COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003626-89**

Jerome J. Donovan, III	Employee
Estate of Jerome J. Donovan, III	Claimant
STW Nutmeg, Inc.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith*****)

APPEARANCES
Kenneth M. Homsey, Esq., for the employee and claimant
Joseph J. Durant, Esq., for the insurer

WILSON, J. The claimant estate sought approval and enforcement of an agreement to settle the employee's workers' compensation case by lump sum agreement under G.L. c. 152, § 48. The employee died before the lump sum agreement was signed by the insurer and approved by the Department. An administrative judge determined that he lacked authority under the Act to order enforcement and denied the claim. We disagree, and conclude that the lump sum agreement was enforceable as a matter of law.

The case was tried on the following stipulation of facts, with referenced attachments:

> That Jerome J. Donovan (the employee) sustained a low back injury on January 18, 1989 while employed by a now defunct employer, STW Nutmeg, Inc.;
>
> That the employee was receiving benefits pursuant to G.L. c. 152, § 35, partial disability benefits, pursuant to a conference order of Administrative Judge Harris of the Department dated June 26, 1997 (See Ex. 2 hereto);
>
> That the employee had appealed the decision of Judge Harris to deny total disability benefits on July 8, 1997 (See Ex. 2 hereto);

***** Judge Smith did not participate in this decision.

That during the course of this appeal the parties engaged in settlement discussions which culminated on July 16, 1997 in an agreement to lump sum settle the employee's case. (See Ex. 3 and 5 hereto). This agreement was memorialized in a letter by the employee's counsel on July 16, 1997 (See Ex. 5 hereto);

That the employee's counsel requested a Lump Sum Conference by submission of Form 116 "Request for Lump Sum Conference" to the Department on July 16, 1997 (See Ex. 6 hereto);

That also on July 16, 1997 the employee withdrew his appeal of Judge Harris's Order (See Ex. 7 hereto);

That a Lump Sum Conference was scheduled by the Department for August 15, 1997 (See Ex. 8 hereto);

That the employee fell sick the morning of the lump sum conference and was thereby prevented from going forward at that time;

That the lump sum conference was postponed to September 5, 1997 and the employee was admitted to the hospital;

That on August 25, 1997 the employee had signed an affidavit, a lump sum settlement agreement and other related documents in preparation of presenting the case for Administrative Law Judge Approval on September 5, 1997 without the necessity of appearing;

That the employee died in the hospital on August 29, 1997 prior to the lump sum settlement conference of September 5, 1997;

That the attorney for the insurer has refused or declined to sign the lump sum settlement agreement forms because of the death of the employee;

That at no time prior to September 5, 1997 had the insurer withdrawn its offer to settle the case for the lump sum payment of $50,000.00. That on September 5, 1997 the parties appeared at the lump sum settlement conference before Administrative Law Judge Nicholas Vergados, and he withdrew the case from the list because the lump sum settlement agreement was not signed by the attorney for the insurer. This action by Judge Vergados was over the objection of the attorney for the employee and estate who had requested either approval, denial or referral to the Reviewing Board of the Department.

(Stipulation of Facts; Dec. 2-4.)

The employee's estate filed a claim seeking approval and enforcement of the § 48 lump sum agreement. The claim was denied at conference. The claimant appealed and a hearing was held. (Dec. 1.) Thereafter, the administrative judge issued a decision in which he denied the claim, reasoning that the failure of the insurer to sign the agreement left the agreement short of the § 19 requirement that any payment of compensation shall be by written agreement by the parties.[1] (Dec. 5, 8.)

The appeal by the claimant presents a question of first impression: Is the signature of the insurer necessary on a lump sum agreement which is in all other respects appropriate for approval, where the insurer's sole reason for withholding its signature is the death of the employee while awaiting lump sum approval? The insurer does not deny the fact that an agreement for the payment of $50,000.00 had been reached to settle the employee's accepted industrial injury, just as stated in the confirmation letter. The only argument the insurer makes is that the lack of its signature on any writing renders the agreement unenforceable.

The judge's denial of the claimant's request for approval of the § 48 agreement follows language in Ferreira v. Arrow Mutual, 15 Mass. App. Ct. 633 (1983), a case involving an employee death prior to department approval of an otherwise complete lump sum agreement. In that case the court stated:

> [W]e believe that when an instrument with the finality of an agreement for redeeming liability *has been executed* and filed with the Division, presented to the single member for approval at a hearing conference, and recommended for approval by that member, the insurer may no longer unilaterally rescind the agreement.

---

[1] General Laws c. 152, § 48, provides in pertinent part:

> (1) Under the conditions and limitations specified in this chapter, the insurer and employee may . . . by an agreement pursuant to section nineteen, redeem any liability for compensation, in whole or in part, by the payment by the insurer of a lump sum amount.

General Laws c. 152, § 19, provides in pertinent part:

> (1) Except as otherwise provided by section seven, any payment of compensation shall be by written agreement by the parties and subject to the approval of the department.

Id. at 635 (emphasis added). Based on this reasoning, the judge concluded that only an agreement *signed by both parties* is subject to the *ex post facto* approval by the department, rendering the agreement enforceable. The Ferreira court also reasoned:

> [T]he act should be construed in a manner which does not make the arbitrary date of approval by the Division determinative of the rights of an employee who has died. 'Otherwise, the success or failure of those for whose benefit . . .[§ 48] was enacted might depend upon . . . the interval between the date' of filing of the agreement and the date of its approval by the Division. Henderson's Case, 333 Mass. At 495. To allow the outcome to depend on 'such arbitrary matters' as the 'time lapse' between the filing and approval is neither consonant with judicial authority, see Bagge's Case, 369 Mass. at 132, n.5, nor with the settled rule that the statute is 'to be construed liberally for the protection of the injured employee.' Meley's Case, 219 Mass. 136, 139 (1914).

Id. at 637.

The Appeals Court relied on Ferreira in an unpublished memorandum decision pursuant to Rule 1:28. In Bertocchi's Case, 42 Mass. App. Ct. 1122 (1997), the court remanded the case to the department for further findings on whether certain documents were sufficient to meet the requirement of a "written agreement" under §§ 48 and 19. In the remand decision, the hearing judge denied the widow's claim for enforcement of the agreement. The reviewing board affirmed the decision, incorporating the reasoning of the Bertocchi Appeals Court memorandum decision. Bertocchi v. Nibur Carpet Co., 14 Mass. Workers' Comp. Rep. 55 (2000). The reviewing board noted the findings of the judge on remand:

> [T]he case before [the administrative judge prior to the Appeals Court remand] had been tried on an Agreed Statement of Facts. The record presented to the Appeals Court apparently contained various documents, which were not clearly marked and were not identified as exhibits either in the hearing decision or in the Agreed Statement of Facts. The Appeals Court concluded that the Department was in error in deciding that the insurer here had the unilateral right to refuse to honor the lump sum agreement. In its remand order, the Appeals Court stated:
>
> > Because the record before us does not show with any degree of certainty when various forms and documents therein contained were in fact filed and by whom, and because they were not considered by the administrative judge, we conclude that the matter must be remanded to the Department for consideration and answer of the questions (1) whether these documents and

> form are sufficient to constitute an agreement pursuant to M.G.L. c, 152, section 19 . . . .

Id. at 57. The judge on remand concluded: "Nowhere in the record or in any of the documents I have found is there any form or combination of forms which would constitute an agreement pursuant to Chapter 152, § 19." The reviewing board affirmed, noting approvingly that the judge's conclusion was based on the lack of any writings existing prior to the employee's death, which memorialized the agreement to settle. Id. at 58.

The question here is similar to that in Bertocchi, but more narrowly focused. Unlike Bertocchi, various lump sum documents and related writings existed at the time of this employee's death. The parties stipulated at oral argument before the reviewing board that the only argument the insurer maintained for its refusal to honor the lump sum agreement was the lack of its signature. In the circumstances of this case, we do not consider that to be a valid reason for its non-performance of the settlement contract under § 48.

First, it is critical to note that neither § 48 nor § 19 requires that written agreements be signed, and that the agreement here embodied everything that was necessary to know to render the agreement enforceable. Moreover, the employee's counsel sent a confirmation letter to the insurer adjuster on July 16, 1997, which memorializes the parties' agreement to settle the employee's claim for $50,000.00. That letter is sufficient to satisfy the requirement of a "written agreement" under §§ 19 and 48, and states: "This will serve to confirm that you have offered $50,000.00 in lump sum settlement of the above referenced claim. The employee excepts [sic] that offer subject to approval of the Department of Industrial Accidents, and I will withdraw the appeal and request lump sum proceedings." (Stipulation of Facts, Ex. E.) At no time prior to the lump sum conference was the offer repudiated by the insurer.

Under analogous law that addresses the sufficiency of written memoranda of agreement under the Statute of Frauds for sales contracts over $500 between merchants, such a confirmation of an oral agreement constitutes an enforceable written agreement,

when not repudiated by the party to be bound, *notwithstanding the lack of that party's signature*. Subsection (1) of G. L. c. 106, § 2-201 sets out the general rule:

> Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

General Laws c. 106, § 2-201(2) provides the exception to this rule:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Following the logic behind this statutory exception to the general Statute of Frauds rule, the insurer's refusal to sign the § 48 agreement at issue here is not a bar to the enforcement of the agreement memorialized in the confirmation letter, and subsequently in the lump sum agreement itself.

Another telling attribute of the confirmation letter is its statement that the employee was going to withdraw his appeal of the conference order reducing his benefits. This makes out a case of detrimental reliance on the part of the employee, induced by the insurer's promise to pay $50,000.00 to settle the case. "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice." Loranger v. Hausermann, 376 Mass. 757, 760 (1978), quoting Restatement Second of Contracts § 89B(2). "When a promise is enforceable in whole or in part by virtue of reliance, it is a 'contract' and it is enforceable pursuant to a 'traditional contract theory' antedating the modern doctrine of consideration." Id. at 761. See also Hurwitz v. Bocian, 41 Mass. App. Ct. 365, 370 (1996). The application of the theory in the present case is apparent: The insurer's $50,000.00 offer induced the employee to withdraw his appeal of the conference order, which fact was made known to the insurer, and which forbearance to

appeal could only be remedied by the enforcement of the promise to pay $50,000.00. Accord Correia v. DeSimone, 34 Mass. App. Ct. 601, 603-605 (1993)(oral agreement to settle case during trial enforceable due to trial court's reliance placed in report of such structured settlement, with court ruling that judicial estoppel prevented Statute of Frauds' application barring enforceability).

We are persuaded, as a final matter, that the lump sum agreement is governed by the rule of law that, "[i]n the absence of contrary provisions, contracts are generally held to survive the death of one of the parties." Kowal v. Sportswear by Revere, 351 Mass. 541, 544 (1967). The parties had reached a meeting of the minds as of July 16, 1997, referenced in the confirmation letter of the employee's attorney, at which point the contract was formed. Nothing in this case removes it from the scope of the general rule. Compare Thomas v. Mass. Bay Transportation Authority, 39 Mass. App. Ct. 537 (1995) (a conditional acceptance or an expressly stated condition precedent that a document be signed may relieve a party to a settlement from performance).

Because under the circumstances of this case the lump sum agreement is enforceable without the insurer's signature, and the parties stipulate to its legal adequacy in all other respects, we reverse the decision, approve the lump sum agreement, and order the insurer to pay benefits in accordance with such agreement.

So ordered.

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: August 18, 2000

_____
William A. McCarthy
Administrative Law Judge