

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JOHNESHA BAILEY,)	
)	
Claimant,)	
)	
v.)	Hearing No. 1425856
)	
XPRESS NURSES LLC,)	
)	
Employer.)	

ORDER

This matter came before the Board on March 31, 2016, on a Petition for Review filed by Xpress Nurses LLC (“Employer”) seeking certain relief based on alleged fraud by Johnesha Bailey (“Claimant”). Employer seeks to terminate Claimant’s receipt of total disability benefits as of July 1, 2015; a reimbursement of \$3,106.04 of benefits paid to Claimant; a credit against future benefits for a missed medical examination with Employer’s medical expert; and a referral to the Fraud Prevention Bureau of the Delaware Insurance Department

Background: Claimant was involved in a compensable work accident on February 22, 2015. Claimant reported a slip-and-fall accident, injuring her right wrist and shoulder, while working for Employer. The parties entered in an Agreement as to Compensation for total disability at the compensation rate of \$221.86 per week, the applicable minimum rate under the Workers’ Compensation Act (“the Act”). Claimant’s average weekly wage at the time of injury was \$232.00 per week.

Employer scheduled Claimant for a medical examination with Employer’s medical expert (Dr. Hummer) on September 16, 2015. Claimant failed to appear for the examination, asserting that she just “ran late.” The fee charged to Employer by Dr. Hummer was \$1,500.00.

Employer then learned that Claimant, while receiving total disability benefits from Employer, was working full time for Cadia Nursing Home (“Cadia”). Employer filed its petition to terminate Claimant’s total disability benefits on October 5, and paid benefits to Claimant through October 6, 2015. Employer obtained evidence that Claimant became employed with Cadia on July 1, 2015. The amount of total disability benefits received by Claimant between July 1 and October 6, 2015, was \$3,106.04.

Employer notes that Claimant then went to the Department of Labor and completed an “Eligibility Certification Form” to receive interim disability benefits from the Workers’ Compensation Fund (“the Fund”).¹ Employer provided the Fund with information concerning Claimant’s employment status and Fund benefits were not paid.

Claimant testified that she was employed for the period stated by Employer and she did receive and cash the total disability checks she was sent. She did not know she was not allowed to do so. At the time, she was represented by counsel and her understanding from him was that she was allowed to cash those checks.² Claimant states that she had told the insurance adjuster

¹ In a normal case, when an employer who is not self-insured files a termination petition, the Fund compensates the claimant after the filing of the petition until the parties consent to a termination or until the Board enters an award. Title 19, section 2347 of the Delaware Code provides in pertinent part:

Compensation shall be paid by the Department to the employee after the filing of the employer's petition to review from the Workers' Compensation Fund until the parties to an award or agreement consent to the termination or until the Board enters an order upon the employer's petition to review. After the parties to an award or agreement consent to the reinstatement of compensation or, after the employer withdraws its petition, or, if the Industrial Accident Board orders the employer's petition dismissed, the employer shall repay to the Workers' Compensation Fund the amount paid out by the Department. A petition to review must be withdrawn whenever the parties to an agreement settle the claim without a hearing before the Board or whenever an employee consents to a termination after a petition to review has been filed with the Board.

DEL. CODE ANN. tit. 19, § 2347.

² On January 28, 2016, the Board granted a motion by Gary S. Nitsche, Esquire, to withdraw as counsel for Claimant. See *Bailey v. Express [sic] Nursing*, Del. IAB, Hearing No. 1425856 (January 28, 2016)(ORDER). Counsel’s representation was that counsel had “reached an impasse with Claimant in the current status of her case.

about her employment, but then the insurance carrier changed the adjuster on her file. She also maintains that she told Employer's doctor about her employment with Cadia. She denies that she defrauded anybody, but she is willing to pay Employer back for the \$3,106.04 she received. She also agrees to repayment of the missed examination fee for Dr. Hummer.

Determination: Employer seeks multiple forms of relief. For clarity, it is best to start with Employer's request to have Claimant referred to the Fraud Prevention Bureau of the Delaware Insurance Department for further investigation.

The Workers' Compensation Act ("Act") provides that:

If the Department or Board has reason to believe that any person is committing or has committed an act of insurance fraud, the Department or Board shall notify the Fraud Prevention Bureau of the Delaware Insurance Department, which shall review the facts and circumstances of the alleged fraud in order to determine whether administrative, civil, or other proceedings are appropriate, in accordance with chapter 24, Title 18 of the Delaware Code.

DEL. CODE ANN. tit. 19, § 2344(b)(4).

The Act makes it clear that the Board is not the proper body for making a determination of fraud. Rather, if the Board "has reason to believe" that there has been fraud, the matter is to be referred to the Fraud Prevention Bureau for a determination. Thus, the Board needs only to recite the facts that suggest that there may have been fraud. It is not a finding of fraud in itself, as that is more properly handled by the Fraud Prevention Bureau.

First, as noted above, Claimant and Employer entered into an Agreement as to Compensation for total disability. That Agreement states clearly that receipt of total or partial disability benefits requires Claimant to notify the insurance carrier "of any change in employment state and/or disability." This is as required by the Act. See DEL. CODE ANN. tit. 19,

Counsel therefore cannot continue to represent the Claimant effectively given the lack of a good working relationship." See *"Motion to Withdraw as Counsel for Claimant and to Continue the Hearing"*, at ¶ 2.

§ 2344(b)(1). Similarly, the Act requires that checks for total or partial disability carry a warning that accepting the check constitutes a representation of being legally entitled to the payment and that any false representation is punishable under the law. *See* DEL. CODE ANN. tit. 19, § 2344(b)(2). Any misrepresentation as to eligibility for benefits is subject to punishment for insurance fraud. *See* DEL. CODE ANN. tit. 19, § 2344(b)(3).

In this case, while Claimant asserts that she did notify the insurance carrier by telling the former adjuster, what is undisputed is that she continued to cash the total disability checks after she returned to employment. There is reason to believe that this was done in violation of the above provisions.

There is also the issue of Claimant's application for Fund benefits. In her Eligibility Certification Form (time stamped October 13, 2015), Claimant checked off: "I have not been gainfully employed due to my industrial accident." The form goes on to state:

I affirm that the facts stated above are true and accurate to the best of my knowledge and belief. I also acknowledge my responsibility to notify the Officer [sic] of Workers' Compensation immediately if I return to gainful employment, change my employment status, change my mailing address, or receive money from a third party action. I am aware that failure to notify the Office of Workers' Compensation of a change in my employment status while receiving Workers' Compensation Fund checks may constitute fraud and result in criminal and/or civil prosecution.

Based on the admitted fact that Claimant was gainfully employed by Cadia, there is reason to believe that the affirmation of facts on this form is incorrect and may constitute fraud.

The Board is therefore satisfied that the evidence presented is sufficient to give it reason to believe that fraud has occurred. Therefore, in accordance with title 19, section 2344(b)(4) of the Delaware Code, the Board refers this matter to the Fraud Prevention Bureau of the Delaware Insurance Department for further proceedings.

This leads us to the next relief requested by Employer. It seeks to have the Agreement as to Compensation deemed terminated as of July 1, 2015, the date of Claimant's return to work.

Certainly, it has been established that an Agreement as to Compensation can be voided upon a finding of fraud. *See* DEL. CODE ANN. tit. 19, § 2349 (noting that awards of the Board are final and conclusive "in the absence of fraud"). Thus, for example, in *Beebe Hospital v. Norwood*, Del. IAB, Hearing No. 823156 (November 27, 2013) the Board voided an agreement for total disability back to 1999 upon finding that the claimant had, in fact, been receiving wages from another employer throughout the period (as evidenced by the fifteen W-2 forms issued to her over those years). Employer in this case, though, is not seeking to void the Agreement (at least, not *ab initio*), and as discussed above the Board is not making a formal finding of fraud, leaving that determination to the Fraud Prevention Bureau.

Even in the absence of fraud, though, the mere fact of returning to work by an injured worker can create an implied agreement to termination of an open agreement for total disability benefits. *See Fague v. Delaware Park Racing Association*, Del. Super., C.A. No. 99A-05-004, Barron, J., 2000 WL 303457 at *3 (February 24, 2000); *Jones v. Spence Protective Agency*, Del. Super., C.A. No. 89A-MY-11, Gebelein, J., 1990 WL 177641 at *4 (October 26, 1990). In this case, the evidence is undisputed that Claimant did return to income-producing work. As such, the Board orders that Employer's petition for termination is granted as of July 1, 2015, the date of Claimant's return to employment.

Next, Employer seeks reimbursement of the overpayment it made of total disability benefits in the amount of \$3,106.04.

The Act does provide that:

Upon any order imposed by the Insurance Commissioner under § 2411(e) of Title 18 of the Delaware Code requiring

payment of restitution following a finding of insurance fraud, and after all rights of appeal from said order have been waived or exhausted, the Board shall, upon any motion of the party to whom restitution was ordered and after hearing and opportunity to be heard, allow a credit against benefits under §§ 2324, 2325 and/or 2326 of this title, for any restitution ordered by the Insurance Commissioner remaining unpaid. The Board shall also review orders establishing such credits upon motion based upon any change in circumstances that may warrant modification or rescission of a prior order.

DEL. CODE ANN. tit. 19, § 2347. Thus, if the Insurance Commissioner finds fraud and orders restitution, there is statutory authority for the Board to grant a credit to Employer against Claimant's future benefits in the amount of such restitution. This provision was designed to protect an employer from the consequences of a claimant's alleged fraud.

However, that statutory remedy depends on the results of the investigation of the Fraud Prevention Bureau. In the present case, although Claimant denies that she committed any fraud, to her credit she has repeatedly stated that she is willing to reimburse Employer for the overpayment of total disability benefits paid while she was employed by Cadia. The Board agrees that this is appropriate and orders that such reimbursement be made. The Board also believes that Claimant's willingness to agree to such reimbursement should be brought to the attention of the Fraud Prevention Bureau for consideration in forming its determination concerning Claimant's actions.

Finally, Employer seeks a credit against future benefits for the fee it was charged by Dr. Hummer for the missed examination. The Board has awarded such credits in the past and Claimant in this case agrees to such a credit against future benefits. As such, the Board awards to Employer a credit against Claimant's future benefits in the amount of \$1,500.00.

Conclusion: For the reasons discussed above, the Board makes a referral of this matter to the State's Fraud Prevention Bureau for further proceedings in accordance with title 19, section 2344(b)(4) of the Delaware Code.

The Board also terminates Claimant's total disability status as of July 1, 2015; orders that Claimant reimburse to Employer the overpayment of \$3,106.04; and awards to Employer a credit against future benefits in the amount of \$1,500.00 for the missed medical examination. None of this voids the acknowledgement that Claimant sustained a compensable injury. Claimant retains the ability to seek appropriate future benefits causally related to the work accident.

IT IS SO ORDERED this 13th day of April, 2016.

INDUSTRIAL ACCIDENT BOARD

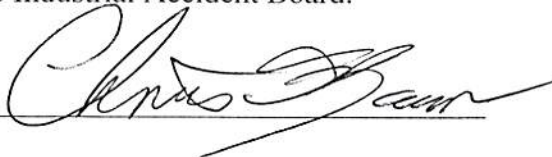


JOHN D. DANIELLO

for: 

GEMMA BUCKLEY

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date:

OWC Staff

Johnesha Bailey, Claimant *pro se*
Joseph Andrews, Esquire, for Employer
Oliver Cleary, Esquire, for the Fund

cc: Fraud Prevention Bureau
Delaware Insurance Department
841 Silver Lake Blvd.
Dover, DE 19904