COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015105-87**

Gilbert Terrell	Employee
McDonald's	Employer
American Motorists Insurance Co./ Kemper County Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Smith and McCarthy)

APPEARANCES
Alan M. Katz, Esq., for the employee
Michael P. Mahany, Esq., for the insurer

WILSON, J. The insurer appeals from a decision in which, after the employee had settled his case in 1991 by § 48 lump sum agreement, an administrative judge awarded further § 36 benefits related to a September 24, 1997 surgery. Because the 1991 lump sum agreement specifically referenced the separate payment of § 36 benefits, contemporaneous with the execution and approval of the lump sum agreement, we conclude that liability for further § 36 benefits was redeemed in that agreement. We therefore reverse the decision.

The parties stipulated to the following pertinent facts: The employee's claim was for § 36 benefits attributable to a September 24, 1997 surgery, which was causally related to his accepted February 13, 1987 right wrist fracture. The insurer duly paid § 30 medical benefits for the surgery. The amounts of § 36 benefits to be paid, in the event the judge awarded the benefits, were $7,383.72 for scarring and $7,172.76 for loss of function. The parties had settled the case-in-chief by an executed lump sum agreement, which was approved by the department on December 13, 1991. That agreement contained the statement, "The insurer is paying Section 36 benefits in addition to the settlement amount." An agreement for compensation for § 36 benefits attributable to the employee's injury and three prior surgeries was executed by the parties and approved by

a conciliator on the same day as the execution and approval of the lump sum agreement. (Dec. 2; Employee Exs. 1 and 2.)

Based on these stipulations, exhibits and arguments of the parties, the judge concluded that the employee had undergone repeated surgeries for his right wrist fracture and that on December 13, 1991, the insurer agreed to pay § 36 benefits in addition to the lump sum settlement proceeds in language that was clear and definite: "The insurer is paying section 36 benefits in addition to the settlement amount." The judge concluded that said language did not bar the employee from collecting additional § 36 benefits. Accordingly, the judge awarded the stipulated § 36 benefits for scarring and loss of function attributable to the employee's September 24, 1997 surgery. (Dec. 4-5.)

The insurer seeks reversal of the decision based on the same language as was the foundation of the judge's award: "The insurer is paying § 36 benefits in addition to the settlement amount." The insurer contends that this language unambiguously references a one-time payment of § 36 benefits. As stipulated by the parties, the agreement for that payment was indeed executed and approved on December 13, 1991, the same day as the execution and approval of the lump sum agreement. (Dec. 2; Employee Ex. 2.) The insurer contends that, because the subject language is unambiguous, its interpretation is purely a question of law, Great Atlantic & Pacific Tea Co. v. Yanofsky, 380 Mass. 326, 334 (1980), and parol evidence of extrinsic circumstances and conduct of the parties is inadmissible. Edwin R. Sage v. Foley, 12 Mass. App. Ct. 20, 27 (1981).

The language at hand arguably might be considered ambiguous. But if it is ambiguous, the sole admitted parole evidence as to extrinsic circumstances and conduct of the parties supports the insurer's contentions. Hence the language, "is paying § 36 benefits in addition to the settlement amount[,]" most likely refers to the extrinsic evidence of the contemporaneous agreement for compensation for § 36 benefits, which was executed by the parties and approved by a conciliator on the very same day as the execution and approval of the subject § 48 agreement. (Dec. 2; Employee Exs. 1 and 2.) Although the employee in his brief invokes for the first time the insurer's conduct in paying the employee after a conference order on another § 36 claim subsequent to the

lump sum agreement, this parole evidence was not presented or admitted at hearing. Nor was it addressed in the parties' proposed findings to the judge. Accordingly, we do not consider it.

It is also significant that the subject sentence in the agreement at hand is stated in the present tense: "The insurer *is paying* . . . ." (Emphasis added). The use of the present tense strongly suggests that the parties had in mind the circumstances that existed contemporaneous with the lump sum agreement's execution, rather than anything which might arise at some indefinite time in the future. See McInnes v. Spillane, 282 Mass. 514, 516 (1933); Genard v. Hosmer, 285 Mass. 259, 263 (1934); Bourgeois v. Hurley, 8 Mass. App. Ct. 213, 214-215 (1979). The language does not reserve rights to future § 36 compensation and evidences only the parties' agreement as to present payment of § 36 benefits in addition to the payment of compensation under the lump sum agreement. Moreover, an explicit provision reserving open-ended future rights to successive § 36 claims "would have been simple to phrase had that been the intent of the parties." Genard v. Hosmer, supra.

It is well-established that "once the lump sum agreement has been approved, payment by the insurer bars the collection of further compensation other than medical benefits and vocational rehabilitation benefits." Sylvia v. Burger King Corp., 6 Mass. Workers' Comp. Rep. 272, 274 (1992). This limitation on future compensation encompasses § 36 loss of function benefits. Id. Certainly, by excluding medical and vocational rehabilitation benefits from the bar on collection of future compensation, the Legislature demonstrated that it was aware of the finality of a lump sum payment as to other compensation. The drafters did allow some flexibility, however, by allowing for any reservation of rights the parties might see fit to include in the agreement: "[T]he insurer and employee may . . . redeem *any* liability for compensation, *in whole or in part*, by the payment by the insurer of a lump sum amount." G.L. c. 152, § 48(1)(emphasis added). When this provision for explicit reservation of rights is read together with the specific exclusion of only medical and vocational rehabilitation benefits from the bar on collection of further compensation, there is no basis for reading another exception into

the clear limits of the statute. See Sylvia, supra at 274. Here, there was no such express reservation of rights.

Additional § 36 compensation was accordingly barred as a matter of law. The decision awarding further § 36 benefits is reversed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: August 11, 2000

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Suzanne E.K. Smith
Administrative Law Judge

MCCARTHY, dissenting, The insurer contends that the lump sum language in dispute, "The insurer is paying § 36 benefits in addition to the settlement amount[,]" unambiguously refers to a one-time payment of § 36 benefits. The employee, along with the administrative judge, believes that the same language specifically, clearly and definitely allows for multiple § 36 payments. (Dec. 4.) I cannot help but conclude that "[o]n its face, [the disputed language], is not clear. If such disagreement [as to the sentence's 'clear' and 'unambiguous' meaning] does not constitute *ambiguity*, [I] have difficulty understanding what would." Computer Systems of America v. Western Reserve Life, 19 Mass. App. Ct. 430, 433, n. 5 (1985)(emphasis added.) Moreover, even if the language were not to be characterized as "ambiguous," "ambiguity on the face of a contract need not be present in order to admit 'evidence of circumstances,' as long as the evidence is not offered to contradict written terms." Id., quoting Robert Indus., Inc., v. Spence, 362 Mass. 751, 754 (1973). Therefore, under either approach parol evidence is available to assist in the interpretation of the lump sum agreement.

That parol evidence is a November 18, 1996 conference order of payment on a subsequent § 36 claim in 1995, which the insurer did not appeal. (Employee's Brief, 2.) The employee argues that this unappealed order establishes that future § 36 claims were not precluded by the lump sum agreement as a matter of law. See Haberger v. Carver, 297 Mass. 435, 440 (1937); Bucholz v. Green Bros, Co., 290 Mass. 350, 355-356 (1935). This appears to be correct as the insurer accepted the conference order, in accordance with § 10A(3), and should therefore be barred from relitigating the question of continuing exposure (liability) to such claims. See Cerasoli v. Hale Development, 13 Mass. Workers' Comp. Rep. 267, 269-270 (1999). Besides, "[t]here is no surer way to find out what parties meant, than to see what they have done." Pittsfield & North Adams R.R. v. Boston & Albany R.R., 260 Mass. 390, 398 (1927). "A person's actions subsequent to executing a legal document which tend to show his understanding of the document's legal effect may be considered in determining his intention at the time of execution." Bourgeois v. Hurley, 8 Mass. App. Ct. 213, 215-216 (1979). See also Lembo v. Waters, 1 Mass. App. Ct. 227, 233 (1973); Rizzo v. Cunningham, 303 Mass. 16, 21 (1939). Finally, even if the insurer did not realize what it was getting into, i.e., did not intend that § 36 should generally remain open, its subsequent conduct certainly indicates an acquiescence in the interpretation which it now dismisses. See Uccello v. Gold'n Foods, 325 Mass. 319, 328 (1950)("Acquiescence is conduct from which may be inferred assent with consequent estoppel or quasi-estoppel."). Thus, even to look at this conflict in terms of equity (contrast Taylor's Case, 44 Mass. App. Ct. 495, 498 [1998]), there would be no basis for our coming to the assistance of a party which has conceivably made a *unilateral* mistake. See Perkins' Case, 278 Mass. 294, 300 (1932).

Because the subsequent conduct of the insurer can only be construed to support the administrative judge's view of the lump sum agreement and award of § 36 benefits, I would affirm the decision.

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William A. McCarthy
Administrative Law Judge