COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 052038-00

Jacqueline Choquette	**Employee**
Matson Community Services	**Employer**
Star Insurance Company	**Insurer**

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

The case was heard by Administrative Judge Dike

APPEARANCES

Justin F.X. Kennedy, Esq., for the employee
Carey H. Smith, Esq., for the insurer

HORAN, J. The employee appeals from a decision denying her attempt to modify the terms of a previously approved § 15 third party settlement agreement.[1] Because the judge lacked jurisdiction to hear the claim, we vacate the decision.

---

[1] General Laws c. 152, § 15, provides, in pertinent part:

> Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee shall be entitled, without election, to the compensation and other benefits provided under this chapter. Either the employee or insurer may proceed to enforce the liability of such person. . . . The sum recovered shall be for the benefit of the insurer, unless such sum is greater than that paid by it to the employee, in which event the excess shall be retained by or paid to the employee. . . . Except in the case of settlement by agreement by the parties to, and during a trial of, such an action at law, no settlement by agreement shall be made with such other person without the approval of either the board, the reviewing board, or the court in which the action has been commenced after a hearing in which both

The employee suffered an industrial injury on December 22, 2000. She pursued a workers' compensation claim and a tort action against a third party defendant. (Dec. 3.) The employee entered into a lump sum agreement to settle her workers' compensation case; that agreement was approved on January 15, 2004. (Dec. 1; Ex. 2.) Thereafter, her third party tort claim was settled for $150,000.00. (Dec. 1; Ex. 3.) The parties then executed and presented a § 15 agreement, which was approved by an administrative law judge on June 23, 2005. In paragraph five of the § 15 agreement, the insurer's total lien amount was set at $319,407.38, of which medical payments totaled $133,600.94. (Ex. 3.) In paragraph ten, the insurer agreed to accept $46,679.65 in satisfaction of its lien. Id. In paragraph thirteen, the parties agreed to the amount of $27,353.36, as the amount to be offset against any future c. 152 payments made to, or on behalf of, the employee. Id. See Hunter v. Midwest Coast Transport, Inc., 400 Mass. 779 (1987). The agreement obligates the insurer to pay 37.486% of any future benefits due, including medical benefits, until the $27,353.36 offset is exhausted. (Ex. 3.)

> the employee and the insurer have had an opportunity to be heard. At such hearing the court shall inquire and make a finding as to the taking of evidence on the merits of the settlement, on the fair allocation of amounts payable to the employee and the employee's spouse, children, parents and any other member of the employee's family or next of kin who may have claims arising from the injury for which [damages] are payable, under this chapter in which the action has been commenced after an opportunity has been afforded both the insurer and the employee to be heard on the merits of the settlement and on the amount, if any, to which the insurer is entitled out of such settlement by way of reimbursement, and on the amount of excess that shall be subject to offset against any future payment of benefits under this chapter by the insurer, which amount shall be determined at the time of such approval. In determining the amount of "excess" that shall be subject to offset against any future compensation payment the board, the reviewing board, or the court in which the action has been commenced shall consider the fair allocation of amounts payable to and amongst family members who may have claims arising from the injury for which said compensation is payable.

Following the § 15 agreement's approval, the employee submitted additional medical bills to the insurer for payment. These bills did not comprise any part of the insurer's $133,600.94 lien for the payment of medical benefits as set forth in the § 15 agreement, which obligated the insurer to pay any further bills at the aforementioned rate, i.e., 37.486% of each such bill. The employee, however, insisted the insurer pay the bills in full. The employee filed a claim to establish the insurer's obligation to pay one hundred percent of the amount of these bills. An administrative judge denied the employee's claim at conference, and she appealed. (Dec. 2.)

Following a hearing, the judge found that although the employee knew of the existence of the unpaid medical bills when she executed the § 15 agreement, the insurer was not made aware of any such bills prior to signing the agreement. (Dec. 3-4.) The judge concluded that the amount of excess to be offset against future payments by the insurer, as indicated in paragraph 13 of the agreement, "shall be reduced by the amount of these medical bills on a per dollar basis." (Dec. 6.) Accordingly, the administrative judge denied and dismissed the employee's claim. Id.

On appeal, the employee contends "the single member commit[ted] a reversible error when he failed to acknowledge the stipulation in the employee's hearing documents that the amount of the medical bills currently in dispute were factored into the Third party Settlement Petition[.]"[2] (Employee br. 1)(Emphasis in original.) The insurer denies it made any such stipulation. (Ins. br. 2.) It also maintains that, at hearing, the employee submitted *no evidence* ─ only her hearing memorandum ─ to support her contention that it had, in fact, agreed to treat the payment of the bills in question differently than the manner set forth in the approved § 15 third party settlement agreement. See Sponatski's Case, 220 Mass. 526 (1915)(employee has the burden of proving every element of her claim). The

[2] Throughout his three page brief, employee's counsel repeatedly refers to the administrative judge below as "the single member." (Employee br. 1-3.) Since the passage of St.1985, c. 572, judges at the conference and hearing levels are administrative judges; members of the reviewing board are administrative law judges.

insurer is correct, but there is a more fundamental basis upon which to deny and dismiss the employee's claim.

Section 19(1) of G. L. c. 152, provides, in pertinent part, that "any payment of compensation shall be by written agreement by the parties and subject to the approval of the department. Any other questions arising under this chapter may be so settled by agreement." Subsection 2 of § 19 provides, in pertinent part: "a party to any agreement under this chapter may file a complaint with the superior court to vacate or modify such agreement on grounds of law or equity." A written and approved § 15 third party settlement agreement clearly qualifies as "an agreement under this chapter." The employee's forum, therefore, is in the superior court. Because the judge below had no jurisdiction to vacate or modify the agreement in question, we vacate his decision.[3]

So ordered.

_____

Mark D. Horan
Administrative Law Judge

_____

William A. McCarthy
Administrative Law Judge

_____

Bernard W. Fabricant
Administrative Law Judge

Filed: January 13, 2009

---

[3] The insurer never raised the issue of subject matter jurisdiction, but this does not prevent us from addressing it. Williams v. Attleboro Mutual Fire Ins. Co., 31 Mass. App. Ct. 521 (1991), citing Patry v. Liberty Mobilehome Sales, Inc., 15 Mass. App. Ct. 701 (1983)(even where parties are silent, courts must consider issue of subject matter jurisdiction sua sponte). See Cricenti v. Weiland, 44 Mass. App. Ct. 785, 789-790 (1998)(subject matter jurisdiction cannot be conferred upon a court by consent, conduct or waiver).