

SELF-INSURING EMPLOYERS EVALUATION BOARD

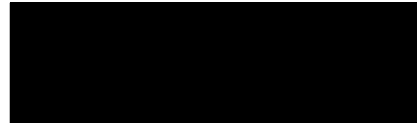
Karen L. Gillmor, Ph.D., *Chairman*
Carol A. Wilson, *Member*
Tommie Jo Brode, *Member*

Mike DeWine, *Governor*

IN THE MATTER OF:

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

Complaint No. 1001127327



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 6, 2019, the Injured Worker alleged the Employer did not approve or deny a C-9, dated July 28, 2017, within ten days of receipt. Attached to the complaint was a C-9 from [REDACTED], Ph.D., dated July 28, 2017 requesting psychotherapy one time a week for six months, psychiatric care one time a month for six months, and neurologic care one time a month for six months. The C-9 also included a recommendation for the additional allowance of mild traumatic brain injury (concussion) and post-traumatic stress disorder.

Relevant History

The July 28, 2017 C-9 at issue was placed in the claim file on August 1, 2017 when the Injured Worker filed a C-86 Motion requesting approval of the C-9 and the additional allowance of the listed conditions. In a letter dated August 7, 2017 to the Injured Worker, the Bureau of Workers' Compensation (BWC) stated the Motion was referred to the Employer and that the Employer had 30 days to respond to the request. The letter further stated that if the Employer disagreed with the Motion or did not respond, the matter would be referred to the Industrial Commission (IC) for hearing. The Employer and its representatives were copied on the letter. On October 25, 2017, BWC referred the Motion to the IC for hearing, noting the Employer's rejection of the request. The requested treatments were ultimately granted in a Staff Hearing Officer (SHO) order issued January 30, 2018.

The BWC Self-Insured Department sent the complaint to the Employer on May 21, 2019. In a letter dated June 12, 2019, Julie Bruns of Frost, Brown, Todd, responded to the complaint. Ms. Bruns asserted there was no evidence the July 28, 2017 C-9 was submitted to the Employer for approval or denial. Instead, the C-9 was submitted to the claim file with a Motion dated August 1, 2017. Ms. Bruns also noted the C-9 was authored by [REDACTED] who never submitted a C-23 Change of Physician form. Ms. Bruns noted that following the issuance of the SHO order on January 30, 2018 approving the C-9, the Employer appropriately responded and addressed the C-9 per the SHO order. Ms. Bruns provided a copy of the C-9 with the Employer's approval dated January 30, 2018.

In a letter dated June 28, 2019, Self-Insured Auditor [REDACTED] found the complaint invalid. [REDACTED] found no evidence was submitted documenting that the C-9 was faxed to the Employer/third party administrator for review or that there was any communication between the parties regarding the treatment request. [REDACTED] also noted the Employer asserted it did not receive the C-9 and therefore there was no evidence provided demonstrating the Employer failed to comply with Ohio Adm.Code 4123-19-05. The Board notes that [REDACTED] cited the incorrect Ohio Administrative Code provision. In her letter, [REDACTED] referenced Ohio Adm.Code 4123-19-05. The applicable provision is Ohio Adm.Code 4123-19-03.

The Injured Worker's representative, Brent Martini, requested reconsideration of the finding the complaint was invalid in a letter dated July 9, 2019. Mr. Martini argued the August 7, 2017 BWC letter and the Injured Worker's attendance at an Employer examination on August 23, 2017 on one of the issues listed in the Motion are evidence the Employer received the Motion. Mr. Martini asserted that even if it were true the C-9 was not sent directly to the Employer, the Motion referred to the Employer by BWC letter dated August 7, 2017 constituted a written request for treatment.

In a letter dated September 11, 2019, Karen Thrapp, the Administrator's Designee, upheld the finding the complaint was invalid. Ms. Thrapp noted that Ohio Adm.Code 4123-19-03(K)(5) requires the Employer to approve or deny a written request for treatment within ten days of receipt of the request. Ms. Thrapp found the question at issue to be whether and when the Employer received the C-9. Citing *State ex rel. Wal-Mart Stores Inc. v. Indus. Comm.*, 10th Dist. Franklin No. 04AP-188, 2005 WL 736631, Ms. Thrapp found "receipt" for purposes of the rule means delivery of a written request from the doctor requesting treatment to the Employer directly. Ms. Thrapp found that it was not possible to discern whether [REDACTED], the requesting doctor, sent the C-9 to the Employer because the form was not entirely filled out. Ms. Thrapp rejected the assertion by the Injured Worker that the BWC's referral of the Motion to the Employer constituted receipt as a matter of law. Ms. Thrapp concluded there was nothing to indicate [REDACTED] served his C-9 on the Employer in a manner designed to accomplish the Employer's receipt of the document and the fact that the Employer may at some later time through the ordinary course of business come into possession of the C-9 is not a violation of the rule.

In a letter dated September 26, 2019, Mr. Martini requested review by the Self-Insuring Employers Evaluation Board. Mr. Martini asserted Ms. Thrapp's reliance on *Walmart* was misplaced and stated the idea that the Employer obtained a medical examination and report on a treatment request of which it was not in possession is unbelievable.

Complaint No. 1001127327 came before the Self-Insuring Employers Evaluation Board on November 13, 2019.

Determination

The Injured Worker asserts the Employer violated Ohio Adm.Code 4123-19-03(K)(5). Ohio Adm.Code 4123-19-03(K)(5) provides in pertinent part:

... The employer shall approve or deny a written request for treatment within ten days of the receipt of the request. If the employer fails to respond to the request, the authorization for treatment shall be deemed granted and payment shall be made within thirty days of receipt of the bill.

The Board agrees with the Administrator's Designee that the question to be addressed is whether and when the Employer was in "receipt" of the C-9 for purposes of triggering the Employer's requirement to respond to the request within ten days. Ms. Thrapp looked to *State ex rel. Wal-Mart Stores Inc. v. Indus. Comm.*, 10th Dist. Franklin No. 04AP-188, 2005 WL 736631, to define "receipt" for purposes of the rule.

In *State ex rel. Wal-Mart Stores Inc. v. Indus. Comm.*, 10th Dist. Franklin No. 04AP-188, 2005 WL 736631, the Franklin County Court of Appeals addressed a similar issue. The C-9 requesting treatment was sent via facsimile to the BWC but there was no evidence the C-9 was sent to the employer. Shortly thereafter, the employer's legal representative accessed the BWC electronic claim file to obtain medical documents for review by a physician examining the injured worker on behalf of the employer. The C-9 at issue was included in the packet of medical documentation printed for the examining physician. The injured worker moved that the C-9 be deemed authorized on the grounds the employer failed to grant or deny the request as required by rule. The SHO adjudicating the injured worker's Motion found the employer's legal counsel was in possession of the C-9 because the C-9 was part of the examination packet and, therefore, the employer failed to respond to the C-9 within the required ten days. The Court disagreed. The Court found the word "receipt" as used in the context of Ohio Adm.Code 4123-19-03 contemplated a change of possession of a written request from the employee requesting treatment (or the employee's agent or doctor) and the employer. The Court found the word "receive" as used in the rule does not mean simply "to come into possession of." The Court noted that it was only by happenstance the employer's legal counsel obtained a copy of the C-9 and, therefore, found the employer's legal counsel did not "receive" the C-9 for purposes of the rule requirements. The Court issued a writ of mandamus ordering the IC to vacate its order deeming the C-9 authorized and to remand the matter for hearing on the merits of the request.

Lacking evidence the July 28, 2017 C-9 of [REDACTED] was served on the Employer (or its representative) by the Injured Worker (or his agent or doctor), the Board finds the requirement the Employer respond to the treatment request within ten days contained Ohio Adm.Code 4123-19-03(K)(5) was not triggered. The Board further finds the Employer's receipt of the C-9 when forwarded by the BWC on August 7, 2017, does not constitute "receipt" for purposes of the rule.


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. 1001127327 invalid.

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

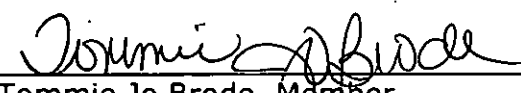
SELF-INSURING EMPLOYERS EVALUATION BOARD



Karen L. Gillmor, Chairman YES



Carol A. Wilson, Member YES



Tommie Jo Brode, Member YES

DATE MAILED: _____ **DAY OF** _____, 2019