

SELF-INSURING EMPLOYERS EVALUATION BOARD

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

~~Mike DeWine, Governor~~

SELF-INSURING EMPLOYERS EVALUATION BOARD

IN THE MATTER OF:

[REDACTED]

and

Greater Cleveland Regional Transit Authority (Employer), Risk No. 20005000

Complaint No. 1001026166

[REDACTED]

Kalish Law Firm
The Western Reserve Building
1468 West 9th Street, Suite 405
Cleveland, OH 44113

Greater Cleveland Regional Transit Authority
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Cleveland, OH 44113-1302

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Morrow | Meyer LLC
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Canton, OH 44718

On February 5, 2015, [REDACTED] ("Injured Worker") was injured when the bus she was operating "hit the ice on the road and the steering wheel jerked" as she was trying to control the bus. The Injured Worker's claim was allowed initially for DISPLACED RADIAL STYLOID FRACTURE, LEFT. On April 1, 2016, the Injured Worker filed a C-86 Motion seeking an additional allowance for "deQuervains Tenosynovitis for (L) wrist."

The Greater Cleveland Regional Transit Authority ("Employer") rejected the request for the additional allowance. By a letter mailed April 4, 2016, the Ohio Bureau of Workers' Compensation ("BWC") referred the C-86 Motion to the Ohio Industrial Commission for a hearing. After a hearing, a District Hearing Officer order denying the request was issued on July 16, 2016.

The Injured Worker appealed the denial of the C-86 Motion. After a hearing, a Staff Hearing Officer order granting the requested additional allowance for LEFT WRIST DE QUERVAIN'S TENOSYNOVITIS was issued on November 10, 2016.

On December 6, 2016, the Injured Worker filed a C-92 Application for Determination of ~~Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability~~ as the result of a newly allowed condition, the LEFT WRIST DE QUERVAIN'S TENOSYNOVITIS. The application was denied by BWC by a Tentative Order mailed April 10, 2018.

The Injured Worker filed an Objection to the Tentative Order on April 17, 2018, which was heard before a District Hearing Officer on June 20, 2018. The Employer was represented at the hearing by Mr. Mallamad who is apparently from the Employer's Legal Department. The District Hearing Officer order vacating the Tentative Order, granting the Application, and increasing the Injured Worker's percentage of Permanent Partial Disability by 4 percent was issued on June 22, 2018.

The Employer filed an IC-88 Application for Permanent Partial Reconsideration on June 28, 2018. This matter was heard before a Staff Hearing Officer on August 21, 2018. The Employer was represented at the hearing by Mr. Mallamad. The Staff Hearing Officer order was mailed on August 23, 2018, modifying the District Hearing Officer order by reducing the increase in the Injured Worker's percentage of Permanent Partial Disability to 2 percent instead of 4 percent. The order was not returned to the Industrial Commission.

Relevant History of the Complaint:

On February 14, 2019, the Self-Insured ("SI") Department of BWC received Self-Insured Complaint #1001026166, filed by the Injured Worker against the Employer, alleging the Injured Worker had been awarded a 2% Permanent Partial Disability increase, and the Employer had not yet paid the award 5 months after the injury.

On February 20, 2019, the SI Department sent a copy of the Complaint to the Employer asking for a response within 14 days. The Employer received the letter and Complaint on February 22, 2019.

On March 1, 2019, the Employer sent a letter to the Injured Worker advising her that her August 23, 2018 Permanent Partial Disability award was being processed and that a "check in the amount of \$1,149.32 will be mailed to your attorney's office on 3-5-19."

In a letter dated March 7, 2019, the Employer's representative filed an answer to the Complaint with the SI Department and denied the validity of the Complaint. The Employer's representative asserted that the Employer did not receive the order at issue and that the first the Employer became aware the Injured Worker was due a payment for a Permanent Partial Disability increase award was upon the Employer's receipt of the Complaint herein. The Employer's representative included the "Affidavit of Augustine Banks," a Workers' Compensation Claims Examiner of the Employer.

In a letter dated March 7, 2019, the SI Department found the Complaint valid.

In a letter dated March 25, 2019, the Employer's representative requested reconsideration of the finding of a valid complaint. The Employer's representative pointed out that R.C. 4123.522 requires receipt of the order by both the party and the representative, that the mailing address for the Employer and its attorney, Mr. Mallamad, were different, and that Mr. Mallamad's copy of the order had been mailed to the Employer's Legal Department.

The Employer's representative also asserted that, while the SI Auditor presumed the Employer's legal representative received the order, it cannot be presumed by law that receipt by the representative is receipt by the Employer. She further asserted that receipt by the legal representative is not the same as receipt by the Employer's workers' compensation section. In addition, the fact that the address was correct on the order creates a presumption the order was received, but that presumption is rebuttable; an order may be lost in the mail or otherwise not received. The Employer's representative contended the affidavit of Ms. Banks, a Workers' Compensation Claims Examiner for the Employer, sufficiently rebutted the presumption that the Employer received the order.

The Employer's representative asserted the Employer first received the Staff Hearing Officer order on February 22, 2019, when the Employer received the Complaint, and that the Employer's payment was issued on March 5, 2019. The Employer's representative noted the Injured Worker had filed another complaint in January 2019 that was found invalid, but that complaint did not mention the Employer had not paid the Permanent Partial Disability award. The Employer's representative contended that payment of the Permanent Partial Disability award upon receipt of the order was the timely payment of compensation, and that the Employer did not violate Ohio Adm.Code 4123-3-18(A)(11).

In a letter dated August 26, 2019, the BWC Administrator's Designee upheld the finding of a valid complaint. Nothing in the affidavit of the Employer's Workers' Compensation Claims Examiner establishes that the Staff Hearing Officer order, mailed August 23, 2018, was not served upon the Employer until February 22, 2019. On September 12, 2019, the SI Department received the Employer's appeal to Self-Insuring Employers Evaluation Board ("SIEEB"). On September 12, 2019, the "Notice of Presentation to the Self-Insuring Employers Evaluation Board" was issued to the parties and their representatives pursuant to R.C. 4123.522. This matter then came before SIEEB on September 30, 2019.

R.C. 4123.511 provides in pertinent part:

(H) Except as provided in section 4121.63 of the Revised Code and division (K) of this section, payments of compensation to a claimant or on behalf of a claimant as a result of any order issued under this chapter shall commence upon the earlier of the following:

(1) Fourteen days after the date the administrator issues an order under division (B) of this section, unless that order is appealed;

(3) If no appeal of an order has been filed under this section or to a court under section 4123.512 of the Revised Code, the expiration of the time limitations for the filing of an appeal of an order;

(4) The date of receipt by the employer of an order of a district hearing officer, a staff hearing officer, or the industrial commission issued under division (C), (D), or (E) of this section.

~~R.C. 4123.522~~ provides:

The employee, employer, and their respective representatives are entitled to written notice of any hearing, determination, order, award, or decision under this chapter and the administrator of workers' compensation and his representative are entitled to like notice for orders issued under divisions (C) and (D) of section 4123.511 and section 4123.512 of the Revised Code. An employee, employer, or the administrator is deemed not to have received notice until the notice is received from the industrial commission or its district or staff hearing officers, the administrator, or the bureau of workers' compensation by both the employee and his representative of record, both the employer and his representative of record, and by both the administrator and his representative.

If any person to whom a notice is mailed fails to receive the notice and the commission, upon hearing, determines that the failure was due to cause beyond the control and without the fault or neglect of such person or his representative and that such person or his representative did not have actual knowledge of the import of the information contained in the notice, such person may take the action afforded to such person within twenty-one days after the receipt of the notice of such determination of the commission. Delivery of the notice to the address of the person or his representative is prima-facie evidence of receipt of the notice by the person.

Ohio Adm.Code 4123-3-18(A) provides in relevant part:

(A) Administrative appeals.

(10) The bureau shall make payment of an award of compensation in a claim at the earliest time provided in division (H) of section 4123.511 of the Revised Code, except that, in all cases of a determination made under division (A) of section 4123.57 of the Revised Code for percentage permanent partial disability compensation, no payment shall be made to the claimant until a final decision on reconsideration allows such compensation.

(11) In all other cases, if the decision of the district hearing officer is appealed by the employer or the administrator, the bureau shall withhold medical benefits during the course of appeal to the staff hearing officer, but where the staff hearing officer rules in favor of the claimant, medical benefits shall be paid by the bureau immediately upon the receipt of the order, regardless of whether or not further appeal is taken. In self-insuring employers' claims, payment shall be made in accordance with applicable laws and rules.

(12) Payments of an award of compensation and/or benefits made by the bureau pursuant to a decision of a staff hearing officer shall commence immediately upon the bureau's receipt of the order.

R.C. 4123.522 provides "a rebuttable presumption, sometimes called the 'mailbox rule' that, once a notice is mailed, it is presumed to be received in due course." *State ex rel. Hadley v. Indus. Comm.*, Franklin App. No. 05AP-766, 2006-Ohio-3589, ¶10, citing *Weiss v. Ferro Corp.* (1989), 44 Ohio St.3d 178, 180.

- In order to successfully rebut that presumption, the party alleging the failure to receive notice must prove that: (1) the failure of notice was due to circumstances beyond the party's or the party's representative's control, (2) the failure of notice was not due to the party's or the party's representative's fault or neglect, and (3) neither the party nor the party's representative had prior actual knowledge of the information contained in the notice. *Id.*, citing *State ex rel. LTV Steel Co. v. Indus. Comm.* (2000), 88 Ohio St.3d 284, 286.

The Employer's Workers' Compensation Claims Examiner submitted an affidavit stating that she did not receive a copy of the Staff Hearing Officer order prior to the receipt of the Complaint herein and that she reviewed her voicemails and her telephone call history and found no calls from the Injured Worker's representative. The Employer did not, however, present any evidence that the "failure of notice was due to circumstances beyond" the Employer's control or that the "failure of notice was not due" to the Employer's or its representative's fault or neglect. The Employer did not, therefore, overcome the presumption of notice under the mailbox rule. Thus, the Employer was not entitled to relief pursuant to the mailbox rule.

The Staff Hearing Officer order modifying the District Hearing Officer order, by reducing the increase in the Injured Worker's percentage of Permanent Partial Disability to 2 percent instead of 4 percent, was mailed on August 23, 2018. The Employer mailed the check in the amount of \$1,149.32 to the Injured Worker's attorney's office on March 5, 2019. The Employer did not timely comply with its duty to act under Ohio Adm.Code 4123-3-18(A)(11).

DETERMINATION:

Based on the foregoing, the Self-Insuring Employers Evaluation Board hereby finds the Employer (Greater Cleveland Regional Transit Authority) did not timely pay the Permanent Partial Disability compensation to the Injured Worker [REDACTED] pursuant to the Staff Hearing Officer order mailed on August 23, 2018. The Employer mailed the check in the amount of \$1,149.32 to the Injured Worker's attorney's office on March 5, 2019. Thus, Complaint No. 1001026166, filed by the Injured Worker against the Employer on February 14, 2019, is valid and resolved.

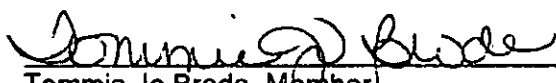
SELF-INSURING EMPLOYERS EVALUATION BOARD:


Karen L. Gillmor, Chairman

YES


Carol A. Wilson, Member

YES


Tommie Jo Brode, Member

NO

DATE MAILED: 30th DAY OF October, 2019