

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DWAYNE ROCHON,

Claimant,

v.

BLUE HEN SPRING WORKS,

Employer.

Hearing No. 1226353

*Claimant is
ordered to
complete agreed
upon MSA commut.*

ORDER

Pursuant to due notice of time and place of hearing served on all parties in interest, on September 22, 2010 the Board heard a motion filed by Blue Hen Spring Works ("Employer") against Dwayne Rochon ("Claimant") seeking to either compel Claimant to execute the agreed upon commutation of medical treatment expenses or alternatively determine that the entire commutation agreement is null and void requiring Claimant to refund the \$150,000 previously disbursed for the indemnification portion of the commutation. Specifically Employer asserts that the parties negotiated a non-severable commutation of both personal indemnification for Claimant's January 21, 2003 compensable work accident as well as commutation of related medical treatment expenses, execution of which was deferred while waiting for CMS (Medicare) approval of the amount of funds to be set aside.¹ According to Employer, Claimant received the \$150,000 for personal indemnification as agreed to and subsequently Medicare by and through CMS, after requiring Employer to provide additional funds above and beyond the original

¹ See Employer's Exhibit 1 (correspondence related to the final terms of the agreed upon commutation).

proposal made by Employer, approved a Medicare Set Aside of \$210,518.00 in Claimant's case.² Now that CMS has provided this approval and Employer has set aside these funds, Claimant should be compelled to complete execution of the medical treatment portion of the agreed upon commutation or the entire agreement found null and void with Claimant directed to return the \$150,000 for indemnification that has previously been disbursed to him.

Claimant contends that the amount approved by CMS to be contributed by Employer to the Medicare Set Aside for Claimant's future medical care is woefully under funded based on the annual amounts that Employer has paid for Claimant's care in recent years.³ Claimant is concerned that the Medicare system is being short changed or defrauded, so to speak, and that once the under funding is discovered, Medicare will seek indemnification from Claimant or his counsel.

In response to Claimant's concerns, Employer argues that it is CMS, the arm of Medicare charged with making such determinations, that has requested that \$210,518.00 be the amount set aside by Employer. As such, CMS has determined that this amount is sufficient to protect Medicare's interests.

Based on the information available to the Board at this time, the Board finds that Claimant shall be required to execute the remainder of the commutation agreement previously agreed to by and between the parties within ten business days of the issuance of this Decision. In reviewing the terms negotiated by the parties as it relates to the entirety of this agreement the Board is convinced that Claimant expressed a willingness to execute the medical commutation once CMS had provided approval for the set aside amount. Counsel for Claimant did not dispute that intention in the course of this legal hearing. Instead, counsel argued that he simply never

² See Employer's Exhibit 3 (CMS approval paperwork).

imagined that CMS would be so far off in providing their approval. While the Board appreciates Claimant's concern in this regard, it is hard to imagine that Claimant is better situated to protect the interests of Medicare than Medicare itself. Employer originally offered a Medical Set Aside of just over \$31,000 to Medicare for consideration. That amount was rejected by Medicare and Medicare requested the \$210,518.00 amount that Employer has since agreed to set aside. Given Employer's compliance with the substantially increased amount requested by Medicare, it is hard to appreciate precisely how a fraud has occurred. Nonetheless, Claimant agreed to the present commutation once CMS approval was granted. CMS has approved and Claimant must now complete the transaction.

Accordingly, as noted above, Claimant is directed to complete execution of the agreed upon medical commutation within ten business days of the issuance of this Decision.

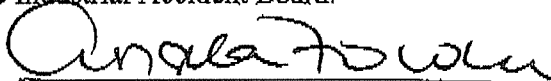
IT IS SO ORDERED THIS 29 DAY OF SEPTEMBER, 2010.

INDUSTRIAL ACCIDENT BOARD


HAROLD BARBER


VICTOR EFOLITO JR.

I, Angela M. Fowler, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date: 10-01-10


OWC Staff

Stephen Hampton, Esquire, for Claimant
Cheryl Ward, Esquire, for Employer

³ See Claimant's Exhibit 1 (payment records indicating what expenses Employer has paid related to Claimant's medical care in recent years).