BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MAIKEYSHA BRATCHER,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1496866
	)	
INTEGRITY STAFFING SOLUTIONS,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on July 20, 2020, as an evidentiary hearing on a motion by Integrity Staffing Solutions ("Employer") concerning whether there is an open or closed agreement for total disability benefits between Employer and Maikeysha Bratcher ("Claimant"). Pursuant to the Industrial Accident Board's COVID-19 Emergency Order dated May 11, 2020, this hearing was conducted by video conferencing using the WebEx video platform.

Background: Claimant was working for Employer on December 11, 2019, when she injured her left great toe. It is agreed that, on January 21, 2020, Employer tendered a single check for total disability benefits for the period from January 7 through January 17, 2020, along with a draft Agreement and Receipt.[1] Claimant has refused to sign the Agreement and Receipt.

On July 1, 2020, Employer filed a Petition for Review on the basis that Claimant has failed to sign a final Agreement and Receipt or, in the alternative, if it is found that Claimant is on an open agreement for total disability, on the basis that Claimant is able to return to work.

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[1] The draft Agreement recited that the compensation rate was $422.67 per week, based on an average weekly wage of $634.00. The parties have subsequently reached agreement that Claimant's actual average weekly wage at the time of injury was $1,103.66 per week, which would result in a compensation rate of $725.89 per week. Thus, the draft Agreement does not contain accurate wage information for Claimant. The Agreement also mistakenly checked off the payment as "partial disability" when it was meant to be for total disability.

The sole issue presented for this evidentiary hearing is whether the parties entered into an agreement for a closed period of total disability or whether the parties entered into an implied open agreement for total disability.[2]

Summary of the Evidence: Claimant testified that she started with Employer in late November of 2019. On December 11, 2019, she injured her left great toe (including a cracked toenail). She reported the injury and was sent by Employer to MedExpress, which just gave her a bandage and sent her on her way. Later, she was limping, got re-examined and was sent to Pivot Occupational Health ("Pivot").

On January 7, 2020, she was released by Pivot to full-time medium duty work (Employer's Exhibit 1). She was then re-evaluated at Pivot on January 17, 2020, at which time she was provided with a full duty (no restrictions) release (Employer's Exhibit 2). During this time, Claimant also set up an appointment with Dr. Jeffrey Barton.

Claimant denied that she received any call from the workers' compensation carrier. She spoke to "Bob" and "Tanya" at Employer and Bob told her that they would be sending out a check. She then received a check from Employer's carrier dated January 21, 2020, in the amount of $664.20. The information that came with the check recited "TTD 1/7/20-1/17/20" indicating that it was payment for total disability for that period (Employer's Exhibit 3). Claimant was also presented with a draft Agreement and Receipt (Employer's Exhibit 4). The Agreement recited that disability began on January 7, 2020 and the "Probable Length of Disability" was listed at "1 weeks [sic] and 4 days." The Receipt similarly recited that the period of disability began on January 7, 2020 and terminated on January 17, 2020. Claimant did not sign either the Agreement

[2] If it is found that there is an open agreement, then Claimant would be entitled to payment for total disability from the Workers' Compensation Fund from the date of filing of the Petition for Review during the pendency of the petition, *see* DEL. CODE ANN. tit. 19, § 2347. Because the Fund therefor has an interest in the result, counsel for the Workers' Compensation Fund was also present at this hearing.

or the Receipt. She does not recall anybody from Employer or the carrier discussing the Agreement or Receipt with her. At the time she received them, Claimant was unrepresented by counsel.[3]

Claimant testified that she has not been able to return to work because she has difficulty wearing closed-toe shoes. Dr. Barton has imposed work restrictions on her. He is treating her for two separate injuries: one to the left foot and one to the right foot.[4] She has still not returned to work.

Kimberly Kauffman works for Gallagher-Bassett, Employer's carrier. She has been the workers' compensation adjuster for this claim. The claim was reported on January 7, 2020. Employer acknowledged the existence of a compensable injury (contusion) to the left great toe. Pivot placed Claimant on medium duty restrictions, which Employer could not accommodate. On January 17, Pivot then released Claimant to full duty. After getting that full duty release, the carrier issued a single payment to Claimant for the limited period of total disability. There was no intent to issue any further disability checks. Medical bills related to the left toe injury were paid in March of 2020.

Ms. Kauffman stated that, back on January 9, 2020, she took a recorded statement from Claimant, but otherwise she has not spoken to Claimant. On January 9, she did not tell Claimant whether the claim was accepted or denied. She did not discuss wage loss or explain the purpose of agreements and receipts. Ms. Kauffman did send Claimant materials, including the draft Agreement and Receipt, which were sent the same day as the check. Ms. Kauffman has no idea who "Bob" is.

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[3] Claimant's counsel's initial contact with Claimant was on March 5, 2020.
[4] Employer's counsel stated that he was unaware of these alleged restrictions.

Ms. Kauffman called Dr. Barton and learned that he was treating Claimant for a non-work right foot injury (the work injury was to the left foot). The carrier, of course, would not pay workers' compensation benefits for a non-work right foot injury. Ms. Kauffman's understanding is that the reason Claimant has not returned to work is because of the right foot.

Decision: Employer argues that the intent was to enter into an agreement for a single-payment limited period of total disability, as reflected by the draft Agreement and Receipt, which were sent at the same time as the one check. Employer did not have any intent or implication of entering into an "open" agreement for total disability when it had a medical release indicating that Claimant could return to work full duty prior to when the check was issued.

Claimant argues that, by sending the check, the parties entered into an implied open agreement for total disability and, by statute, payment of such benefits cannot be unilaterally terminated by Employer. Termination is only granted by agreement of the parties or the issuance of a Board order. *See* DEL. CODE ANN. tit. 19, § 2347. Claimant has not consented to termination.

The Fund argues that, under the facts of this case, there was no meeting of minds to establish any agreement between the parties. Employer tendered a draft Agreement for a limited period of total disability, but Claimant did not sign that agreement. Employer never agreed to an open agreement and Claimant never agreed to a closed period of disability. There cannot be an "implied" agreement when the evidence clearly demonstrates that the parties never reached any agreement. As such, there is no agreement between the parties and there is nothing to terminate.

The Board agrees with the Fund. It is, of course, beyond dispute that an "implied" agreement can be created by the actions of the parties. Thus, for example, payment of medical expenses may establish an agreement that a compensable injury exists if those payments are deemed to have been made under a "feeling of compulsion" under the Workers' Compensation

Act. *See McCarnan v. New Castle County*, 521 A.2d 611, 616-17 (Del. 1987); *Starun v. All American Engineering Co.*, 350 A.2d 765, 767 (Del. 1975). However, a finding of an implied agreement must be reflected in the facts. When, for example, the employer/carrier pays a medical bill at almost the exact same time as it issues a denial letter for the claim, the only reasonable conclusion is that the payment of the medical bill was made in error and did not establish an implied agreement as to compensability. *See Tomic v. Healthcore*, Del. IAB, Hearing No. 1361128, at 13-14 (November 17, 2011).

In the present case, there is no dispute that Employer has acknowledged that Claimant has a compensable injury and it has paid medical expenses. The question is whether Employer has agreed to pay for an open period of total disability. As Claimant argues, if there is an "open" agreement then, by law, Employer cannot unilaterally terminate benefits. Employer must then either have Claimant's consent to the termination or receive a Board order. The question for this case is whether there ever was an implied "open" agreement. The Board agrees with the Fund that the evidence does not support such a conclusion.

It is abundantly clear that Employer never agreed to pay an open period of total disability. The one check that was paid was specifically limited to an expressed duration of disability (January 7 through 17, 2020) and, at the same time as it was tendering the check, Employer was also providing a draft Agreement expressing an expected limited period of disability ("1 weeks [sic] and 4 days") and a Receipt which unambiguously indicated the closing of the period of disability. In light of these facts, it simply cannot be stated that Employer intended to create an open-ended agreement for total disability. Employer's intent was unambiguous.

By the same token, though, it is also abundantly clear that Claimant never agreed that she was only entitled to a limited period of total disability. She did not sign either the draft Agreement

or the Receipt. For that matter, the draft Agreement itself was riddled with errors, such as expressing an incorrect average weekly wage and compensation rate, and incorrectly indicating that the payment was only for partial disability rather than total disability. In light of these facts, it simply cannot be stated that Claimant intended to enter into an agreement for a closed period of total disability. Claimant was entitled to wage loss benefits, so her mere cashing of the check cannot be read as indicating one result over the other. Cashing the checking does not imply either an open or closed period of disability.

In short, the parties have failed to establish that there is an agreement between them as to disability. At no point was there any actual meeting of the minds on the issue, nor can one be implied in light of the facts presented. Claimant never agreed to a closed period of disability and Employer never demonstrated any intent to offer anything other than a closed period.

As a result, Employer's pending Petition for Review is moot and should be withdrawn. There is no agreement to terminate. If Claimant seeks compensation for a period of total disability with respect to this work accident, Claimant will need to file a petition to determine the amount of that compensation.

IT IS SO ORDERED THIS 6th DAY OF AUGUST, 2020.

INDUSTRIAL ACCIDENT BOARD

Peter W. Hartranft /cs
PETER W. HARTRANFT

Angelique Rodriguez/cs
ANGELIQUE RODRIGUEZ

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

Mailed Date: 8/7/20

OWC Staff

Candace E. Holmes, Esquire, for Claimant
Nicholas Bittner, Esquire, for Employer
Kevin R. Slattery, Esquire, for the Workers' Compensation Fund