INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Beebe Hospital,	)	
	)	I.A.B. No.: 823156
and	)	
	)	
Workers' Compensation Fund,	)	
Petitioners,	)	
	)	
vs.	)	
	)	
Sandra Norwood,	)	
Respondent.	)	

ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, this matter came before the Industrial Accident Board on November 21, 2013 in Wilmington, Delaware.

Beebe Hospital ("Employer") filed this Petition on behalf of itself and the Workers' Compensation Fund ("Fund") seeking review and termination of ongoing total disability benefits being paid to Sandra Norwood ("Claimant") on the grounds that she has committed actual fraud against Employer, the Fund and the Board. Employer asks the Board to terminate ongoing total disability by finding the open Agreement voided *ab initio* as of 1999 based upon actual fraud by Claimant since 1999 as per the Board's authority under 19 *Del. C.* §§ 2349 and 2344(b), *Comegys v. Chrysler Corp.*, C.A. No. 83A-SE-5 (Del. Super. 1984), *Conner v. Boulden Buses*, C.A. No. 92A-06-020 (Del. Super. 1993) and *Skinner v. Barbutes*, No. 1380681 (Del. I.A.B. Sept. 11, 2012). Upon those same grounds, Employer also asks the Board to Order Claimant to indemnify the Fund $112,337.19 and to indemnify Employer $1,782.12;[1] and to officially refer Claimant to the Bureau of Fraud pursuant to 19 *Del. C.* § 2344(b)(4).

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[1] Specifically, Employer does not seek a "credit against future benefits" for itself or the Fund because it argues there can be no "future benefits" against which to award a credit in this case. As held in *Comegys v. Chrysler Corp.*, C.A. No. 83A-SE-5 (Del. Super. 1984), the Board is authorized to void compensation agreements or awards based on fraud *ab initio*. Thus, Employer argues that a standard "credit" would be inequitable because if the Board finds that fraud voided the current Agreement by 1999, then 2003 would be the last year under 19 *Del. C.* § 2361(b) that there could ever have been any "future benefits." Employer argues that if the Board did that, it would essentially order the parties to accept awards they can never collect.

The undisputed evidence presented to the Industrial Accident Board is as follows:

In 1976 Claimant sustained an initial injury to her lumbar spine. Following this, she sustained a second injury while working for Employer in 1986. On November 14, 1986 Employer and Claimant entered into an Agreement that was approved by the Board.[2] It was later determined that Claimant sustained permanent impairment due to her second injury; therefore, the parties entered into a second Agreement and Final Receipt for this permanency on November 10, 1989.[3] A petition to place Claimant on the Second Injury Fund was filed on November 21, 1989.[4] The Board entered an Order placing Claimant on the Fund as of March 5, 1990.[5]

In compliance with the Board's Order and the open Agreement, Employer paid Claimant total disability from March 5, 1990 through September 10, 2013, bi-weekly, at the Compensation Rate of $148.51 based upon an Average Weekly Wage of $222.77.[6] During that time, and pursuant to the mandatory fraud notice requirements of 19 *Del. C.* § 2344(b)(2), Employer consistently printed the following language immediately above where Claimant was to sign for each check:

> "Your acceptance of this check for total or partial disability is a representation by you that you are legally entitled to such payment and a false representation is punishable under Federal and State laws."

Claimant signed each check immediately above or below this mandatory fraud notice, copies of which were provided to the Board for the record.[7] Also as per the Board's Order, over the next fourteen and a half out of fifteen years, Employer was reimbursed every six months by the Fund.[8]

Throughout the entire period at issue, Employer had Claimant undergo annual defense medical examinations to confirm whether she remained totally disabled. During those times,

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[2] Employer's Exhibit 1.
[3] Employer's Exhibit 2.
[4] Employer's Exhibit 3.
[5] Employer's Exhibit 4.
[6] Employer's Exhibit 5.
[7] Employer's Exhibit 6; Claimant deposited these funds into 13 separate bank accounts between 1999 and 2013.
[8] Employer's Exhibit 7.

Claimant consistently informed the medical examiners that she was not working. For example, at a recent DME of April 7, 2008 the physician noted that Claimant reported the following to him:[9]

> "She has not been back to work. She still is receiving Workmen's Compensation benefits and has not worked in any capacity."

Moreover, as recently as March 18, 2013 Claimant provided Employer with a signed Affidavit in which she swore that she was not presently employed; that she was not presently self-employed; and that she has never been employed or self-employed at any time while receiving workers' compensation benefits.[10] Claimant signed the Affidavit immediately below the following language:

> "I verify that this information is true and correct based upon my knowledge, information and belief. I understand that making false statements for the purpose of obtaining Workers' Compensation benefits may result in penalties."

She also dated the Affidavit immediately above the following language:

> "*State law requires us to include the following statement* – Any person who, knowingly and with intent to defraud any insurance company or other person, files an application for insurance or statement of claim containing any materially false information or conceals for the purpose of misleading, information concerning any fact material thereto commits a fraudulent insurance act, which is a crime and subjects such person to criminal and civil penalties."

By all accounts Claimant led Employer, the Fund, various defense medical examiners and the Industrial Accident Board to believe that she was, indeed, totally disabled for the past fifteen years. Since 1999 the Fund has paid Claimant $112,337.19 in total disability while Employer has paid an additional $1,782.12. Then, on or around September 1, 2013 Employer received a subpoena from the Court of Common Pleas of Montgomery County, Pennsylvania that specifically sought any employment records on file for Claimant from her current employment at Pine Forge Academy.[11]

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[9] Employer's Exhibit 8. Pursuant to 19 *Del. C.* § 2343(c), "No fact communicated to or otherwise learned by any physician... who has attended or examined the employee or who has been present at any examination shall be privileged either in the hearings provided for in this chapter or in any action at law."

[10] Employer's Exhibit 9.

[11] Employer's Exhibit 10.

When Employer confronted Claimant with this, she finally admitted that she has been working at Pine Forge Academy since 1999, in contradiction to her affidavits and previous statements to DME physicians over the last fifteen years. By that time Employer had already issued two total disability checks to Claimant that she had not deposited dated August 27, 2013 and September 10, 2013; yet, after admitting that she had not been totally disabled since 1999, Claimant cashed both checks on September 13, 2013 before Employer could cancel them.[12]

Employer then referred this matter to legal counsel on September 18, 2013 who immediately informed the Fund about the fraud it had discovered and its intent to file the instant Petition for fraud, termination, fraud referral and reimbursement to the Fund and Employer.[13] The Petition itself notified Claimant that Employer would seek a finding of fraud, official referral to the Fraud Bureau, a forfeiture of benefits and reimbursement.[14] Claimant signed the certified mail receipt on September 23, 2013 and the Petition was filed with the Board on September 30, 2013. Claimant was also notified of the Pretrial Conference in this matter and the instant Hearing.

As stated earlier, Claimant had denied any and all employment over the past fifteen years to various defense medical examiners who would then report this to Employer and the Fund in order for Claimant to continue receiving total disability. Despite that, discovery conducted after the instant fraud Petition was filed brought to light that Claimant had informed multiple other physicians that she "is employed at Pine Forge Academy," "works as a dean in a school," "works in Montgomery County" and "is a dean at Pine Forge Academy" approximately 25 times between August 15, 2004 and December 13, 2012.[15]

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[12] Employer's Exhibit 6; Check No. C9360960 dated August 27, 2013 and Check No. C9369855 dated September 10, 2013.
[13] Employer's Exhibit 11. As per 19 *Del. C.* § 2396(b) "the Fund shall be a party to... any proceeding involving possible reimbursement to... the Fund."
[14] Employer's Exhibit 12.
[15] Employer's Exhibit 13. None of these incidents involved any medical issues concerning Claimant's back.

Claimant never informed Employer of these other records or medical providers; thus, they were never provided to the DME physicians over the past fifteen years who only had Claimant's word to rely upon when she told them that she "has not worked in any capacity." They were received by way of a subpoena sent to the Pennsylvanian law firm who had initially informed Employer that Claimant was employed for the last fifteen years.

The website for Pine Forge Academy lists Claimant as a dean for Kimbrough Hall.[16] Pine Forge Academy provided copies of every yearbook photograph of Claimant showing that she has been holding herself out to the public as a Pine Forge employee from 1999 to the present.[17] Pine Forge also provided copies of every W-2 of Claimant from 1999 to the present, which unanimously list her as a Pine Forge "employee" during the past fifteen years she collected total disability.[18]

Paystubs from Pine Forge show that Claimant's weekly wage as a Pine Forge employee is much higher than the Average Weekly Wage she ever received from Employer for total disability.[19] They also show that Claimant deposited an Employee paycheck on September 13, 2013, which is the same date that she deposited the two total disability checks from Employer immediately after admitting that she had not been totally disabled since 1999.

Official Pine Forge Leave Authorization Forms show that Claimant has signed multiple documents as an "employee" of Pine Forge over the past fifteen years.[20] Various "no work" notes sent to Pine Forge by Claimant's previously undisclosed physicians during the past decade show that she specifically asked to be taken off "cleaning duties" and other "work" at Pine Forge for unrelated respiratory problems.[21] One of these is dated January 19, 2009 which is only nine months after she informed the DME physician for Employer that "she still is receiving Workmen's

[16] Employer's Exhibit 14.
[17] Employer's Exhibit 15.
[18] Employer's Exhibit 16.
[19] Employer's Exhibit 17.
[20] Employer's Exhibit 18; Employer's Exhibit 19.
[21] Employer's Exhibit 20.

Compensation benefits and has not worked in any capacity." A Substitute Teacher / Dean Report of January 21, 2009 lists Claimant as an "employee" of Pine Forge.[22] Claimant herself signed an "Employment / Summer School Intent Form" on February 9, 2011 in which she expressly stated that "I plan to remain in my present position" and further stated that her position was "Dean of Girls."[23] She completed and signed an identical employment form again on January 4, 2012.[24]

A "Job Description" provided by Pine Forge for this hearing shows that, in addition to Claimant's regular duties associated with being a dean, she is expected to "take care of all custodial duties in Kimbrough Hall: cleaning the restrooms, mopping and cleaning the hallways, laundry room, stairwells and recreational room."[25] Finally, as recently as August 5, 2013 Claimant signed an Acknowledgment and Certification Form for Pine Forge stating:[26]

> "I expressly acknowledge and understand that my status, as an *employee*... will be contingent upon completion of the background check and finger print requirements."

This was exactly four days after she deposited a total disability check from Employer after signing directly above the following statement, which pursuant to § 2344(b)(2) and as stated earlier, was printed upon each of the more than 300 checks that Claimant received from Employer throughout the entire time she knowingly worked at Pine Forge Academy:[27]

> "Your acceptance of this check for total or partial disability is a representation by you that you are legally entitled to such payment and a false representation is punishable under Federal and State laws."

19 *Del. C.* § 2349 has long been recognized by Delaware's Courts to grant the Board inherent authority to overturn awards and agreements on the basis of fraud.[28] That statute states that "an award of the Board, *in the absence of fraud*, shall be final and conclusive between the parties."

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[22] Employer's Exhibit 21.
[23] Employer's Exhibit 22.
[24] Employer's Exhibit 23.
[25] Employer's Exhibit 24.
[26] Employer's Exhibit 25.
[27] Employer's Exhibit 6; Check No. C9340496 dated July 29, 2013.
[28] *Comegys v. Chrysler Corp.*, C.A. No.: 83A-SE-5 (Del. Super. July 20, 1984). As per *Conner v. Boulden Buses*, C.A. No. 92A-06-020 (Del. Super. Feb. 19, 1993), this required the Board to have held the instant hearing on the issue of fraud.

Relying upon § 2349, in *Comegys v. Chrysler Corp.*, No. 592791 (Del. I.A.B. Apr. 14, 1982) and its companion case *Comegys v. Chrysler Corp.*, No. 592791 (Del. I.A.B. Aug. 16, 1983) the Board, with Superior Court approval, laid out the following five elements a moving party must prove in order to void an open agreement or prior Board order *ab initio* upon the basis of fraud:

(1) The defendant made a substantial, material misrepresentation respecting the transaction;

(2) The representation must be false;

(3) The defendant must have known the representation was false when he made it;

(4) The defendant made the representation with the intent to induce the plaintiff to act on it; and

(5) The plaintiff did act in reliance on the statement and was harmed as a result.

First, for the past fifteen years Claimant represented to Employer, the Fund and DME physicians upon which both relied that she has been totally disabled, has not worked in any capacity and is incapable of working. She also represented this each time she signed the more than three hundred total disability checks and on the 2013 affidavit. Those are material misrepresentations respecting whether she was entitled to total disability benefits for the past fifteen years.

Second, those representations were false. As shown by the evidence discussed above, Employer has proven that Claimant has been working full time as a Pine Forge Academy dean since 1999 at a much higher wage rate than she ever received when she worked for Employer in 1986.

Third, it is clear that Claimant knew her representations that she was "totally disabled" and "not working" were false when she made them. She deposited employment checks from Pine Forge within days or on the same day as she deposited total disability checks from Beebe Hospital. She also stated to DME physicians that she cannot work and has not worked "in any capacity" at the same time she was working at Pine Forge in a capacity she told the DME physicians she could not handle. At other times she sought "no work" notes from her other, undisclosed, physicians for unrelated issues. She signed "Employment Intent" forms as a "Dean of Girls" and has held herself

out to the public as such in Pine Forge's yearbook since 1999. She received fifteen W-2s from Pine Forge from 1999 to the present. This alone has been held to be fraud in prior Board decisions.[29]

Fourth, it is clear that Claimant made the representations with the intent of inducing Employer and the Fund to act on them. As stated in *Comegys*, "We find that this is the case because [Claimant] made this representation in order to get workman's compensation benefits. There is no other reason for the Claimant to have made this representation."[30] This is more apparent here as right after Claimant admitted to Employer that she had been employed for the past fifteen years she quickly deposited the two checks dated August 27, 2013 and September 10, 2013, signing below the fraud statement, on the same day she deposited her September 12, 2013 wages from Pine Forge.

Fifth, the Board finds that Employer and the Fund both relied upon Claimant's false representations and were harmed as a result. The Fund has been harmed in the amount of $112,337.19 and Employer has been harmed in the amount of $1,782.12 plus whatever legal costs or defense medical costs arose out of this.[31] As per the 1990 Order, Employer was ordered to confirm Claimant's continuing total disability each year via annual defense medical examinations. Employer relied entirely upon Claimant's false statements and misrepresentations to these physicians in good faith to issue total disability to Claimant for the past fifteen years when she was employed full time at Pine Forge. The 1990 Order also required the Fund to reimburse Employer every six months upon Employer's providing those DME Reports to the Fund for review so that it could verify that Claimant was totally disabled before issuing reimbursements to Employer. Thus, both Employer and the Fund individually relied entirely on the DME reports to their respective detriments in the amounts of several thousands of dollars each.

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[29] *Aakala v. State*, No. 1287779 (Del. I.A.B. Mar. 26, 2008); *Mora v. Metal Master Food Serv.*, No. 1273764 at *8 (Del. I.A.B. June 15, 2007); *Wells v. Mitchell & al.*, No. 1240948 at *13-14 (Del. I.A.B. June 21, 2004).

[30] *Comegys v. Chrysler Corp.*, No. 592791 at *8 (Del. I.A.B. Aug. 16, 1983).

[31] As Employer argues, it is the "ultimate" injured party: "All claims, including those that are fraudulent, paid from the Fund are paid with premium dollars" from its insurance policy. *Del. Op. Att'y Gen.* No. 95-IB38 (Dec. 11, 1995); 19 *Del. C.* § 2395(a).

The Board finds that Employer has met all five of the *Comegys* requirements to terminate the Agreement and 1990 Order upon Claimant's actual fraud against Employer and the Fund. Pursuant to 19 *Del. C.* § 2349 agreements and awards of the Board in the presence of fraud are void *ab initio*. Therefore, the Board GRANTS the Petition to set aside the Agreement and 1990 Order and hereby terminates total disability as of 1999 when Claimant began working at Pine Forge.

Having found as above, the Board also GRANTS Employer's request to officially refer Claimant and the record above to the Bureau of Fraud as required by 19 *Del. C.* § 2344(b)(4).

Finally, as stated above, Claimant has defrauded two separate parties, both of which detrimentally relied upon her false representations to them and the defense medical examiners upon whom they relied in good faith: Claimant knowingly defrauded Employer; she also knowingly defrauded the Fund. In affirming the Board's decisions in *Comegys*, Superior Court also held:[32]

> "A party to a voluntary compensation agreement who later discovers he has been defrauded *should seek relief from the Board.* The legislature has clearly expressed its intention to give the Board broad authority over all cases arising under Title 19 Chapter[] 23... Since the Board is required to approve all voluntary agreements and is given exclusive jurisdiction over workmen's compensation matters, *the inherent power to negate the effect of fraud must rest with the Board to provide relief when it is discovered* that such an agreement was executed fraudulently."

The effect of Claimant's fraud against the Fund has been that it paid her $112,337.19 to which she knew she was never entitled since she began working at Pine Forge in 1999. The effect of her fraud against Employer is that it paid her an additional $1,782.12 to which she also knew she was never entitled. Yet, since the Agreement is void as of 1999 it is inequitable to award a "credit against future benefits" when 2003 was the last possible year for future benefits under § 2361(b).

In *Skinner v. Barbutes*, No. 1380681 (Del. I.A.B. Sept. 11, 2012) the Board faced a similar situation. There, an employer defrauded a claimant out of approximately $10,000.00 in total

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[32] *Comegys v. Chrysler Corp.*, C.A. No.: 83A-SE-5 at *4 (Del. Super. July 20, 1984). The Board's inherent power to "negate" the effect of fraud is distinct from the Fraud Bureau's authority to "punish" or "penalize" fraudulent acts.

disability benefits and also defrauded a carrier into paying an additional $10,220.30 on a claim it never insured. The Board was aware of its authority to negate the effect of fraud under *Comegys.*[33] There, like here, the Board could not simply award a credit against future benefits as it would have been impossible for the carrier to recover a credit on a claim it never insured and to which it was no longer a party. Yet, despite the absence of explicit statutory authority, the Board and Supreme Court recognize that "the bad faith exception to the American Rule permits an administrative tribunal with ancillary equitable jurisdiction to award attorney's fees and costs to a *prevailing litigant.*"[34]

This is also indicated by 19 *Del. C.* § 2349; because fraud, by its very nature, is bad faith[35] and right after referencing Board awards in the absence or presence of fraud, § 2349 continues:

> "Whenever an award shall become final and conclusive... the *prevailing party*, at any time after the running of all appeal periods, may... file with the Prothonotary's office, for the county having jurisdiction over the matter, the amount of the award and the date of the award. From the time of such filing, the amount set forth in the award shall thereupon be and constitute a judgment of record in such court."

"Prevailing party" is more expansive than provisions limiting certain awards to the "employee."[36] By using "prevailing party" in the same section granting the Board "inherent power to negate the effect of fraud," § 2349 allowed the Board to order reimbursement to the prevailing parties in *Barbutes* dollar for dollar. The *Barbutes* solution worked and ensured that both the carrier and the claimant were fully reimbursed.

A similar *Barbutes* award is appropriate under the circumstances of this case. After all appeal periods have expired, the Fund and Employer may convert their awards into judgments with the Prothonotary of the appropriate county. Superior Court has previously approved this method.[37]

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[33] *Skinner v. Barbutes*, No. 1380681 at *3 (Del. I.A.B. Sept. 11, 2012).
[34] *Smith v. General Motors Corp.*, No. 1203901 at *5 (Del. I.A.B. Dec. 17, 2002); see also, *Brice v. Dep't of Corr.*, 704 A.2d 1176, 1179 (Del. 1998).
[35] *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997); aff'd by *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998).
[36] E.g., 19 *Del. C.* § 2320(10). This also corresponds with the Fund's explicit authority to be reimbursed. 19 *Del. C.* § 2396(b).
[37] *State v. Ruba*, C.A. No. N13J-00-670 (Del. Super. 2013); *Beebe Med. Ctr. v. Hayward*, C.A. No. S12J-05-028 (Del. Super. 2012); *Corrado Constr. v. McCall*, C.A. No. N12J-00-386 (Del. Super. 2012).

THEREFORE the Board GRANTS Employer's petition to terminate the open Agreement and 1990 Order for being void *ab initio* as of 1999 based upon Claimant's fraud. Pursuant to 19 *Del. C.* § 2344(b)(4) the Board will also refer Claimant to the Bureau of Fraud for the reasons stated. Finally, pursuant to 19 *Del. C.* §§ 2349, 2396(b), 2320(8), 2348(c) and the authorities referenced above the Board orders Claimant to reimburse the Fund $112,337.19 and orders Claimant to reimburse Employer $1,782.12 along with costs to negate the effects of her actions.[38]

IT IS SO ORDERED this 27th day of November, 2013.

ATTEST:

HEARING OFFICER

INDUSTRIAL ACCIDENT BOARD

FOR:
WILLIAM IRANE

MAILED: 12.5.13

Sandra Norwood, pro se
Edward Black, Esquire for the Fund
Joseph Andrews, Esquire for Employer

[38] See, *Jacobs v. Am. Manganese Steel Co.* (Del. I.A.B. July 10, 1930), Vol. 1, Delaware Workmen's Compensation Law Decisions (1918-1937), pp. 396-397. This would include legal costs if the parties ultimately seek judgments pursuant to 19 *Del. C.* § 2349.