BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

KIMBERLY GRAHAM,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1496173
	)	
SMOKIN' JOE'S TOBACCO SHOP, INC.,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on October 8, 2020, on a motion by Kimberly Graham ("Claimant") alleging that her receipt of wage replacement benefits was improperly unilaterally terminated by Smokin' Joe's Tobacco Shop, Inc. ("Employer").

Background: The basic underlying facts in this case are not in dispute. Claimant was injured in a work accident on February 7, 2020. Employer paid Claimant's first two weeks of total disability (February 7 through February 20, 2020) properly indicating in accordance with title 19, section 2322(h) of the Delaware Code that the payment was "without prejudice" and that the claim was in dispute.

Employer then paid Claimant for an additional period of total disability benefits from February 21 through February 27, 2020. This payment was not accompanied by the statutory language concerning a payment made without prejudice. Apparently some medical bills were also paid, again without accompanying language that the payments were being made "without prejudice."

Around this the same time, Employer tendered a draft Agreement as to Compensation to Claimant recognizing a February 7, 2020 work accident. The nature of the injury was written as

"Contusion Left Knee." The Agreement as drafted was for an open-ended period of total disability. Claimant signed the Agreement but disputed the characterization of the injury as just a contusion and he crossed that word out. Employer does not accept the Agreement with the omission of the contusion language. Because of this ongoing dispute over the extent of the injury, Claimant filed a petition on May 5, 2020. That petition is scheduled to be heard by the Board on October 20, 2020.

Claimant argues that, once total disability benefits begin to be paid, an employer/carrier is not permitted to unilaterally cease payments, but must file a termination petition or reach an agreement with Claimant to terminate those benefits. Employer argues that the facts show that the parties never entered a formal Agreement as to Compensation, never reached a meeting of the minds as to benefits, and Employer never showed that payments were made under a feeling of compulsion. Claimant responds that the parties have reached agreement that Claimant was injured in a compensable work accident and it is only the extent of that injury that is in dispute.

Analysis: The starting point for this analysis is title 19, section 2347 of the Delaware Code, which provides, in pertinent part:

> Compensation payable to an employee, under this chapter, shall not terminate *until and unless* the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation *where the parties to an award or an agreement consent to the termination.*

DEL. CODE ANN. tit. 19, § 2347 (emphases added). This provision has been deemed unambiguous. "[A]bsent the employee's consent, the determination of whether an employee continues to be entitled to compensation under the law is to be made by the Board before compensation is suspended or terminated, and not by the employer or its insurer." *Huffman v. C.C. Oliphant &*

Son, Inc., 432 A.2d 1207, 1209-10 (Del. 1981). "The employer may not unilaterally terminate the benefits, even if the employer acts in good faith." *Blue Hen Lines, Inc. v. Turbitt*, Del. Supr., Nos. 423 and 444, 2000 Consolidated, Walsh, J., slip op at 9 (December 12, 2001)(*en banc*). In enacting section 2347, the General Assembly understood that an employer might have a good faith basis for thinking that it no longer owed disability benefits to a worker, but the General Assembly determined that, in such a situation, benefits to an injured worker should still continue to be paid until either the injured worker agrees to the termination or the Board enters an award formally terminating those benefits. If an employer is insured by an insurance carrier, then section 2347 provides a means for a claimant's disability benefits to be paid by the Workers' Compensation Fund (which is funded by the insurance carriers) following the filing of a termination petition. In such a case, an insurance carrier can stop paying, but only after the filing of a termination petition. An employer cannot, however, unilaterally cease disability payments prior to the filing of the petition.

It follows from this that, if Employer began to pay total disability benefits to Claimant, then Employer cannot stop making such payments absent compliance with section 2347. The issue in this case is whether Employer did begin such payments.

It is undisputed that the first payment of total disability (for a two-week period) was clearly done "without prejudice." Employer argues that that clear indication of a claim dispute should bind future payments. Claimant argues that each payment of benefits needs to follow the statutory procedure to be a proper payment without prejudice.

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

> [a]n employer or insurance carrier may pay any health care invoice or indemnity benefit without prejudice to the employer's or insurance carrier's right to contest the compensability of the underlying claim or the appropriateness

> of future payments of health care or indemnity benefits. In order for any provision or payment of health care services to constitute a payment without prejudice, the employer or insurance carrier shall provide to the health care provider and the employee a clear and concise explanation of the payment, including the specific expenses that are being paid, the date on which such charges are paid, and the following statement, which shall be conspicuously displayed on the explanation in at least 14 point type:
>
> This claim is IN DISPUTE and payment is being made without prejudice to the Employer's right to dispute the compensability of the workers' compensation claim generally or the Employer's obligation to pay this bill in particular.

DEL. CODE ANN. tit. 19, § 2322(h). The Supreme Court has recognized that this provision "exists to allow a carrier the opportunity to make payments on behalf of an employee, but explicitly reserve the right to later challenge those payments as being unrelated. This operates to benefit the workers' compensation system as a whole, because it provides for swift payments, which is what the system encourages, but notifies all parties that the claim being paid is not final and is subject to withdrawal." *Andreason v. Royal Pest Control*, 72 A.3d 115, 124-25 (Del. 2013).

The Board is satisfied that under the clear language of the statute, the "IN DISPUTE" language is meant to accompany each payment made in order for that payment to be made "without prejudice." The section provides that "any health care invoice or indemnity benefit" can be paid without prejudice. This singular phrasing identifies an individual payment. If done properly, it preserves an employer/carrier's "right to contest the compensability of the underlying claim or the appropriateness of future payments of health care or indemnity benefits." There is therefore a clear distinction between the singular payment made and future multiple payments. In addition, for a payment to be made without prejudice under the statute, the employer/carrier is required to provide "a clear and concise explanation of the payment, including the specific expenses that are being

paid" along with the required "IN DISPUTE" language. This requirement of a clear and concise explanation of the payment (plus an explanation of "the specific expenses" being paid) shows beyond doubt that it is directed to the specific individual payment being made. Under the statutory scheme, one cannot just make a single payment "without prejudice" and expect that language to apply to all future payments. The statutory language requires that the explanation and "IN DISPUTE" language be attached to each and every payment made.

The payment of total disability benefits by Employer for the period from February 21 through February 27, 2020, did not follow the statutory language and cannot be considered a "payment without prejudice" under the Act.

It follows therefore that the payment of total disability benefits by Employer for that period was not made "without prejudice." Having started paying total disability to Claimant, by law Employer cannot then unilaterally cease making such payments absent compliance with section 2347. Employer, however, argues that no agreement to pay total disability exists because the payment was not made under a feeling of compulsion under the Act.

The Delaware Supreme Court has held that section 2322(h) does not abrogate the common law rule that, for a payment by an employer or carrier to be construed as an acknowledgement of the compensability of a workers' compensation claim, the payment must be made under a "feeling of compulsion" under the Act. *See Andreason*, 72 A.3d at 125. The courts have long made it clear that payments made by an employer under a "feeling of compulsion" under the Act create an implied agreement as to compensability. *See Tenaglia-Evans v. St. Francis Hospital*, 2006 WL 3590385 at *3 (Del. 2006); *McCarnan v. New Castle County*, 521 A.2d 611, 616-17 (Del. 1987). By contrast, payments made by mistake or simple inadvertence by a carrier do not create an

implied agreement. Indeed, it has been stated that it would be "an absurd result" to hold otherwise. *Andreason*, 72 A.3d at 125.

In this case, though, it cannot be said that the payment of total disability benefits to Claimant was done by mistake or inadvertently. In fact, Employer was tendering a draft Agreement as to Compensation to Claimant along with the payment of total disability. This Agreement, drafted by Employer, was for an open-ended period of total disability (*i.e.*, it did not specify that the period of total disability ended as of February 27, 2020). Clearly, then, the payment of benefits was made because Employer recognized that Claimant had been involved in a compensable work accident and was entitled to compensation for total disability. The payment was made because Employer felt compelled to do so under the Act.

Employer argues that Claimant altered the tendered draft Agreement and that therefore no agreement had been reached. Claimant's alteration, however, had nothing to do with whether there was a compensable injury to the left knee. The alteration concerned the extent of the injury (*i.e.*, whether the nature of the injury was just a contusion or more significant). Claimant acknowledges that the extent of the knee injury is in dispute and has filed a petition to establish the extent of the injury. That does not change the fact that the parties agree that Claimant had "an injury" to her left knee and Employer felt compelled to make a payment of total disability benefits because of it. This payment was not made "without prejudice" under the procedure set forth in the Act. In light of the remedial nature of the Act, as discussed in *Huffman* and *Turbitt*, Employer cannot then unilateral cease making such payments absent compliance with section 2347.

Accordingly, Claimant's motion is granted and Employer is ordered to resume paying total disability benefits to Claimant, retroactive to February 27, 2020.

IT IS SO ORDERED this 19th day of October, 2020.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany /cs
MARK A. MUROWANY

Idel M. Wilson /cs
IDEL M. WILSON

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

Chris F. Baum
OWC Staff

Mailed Date:

Joel H. Fredericks, Attorney for Claimant
Sean A. Dolan, Attorney for Employer