BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

THELMA GARCIA-ESPINOZA,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1491086
	)	
AMERICAN BREAD COMPANY LLC,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on April 22, 2021, on a motion by American Bread Company LLC ("Employer") seeking a credit against future benefits for an overpayment of benefits paid to Thelma Garcia-Espinoza ("Claimant").[1]

Background: The following facts are undisputed: Claimant was injured at work on September 23, 2019, when a case of soup fell onto her left hand. The injury was accepted as compensable and has led to two surgeries.

Employer, through its workers' compensation carrier ("Carrier"), entered into an Agreement as to Compensation with Claimant and began to pay total disability on September 24, 2019. The Agreement listed Claimant's average weekly wage as $1,070.05, and the compensation rate was listed as $713.36 per week.

This Agreement was terminated on December 8, 2019, when Claimant attempted to return to work. She was then placed on a new Agreement as to Compensation for a recurrence of total

[1] There had also been a motion seeking reformation of the Agreement as to Compensation concerning Claimant's average weekly wage and compensation rate. By the time of this motion, Claimant no longer opposed the reformation. It is agreed that Claimant's average weekly wage should be $515.05, with a compensation rate of $343.36 per week. The sole issue to be decided concerns whether a credit for overpayment should be awarded.

disability on December 13, 2019. The Agreement again recited her average weekly wage as $1,070.05 with a compensation rate of $713.36 per week.

During the time that these two Agreements were entered into, Claimant was unrepresented by counsel. Claimant did not become represented by counsel until March 27, 2020.

As a result of the error in the average weekly wage and compensation rate, the Carrier calculates that it has overpaid Claimant by $24,367.13.

Testimony: Janet Coster testified that she is a critical claims representative for the Carrier. She has been with the Carrier for over twenty-five years. She currently is the adjuster assigned to Claimant's case, but she was not the adjuster assigned to the matter originally.

Ms. Coster explained that the Carrier's intent is to calculate an injured worker's wages accurately. When an employee is injured, the Carrier gets information concerning the gross wages from the employer. That is then sent to the "wage team" which calculates the average weekly wage and compensation rate for the employee in accordance with the rules for the applicable jurisdiction. They then put that information into the system's Wage & Rate screen and an Agreement as to Compensation is drafted. Whatever wage/rate is inputted stays there until it is adjusted. As a result, if a second Agreement is issued, it just takes the same wage/rate information from the screen as the first Agreement.

The calculation of the wage and compensation rate is done automatically. The "wage team" puts the numbers into a spreadsheet, which then runs the calculation. In Claimant's case, there was human error in inputting the wage information (an extra number was added). As a result, the average weekly wage and compensation rate were calculated incorrectly.

Ms. Coster testified that there have been occasions when an injured worker will call to question their compensation rate (some because it seems too much; others because they think it is

too little). Claimant never called the Carrier to question her wage or rate. Ms. Coster understands that Claimant is a Spanish-speaker, but the Carrier does have translators available if a Spanish caller should call in. For example, the Carrier uses a Spanish-speaking nurse case manager for Claimant.

Ms. Coster noted that in April of 2020 they received a letter of representation from Claimant's counsel in which she did ask for wage information and other documents. These were sent to counsel a few days later by the Operations Department (which just gathers the records and sends them out). Claimant's counsel also never contacted the Carrier about Claimant's wage or compensation rate.

Ms. Coster explained that she was assigned to the file on December 14, 2020. She then reviewed the file and ran an audit of it. In the process of doing this, she discovered the problem with Claimant's average weekly wage (and, hence, the compensation rate). She sent it back to the "wage team" to recalculate and it was discovered then that they had erred in the original calculation

Analysis: In this case, there is no dispute that the average weekly wage ($1,070.05) and the compensation rate ($713.36) recited on the two Agreements as to Compensation are inaccurate. The weekly wage should be reformed to $515.05, with a compensation rate changed to $343.36 per week. There is no dispute that all current and future Agreements as to Compensation are to use the correct wage and rate. That is not the dispute in this case. The question is whether the Board should make this change *retroactive* for the two prior agreements so that Employer can claim a credit against future benefits for an overpayment based on the reformed agreements.

It has been held that, when reforming an agreement, "the Board must exercise its discretion and decide whether or not the modifications will be retroactive or prospective in effect." *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96C-01-005, Cooch, J., 1996 WL 527213 at *8 (August 9,

1996). In *Ohrt*, the claimant was injured on June 2, 1992. The injury was acknowledged and the claimant was put on an open agreement for total disability. The agreement, prepared by the employer's carrier, contained an inaccurate average weekly wage and a corresponding inaccurate compensation rate. The error was not discovered by either party until January of 1994. At that time, the employer sought reformation. *See Ohrt*, 1996 WL 527213 at *1. The Board denied reformation on the basis that it was a unilateral mistake by the carrier. The Board also observed that, because of the time that had elapsed since the total disability agreement had started, it would be inequitable to permit the employer to recover the overpaid funds retroactively. *See Ohrt*, 1996 WL 527213 at *7-*8. On appeal, the Court disagreed with the Board about a "unilateral" mistake, finding that it was a mutual mistake and that, therefore, the Board should have reformed the existing agreement so that future benefits were paid at the legally correct rate. *See Ohrt*, 1996 WL 527213 at *8. However, the Court also held that the question of whether to make the modification retroactive was committed to the sound exercise of the Board's discretion. *Id.*

The issue has arisen in a variety of circumstances over the years. In *Gant v. Phoenix Steel Corp.*, Del. Super., C.A. No. 94A-04-002, Bifferato, J., 1995 WL 562142 (August 8, 1995), a carrier began to make an overpayment in 1982. In 1993, the carrier became insolvent and the account was transferred to Delaware Insurance Guaranty Association ("DIGA") which continued to make the excessive payments. However, by July 8, 1993, DIGA discovered the error and filed a petition seeking (among other things) a credit for the overpayment. At the hearing, the claimant testified that he noticed the overpayment when it began and he had brought it to his attorney's attention. His attorney contacted the carrier twice about it, but the carrier took no action.[2] The claimant admitted that his attorney had warned him that he would eventually have to repay the

[2] As noted, this carrier subsequently became insolvent.

money. *See Gant*, 1995 WL 562142 at *1. Under those circumstances, a credit for the overpayment was granted to DIGA.

In *Hall v. Wilmington Housing Authority*, Del. IAB, Hearing No. 1302219 (April 24, 2009)(ORDER), the employer managed to understate the claimant's average weekly wage, but still ended up paying too high of a compensation rate. While the agreement was reformed to state the correct wage and compensation rate, the Board declined to make the change retroactive (and thus declined a credit) on the basis that the employer was primarily responsible for the error and the claimant's mistake was only in assuming that the employer had checked the accuracy of its calculations. *See Hall*, at 4.

In *Dale v. Tire Sales & Service*, Del. IAB, Hearing No. 1244445 (March 23, 2010)(ORDER), the claimant, who was represented by counsel, entered into three Agreements as to Compensation from November 2004 to April 2008. Each of these agreements recited a weekly wage of $658.10 and a compensation rate of $438.74. In 2010, the Board found that the claimant's average weekly wage should have been $799.69 and the compensation rate for total disability would be capped at the applicable legal maximum rate of $506.81 per week. Although it found that the claimant had been underpaid under all three agreements, the Board declined to make the reformation retroactive, noting that the claimant and his original counsel were at fault for not checking the rate at any time during the period in question and the claimant's delay in challenging the rate (until a time after the employer's ownership had changed) made the issue harder to research because pertinent evidence was no longer available. For these reasons, the Board, in its discretion, decided that the claimant should bear the burden for the past underpayment. *See Dale*, at 8-9.

In *Cruz v. Star Building Services, Inc.*, Del. IAB, Hearing No. 1318869 (July 19, 2011)(ORDER), the claimant, beginning in 2008, was paid total disability at the rate of $267.32

per week, based on an average weekly wage of $400.97. In 2009, following a hearing, the Board terminated total disability and awarded partial disability benefits at the rate of $100.31 per week based on a loss of earning capacity compared to the average weekly wage of $400.97. After the Board's decision, the employer then moved for reargument alleging that the average weekly wage was wrong. The Board, in December of 2009, denied the reargument, noting that that was not an issue raised at the termination hearing, and directing the employer to request an evidentiary hearing on the issue at which evidence could be presented. Instead of doing this, the employer waited until October 27, 2010, to file another termination petition and, in connection with this, asked for reformation of the average weekly wage and compensation rate. *See Cruz*, at 2. The Board eventually found that the claimant's true average weekly wage was $183.17, which (because it was below the applicable minimum rate) was also her compensation rate. *See Cruz*, at 12. In deciding whether to make the reformation retroactive and award a credit, the Board observed that it was "hard to imagine" that the claimant did not notice that she was being paid more in total disability than she would have received if she continued working. As such, she bore some fault for not recognizing the overpayment, although the Board also accepted that the claimant likely did not know how workers' compensation benefits were to be calculated. On the other hand, the employer did not check or challenge the rate until after a full termination hearing and then, when told to file an evidentiary hearing on the subject, waited about a year before seeking to have the agreement reformed. Weighing these factors, the Board denied a credit, finding that the employer had rested on its rights too long. *See Cruz*, at 13-14.

In *Simms v. Luxe Communications*, Del. IAB, Hearing No. 1381043 (October 24, 2013)(ORDER), the claimant was compensated at the rate of $622.05 per week when he should have only received $294.95 per week. The total overpayment came to $17,336.30. In this case,

though, the claimant was also co-owner (with his wife) of the employer. The incorrect wage information that the carrier relied on came from the claimant himself. The Board awarded the full credit to the carrier, stating that, under the circumstances, the claimant should not be permitted to benefit from the errors that were made. *See Simms*, at 11-12.

Thus, it is clear that the exercise of the Board's discretion as to whether to make a reformation retroactive is highly factually dependent. In the present case, as in *Cruz*, Claimant ended up being paid more for total disability than she would have earned if she was uninjured. On the other hand, Claimant is unsophisticated and there is no reason to think that she would know how workers' compensation benefits are calculated. Unlike the claimant in *Dale*, she was unrepresented by counsel when the Agreements as to Compensation were entered into. By contrast, the Carrier is a sophisticated professional organization who does such calculations as a regular part of its business. It issued not one, but two Agreements as to Compensation to Claimant with the incorrect information. Unlike the claimant in *Simms*, the fact that that information was incorrect was no fault of Claimant.

Having said this, it is also true that Claimant obtained counsel on March 27, 2020, and, by early May of 2020, Claimant's counsel had the wage records for Claimant. Counsel also did not notice the overpayment despite having the agreements and the pertinent wage records. Still, in fairness to counsel, there was no active litigation going on in the case that would necessarily cause her to recalculate the wage or compensation rate from the documents. The first petition filed in this matter was Employer's Petition for Review filed on January 5, 2021.[3]

[3] It should be noted that total disability benefits have been paid by the Workers' Compensation Fund since the filing of the petition, but they have been paid at the correct compensation rate of $343.36 per week, based on the correct average weekly wage of $515.05.

The Board also takes into account that, unlike the employer in *Cruz*, Employer/Carrier here did not delay on bringing the reformation issue to the Board's attention once the error was found. It is also worth noting that Claimant has received the benefit of these overpayments such that she is in a better financial position now than if the wage and compensation rate were calculated correctly. Granting a credit would not, in that sense, be causing her any financial harm.

Taking all of this into consideration, the Board makes the following observations: to grant a credit in the full amount of the overpayment would be inequitable because it would completely absolve Carrier of all responsibility for an error that was totally self-created. By the same token, though, to fully deny a credit would be inequitable because the extent of the overpayment (receiving more in workers' compensation than Claimant would have got if she were uninjured) is difficult to ignore. While Claimant may not have recognized the significance of the overpayment early on before she had counsel, it is more difficult to justify her continued ignorance of a significant overpayment once she had counsel and counsel received the pertinent records. Dividing the overpayment fifty-fifty between the parties would also be inequitable because that would suggest that both parties were equally at fault throughout. Clearly, though, the primary fault rests with Carrier.

Weighing all these factors, in the exercise of its discretion, the Board apportions the fault 75% to Carrier and 25% to Claimant. The total overpayment was $24,367.13. Carrier is entitled to a credit against future benefits in 25% of this amount, or $6,091.78. In light of her low income, Claimant requests that this credit only be applied against future permanent impairment and disfigurement benefits and the Board agrees that that is appropriate.

IT IS SO ORDERED this 21st day of May, 2021.

INDUSTRIAL ACCIDENT BOARD

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IDEL M. WILSON

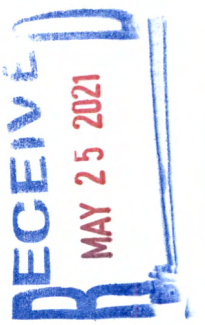
Vincent D'Anna/cm
VINCENT D'ANNA

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

Tara E. Bustard, Esquire, for Claimant
Wade A. Adams, III, Esquire, for Employer
Kevin R. Slattery, Esquire, for the Workers' Compensation Fund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