COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS**.: 050694-02, 010317-04, 010319-04, 010321-04, 010322- 04, 010550-04, 010568-04

Frank Stillman	**Employee**
General Dynamics	**Employer**
Insurance Co. State of Pennsylvania	**Insurer**
Lockheed Martin	**Employer**
Ace American Insurance Co.	**Insurer**
General Dynamics	**Employer**
American Casualty of Reading, PA	**Insurer**
Lockheed Martin	**Employer**
Bankers Standard Insurance Co.	**Insurer**
General Dynamics	**Employer**
Insurance Co. State of Pennsylvania	**Insurer**
Lockheed Martin	**Employer**
Travelers Property Casualty Co. of America	**Insurer**
Martin Marietta	**Employer**
Pacific Employers Insurance Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge Rose.

APPEARANCES

Katherine Lamondia Wrinkle, Esq., for the employee
John J. Canniff, III, Esq., for Insurance Co. State of Pennsylvania
William R. Maher, Esq., for Ace American, Bankers Standard & Pacific Employers Ins. Cos.
John F. Burke, Esq., for American Casualty of Reading, PA
Thomas F. Finn, Esq., for Insurance. Co. State of Pennsylvania

Thomas B. Daniels, Esq., for Travelers Property Casualty Co. of America
Paul M. Moretti, Esq., for Electric Mutual Insurance Co. on appeal

FABRICANT, J. The Insurance Company of the State of Pennsylvania, (ICSP), appeals from a hearing decision which, inter alia, ordered it to reimburse to Electric Mutual Insurance Company (Electric), a non-party to the evidentiary hearing,[1] certain benefits Electric had paid to the employee for a work injury to his back which occurred on January 21, 1992.[2] On September 15, 2003, the employee and Electric resolved that claim by lump sum settlement under § 48, for a net amount, after attorneys' fees and costs, of $105,000, allocated, for purposes of Social Security disability benefits offset, as $88.18 per week over the employee's lifetime. (Dec. 27.)

The relevant portion of the administrative judge's award required ICSP to pay § 34 benefits for the employee's back injury from January 22, 2002 to January 5, 2005,

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[1] Given its absence from the litigation, Electric made no claim against any award of benefits the employee might realize. However, several of the insurers raised the issues of double recovery and/or Section 48 in defense of the employee's claim. (Dec. 4-7.)

[2] In mid-1995, the employee returned to work following lumbar disc surgery related to his 1992 back injury. He continued to work, "switching between full capacity and restricted capacity through January 21, 2002." (Dec. 9.) On April 28, 2004, the employee filed a number of claims alleging a back injury resulting from "aggravation of prior work injury January 21, 1992 due to cumulative stresses of work activities," seeking benefits from January 22, 2002 to date and continuing. The insurers and alleged dates of injury included Travelers of Illinois on April 1, 1995; Banker Standard Ins. Co. on December 31, 1996; Ace American Ins. Co. on September 30, 1995; Ins. Co. State of PA c/o AIG on June 30, 2000; American Casualty of Reading on June 30, 2001; and Ins. Co. State of PA c/o RSK Co. on January 21, 2002. (Dec. 12.)

and ongoing § 35 benefits after January 6, 2005, with an assigned earning capacity of $600. At issue here is the judge's order that ICSP pay Electric the entire amount of the § 34 proceeds ($111,988.89) as reimbursement for its payment to the employee of the net lump sum proceeds, $105,000, with the remainder of the § 34 proceeds credited toward Electric's earlier payments totaling $42,073.78, made pursuant to a § 10A conference order. Finally, the judge noted that $35,084.89 remaining of the § 35 benefits paid to the employee by Electric would be recouped in the amount of $88.18 per week out of ICSP's ongoing payments of § 35 benefits, in accordance with the weekly lifetime allocation set out in the settlement between Electric and the employee. (Dec. 10-11, 27-28.)

The judge's findings as to how his award against ICSP was affected by Electric's prior lump sum agreement for the same body part during an overlapping period of incapacity are as follow:

> The insurer rightfully cites Franklin v. Banner Truck Leasing Co., 14 Mass. Workers' Comp. Rep. 332, [sic] N.4(2000), as to the issue of offset. The [Electric] lump sum in the present case included an allocation over the employee's life expectancy of $88.18 per week. Therefore, using the Review [sic] Board's opinion in footnote 4, supra, any weekly award would be reduced by $88.18 per week. Behind the reasoning of Franklin is the principle that the employee can only receive one weekly benefit award for disability. . . . The allocation of the employee[']s lump sum was a calculation over the employee's entire life span (1190.8 weeks), based on an assumption that he would be receiving § 34A benefits. I have declined to award § 34A benefits, and the employee has placed his disability into issue by filing this claim. Under these circumstances, I decline to follow the legal fiction as to the weekly offset being limited to $88.18 per week. The Insurance Co. of the State of Pennsylvania was not a party to the lump sum and to use $88.18 per week in the present case, where the employee actually is receiving a closed period of Section 34 and ongoing Section 35, would violate the principle of no double recovery stated in Franklin. The net award to the employee was $105.000.00. The amount of the back order created by Section 34 benefits

> from January 22, 2002 to January 5, 2005 is $111,988.89. However, the employee already received $42,073.78 in partial benefits from Electric Mutual pursuant to the previous conference order. Therefore, the Section 34 is entirely offset, as the insurer by operation of law will be reimbursing Electric Mutual for the previous compensation paid, and the remaining offset to be applied against the partial order is $35,084.89.

(Dec. 26-27.)

In Franklin, supra, the reviewing board wrote, in dicta, that such an offset as the judge ordered here is the proper means to avoid double recovery when a prior injury is settled and another injury is then determined to cause an incapacity coterminous with the period of incapacity for which the lump sum settlement was paid. The board stated:

> The lump sum agreement here [for a back injury] allocated the net amount of the award the employee received over the employee's work life expectancy and yielded a weekly rate of $34.98. Should the employee succeed on his claim of a work-related respiratory condition, any weekly benefits should be offset by that amount to avoid double recovery. Cf. Kszepka's Case, 408 Mass. 843, 848-849 (1990)(since the lump sum did not make allocations for weekly benefits, it was impossible to determine that there would be double recovery).

Franklin, supra at 376 n.4.

In our view, the quoted Franklin dicta violates the provisions of § 48(4), and we decline to follow it. That section provides, in pertinent part:

> (4) Whenever a lump sum agreement has been perfected in accordance with the terms of this section, such agreement shall affect only the insurer and the employee who are parties to such lump sum agreement and shall not affect any other action or proceeding arising out of a separate and distinct injury under this chapter, whether the injury precedes or arises subsequent to the

> date of settlement, and whether or not the same insurer is claimed to be liable for such separate and distinct injury.[3]

Electric's lump sum settlement with the employee foreclosed any further proceedings as to the rights of those parties with regard to the 1992 back injury. That settlement, under the terms of § 48, cannot have any effect on any later litigation between the employee and other insurers. The judge's order directing ICSP to pay the employee's incapacity benefits to Electric, by way of reimbursement, is contrary to law.

On September 15, 2003, when Electric settled the employee's claim against it, it relinquished all other rights and recourses it could have pursued against the employee. Its settlement was a calculation based on any number of factors. See Berke Moore v. Lumbermen's Mut. Cas. Co., 345 Mass. 66, 70-71 (1962)(tactical determination of whether to settle a claim rather than litigate is informed by numerous considerations such as "the likelihood of success or failure, the cost, uncertainty, delay, and inconvenience of trial as compared with the advantages of settlement"); Kszepka, supra at 848 (settlement influenced by many potential factors, including liability issues, extent of future medical benefits, possibility of intervening injury or death cutting off insurer's responsibility, attitudes of administrative judges, and willingness of employee to settle). With its settlement, Electric closed the book on the merits of the various underlying issues in the case. See West's Case, 313 Mass. 146, 153 (1943)("When an agreement for compensation has been made and approved . . ., then all further inquiry into the merits of the original claim both as to liability and the amount of compensation for the period covered are, in the absence of fraud, accident or mistake, conclusively settled"). Electric's position, that it is entitled to unsought reimbursement for monies it voluntarily paid to the employee in a lump sum settlement, goes against

[3] Subsection 4 was added to § 48 by St. 1991, c. 398, § 75, following the court's decision in Kszepka, supra.

both the plain language of § 48 and these general precepts underlying the nature of settlement. (Electric Mut. br. 22).

The record is clear that Electric settled the employee's claim in 2003 with full awareness of his claims against successive insurers potentially liable for the employee's aggravation injury. (Dec. 11.) Although Electric had been ordered to pay § 35 benefits at conference, it then elected to settle rather than litigate an appeal of that order. Had it sought a hearing decision on the merits, Electric would have had the opportunity to join other insurers under 452 Code Mass. Regs. § 1.20,[4] and perhaps proceed with the voluntary mechanism for adjudicating successive insurer cases afforded by G. L. c. 152, § 15A. See Utica Mutual v. Liberty Mut., 19 Mass. App. Ct. 262, 265-267 (1985)(joinder and utilization of § 15A, though not mandatory, highly favored in multiple insurer case).

Thus, we hold Electric to its settlement with the employee, in full knowledge of his pending claims against successive insurers. The administrative judge lacked the authority to order ICSP to reimburse Electric for the benefits it paid, and we therefore reverse that aspect of his decision. G. L. c. 152, § 11C.

This is not a case where the employee has been improperly awarded overlapping weekly incapacity benefits for the same time period based upon two distinct injuries. Mizrahi's Case, 320 Mass. 733 (1947)(overlapping incapacities for independent work injuries, under different compensation acts, held to support only one recovery). Whatever the judge may have perceived as a double recovery in this case was the result of Electric's informed decision to settle the employee's claim

[4] 452 Code Mass. Regs. § 1.20(1), provides:

> An administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join, as a party, on written notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the claimant.

against it. In the two-plus years between the settlement and the judge's hearing decision, Electric did nothing to assert, let alone advance, a claim that it was entitled to reimbursement. The judge's *sua sponte* award of reimbursement was in contravention of the plain meaning of G. L. c. 152, § 48(4),[5] and we vacate that order.[6] See Atwood v. Commonwealth of Massachusetts, 19 Mass. Workers' Comp. Rep. 227 (2005)(self-insurer's failure to avail itself of remedies against potential double recovery barred its claim of offset on that basis).

So ordered.

Filed: **April 1, 2009**

Bernard W. Fabricant
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law

[5] We note that the *only* limitation § 48 places on further litigation after the execution of a lump sum settlement is prohibition of successive settlements of § 34A permanent and total incapacity benefits: "Any employee who accepts a lump sum settlement for benefits claimed under § 34A shall be precluded from any further lump sum settlements for said benefits."

[6] Were we to side with the judge and permit Electric, post settlement, to recover against ISCP, we would, in effect, sanction further litigation by all settling insurers against non-settling insurers in circumstances similar to these. We find nothing in our act to suggest the legislature envisioned such litigation post settlement. See G. L. c. 152, § 48(4).