability was limited to the medical or clinical findings specifically expressed in a doctor's report. Ms. Thrapp upheld the finding the complaint was invalid.

In a letter dated September 26, 2019, Mr. Martini requested referral to SIEEB. Mr. Martini asserted that had the physical therapy notes been on file prior to the hearings on the issue of permanent partial disability, the notes could have been considered in conjunction with doctors' report to help determine the disability's severity.

Complaint No. 1001174083 came before the SIEEB on November 13, 2019.

Determination

The Injured Worker asserts the Employer's failure to place physical therapy notes in file prior to hearing on the issue of permanent partial disability was a violation of Ohio Adm.Code 4121-3-13(D). Ohio Adm.Code 4121-3-13(D) provides:

(D) Prior to the hearing in a contested claims matter the parties or their authorized representatives shall file the information necessary to comply with the provisions of paragraph (A)(1) of rule 4121-3-09 and paragraph (A)(2) of 4121-3-09 of the Administrative Code. Such information shall include, but not be limited to, medical reports received by the parties or their authorized representatives from the treating physician and physicians who have seen the injured worker in consultation for the allowed injury or occupational disease for which the claim has been filed.

Paragraphs (A)(1) and (2) of Ohio Adm.Code 4121-3-09 provide:

(A) Evidence and discovery.

(1) In every instance the evidence shall be of sufficient quantum and probative value to establish the jurisdiction of the commission to consider the claim and determine the rights of the injured worker to an award. Evidence may be presented by affidavit, deposition, oral testimony, written statement, document, or other forms of evidence.

(a) The parties or their representatives shall provide to each other, as soon as available and prior to hearing, a copy of the evidence the parties intend to submit at a commission proceeding.

(b) In the event a party fails to comply with paragraph (A)(1)(a) of this rule, the hearing officer has the discretion to continue the claim to the end of the hearing docket, or to a future date with instructions to the parties or their representatives to comply with the rule.

(2) The free pre-hearing exchange of information relevant to a claim is encouraged to facilitate thorough and adequate preparation for commission proceedings. If a dispute arises between the parties regarding the exchange of information, the hearing administrator, pursuant to paragraph (B) of this rule may conduct a pre-hearing conference to consider the dispute. At the conclusion of the pre-hearing conference, the hearing administrator may issue a compliance letter, which becomes part of the claim file and which shall be adhered to by the parties.

The Board agrees with the Administrator's Designee that the issue to be addressed is whether the physical therapy notes that were not filed prior to hearing were relevant to a determination of the Injured Worker's right to a permanent partial disability award.

The Board distinguishes this complaint from its prior decision issued June 19, 2018. In the prior decision, the Board found the Employer in violation of Ohio Adm.Code 4121-3-09(A)(1) and 4121-3-13(D) for failing to provide medical records prior to hearing that were relevant to the issue in controversy. Specifically, the Employer failed to provide the medical records discussed in its independent medical examination report on the contested hearing issue.

In this complaint, the physical therapy notes at issue were for dates of service after the examinations on the issue of permanent partial disability took place and were therefore not a basis for the opinions of the examining physicians. Further, *Adjudications Before the Ohio Industrial Commission* Memo E2 limits the evidence Hearing Officers may rely upon in addressing the issue of permanent partial disability. Memo E2 provides in pertinent part:

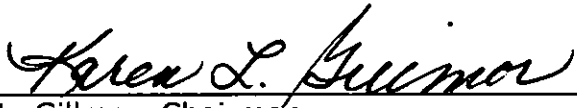
Hearing officers shall be limited in their determinations of disability under R.C. 4123.57 to the percentage of permanent partial disability based on the medical or clinical findings specifically expressed in a doctor's report.

The physical therapy notes listed in the complaint were not evidence that could be relied upon to support a decision on the issue of permanent partial disability.

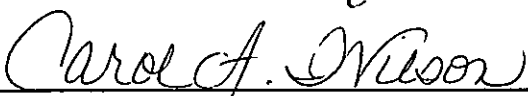
Based upon the above-cited findings, the Board affirms the findings of the Administrator's Designee contained in the decision issued September 11, 2019 and finds Complaint No. 1001174083 invalid.

This action is based upon a motion made by Ms. Brode, seconded by Ms. Wilson, and voted on as follows.

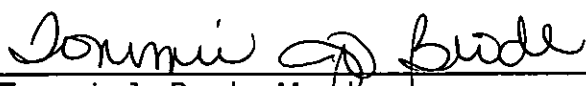
SELF-INSURING EMPLOYERS EVALUATION BOARD



Karen L. Gillmor, Chairman YES



Carol A. Wilson, Member YES



Tommie Jo Brode, Member YES

DATE MAILED: 12/23/19 DAY OF December 23rd, 2019