COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.**	**037067-11** **036928-11** **009549-14** **001135-15**
Jeremiah Fluet (Deceased)[1]		Employee
Drilex Environmental, Inc.		Employer
Old Republic General Insurance Company		Insurers
Zurich American Insurance Company		

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Byron G. Mousmoules, Esq., for Old Republic at hearing[2]
David M. O'Connor, Esq., for Old Republic on brief
Patrick M. Jamison, Esq., for Old Republic on appeal and at oral argument
Henry E. Bratcher III, Esq., for Zurich American Insurance Company

HARPIN, J. This case involves Old Republic General Insurance Company's (Old Republic) § 15A[3] complaint for reimbursement from Zurich American Insurance

[1] The employee passed away on February 5, 2017, after the hearing in this matter was concluded. (Oral Arg. Tr. 6.)

[2] In his hearing decision, the judge listed the appearance of Attorney David O'Connor for Old Republic. (Dec. 1.) Attorney Byron G. Mousmoules, from O'Connor and Associates, actually appeared for Old Republic at hearing. (Tr. 3.) This was later reflected in his decision. (Dec. 3.)

[3] G.L. c. 152, § 15A reads as follows:

> If one or more claims are filed for an injury and two or more insurers, any one of which may be held to be liable to pay compensation therefor, agree that the injured employee would be entitled to receive such compensation but for the existence of a controversy as to which of said insurers is liable to pay the same, such one of said insurers as they may mutually agree upon or as may be selected by a single member of the board shall pay to the injured employee the compensation aforesaid, pending a final decision of the board as to the matter in contro-

Company (Zurich) for benefits Old Republic paid to the employee pursuant to a conference order as a result of an alleged workplace injury. The administrative judge ordered Zurich to reimburse Old Republic "for all monies paid and all benefits provided to or on behalf of Jeremiah Fluet." (Dec. 8.) We reverse.

The employee, Jeremiah Fluet, claimed injuries sustained while working for his employer, Drilex Environmental, Incorporated. He filed two claims against Old Republic, one for a date of injury of June 20, 2011, and the second for a date of injury of September 23, 2011. (Two Forms 110, dated, June 14, 2012 and July 9, 2012. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 [2002][permissible to take judicial notice of Board file]). The employee's attorney had received information from the Department that Old Republic was the insurer on those dates. (Dec. 3.) The employer did not have a direct policy with Old Republic, however, as it was a subcontractor on a project that was covered by a "wrap" policy held by the general contractor. The wrap policy covered workers of the subcontractors working on a particular project at the University of Massachusetts Medical School. Id. The insurer on that wrap policy was Old Republic. Id. After receiving notice of the injury through the filing of the claims, Old Republic did not voluntarily commence payment of benefits. Id. At the conference on October 24, 2012, Old Republic raised liability, as well as disability and causal relationship. Id. The administrative judge ordered Old Republic to pay ongoing § 35 temporary partial incapacity benefits in a conference order dated November 15, 2012. Both parties appealed. Id.

> versy, and such decision shall require that the amount of compensation so paid shall be deducted from the award if made against another insurer and be paid by said other insurer to the insurer agreed upon or selected by the single member as aforesaid. *If, however, said insurers cannot agree that such employee would be entitled to compensation irrespective of the existence of such controversy, then a hearing to determine the question of liability and the payment of compensation shall be held forthwith by the division*, such hearing to take precedence over other pending matters.

(Emphasis added.)

On February 22, 2014, the employee was examined by Dr. Charles Kenny, the § 11A physician. Old Republic determined, after that date, that the alleged injury did not occur at the worksite covered by the wrap policy, as the employee was working for the employer at other job sites on the alleged dates of injury. (Dec. 4; Old Republic's Motion to join Zurich.) Rizzo, supra.-) It determined that Zurich was the insurer for Drilex for all sites other than the medical school site. (Dec. 4.) On July 24, 2014, Old Republic filed a motion to join Zurich to the pending case, and sought permission, pursuant to § 15A, to join a complaint for recoupment from Zurich for the compensation which it had paid pursuant to the conference order. (Dec. 4; Old Republic's Motion to Join.) Rizzo, supra.[4] The judge held a motion hearing on October 29, 2014, at which Zurich opposed joinder pursuant to § 15A on the grounds that § 15A only applies to situations where the insurers agree the employee is entitled to compensation, and here there was no such agreement, as the industrial accident and compensability were contested. (Motion Hearing, 10/29/14, 10.) On November 17, 2014, the judge allowed the motion to join, and noted that § 15A "will be an issue at the hearing, involving both Old Republic and Zurich . . . ." (Dec. 4.)

On April 13, 2015, prior to the hearing, the judge approved a Lump Sum Settlement Agreement between Zurich and the employee for $60,000.00, on an unaccepted liability basis, with an addendum to the Agreement providing for two years of payment of future causally related medical treatment and payment for half the cost of retraining as a commercial truck driver, up to $5,000.00.[5] (Dec. 5.) Three days later, on April 16, 2015, the date of the rescheduled hearing, Old Republic settled the employee's claims against it, also without liability, by a Lump Sum Agreement for $1.00.[6] (Dec. 6.)

[4] Old Republic also sought to join Great Divide Insurance Company, a subsequent insurer. That portion of the motion was denied. (Dec. 4.)

[5] The Agreement covered the dates of injury of June 20, 2011 and September 23, 2011. (Lump Sum Agreement of April 13, 2014, Rizzo, supra.)

[6] The Agreement with Old Republic covered the same dates of injury as those covered in the agreement with Zurich. (Lump Sum Agreement of April 16, 2014, Rizzo, supra.)

Over Zurich's objections, (Tr. 7-11, 23-24), Old Republic's claim against Zurich for reimbursement of monies paid to the employee prior to the lump sum agreement, proceeded to a hearing on April 16, 2014. (Dec. 6.) The judge found the issue presented was: "[w]hether an insurer (Old Republic) – by virtue of a 'wrap' policy of insurance – that paid benefits pursuant to a Conference Order is entitled to reimbursement from the insurer (Zurich American Insurance Company) of the actual employer (Drilex Environmental, Inc.) . . . ." (Dec. 1.) The employee and Scott Sousa, the safety and compliance manager for the employer, were the only witnesses. No medical evidence was submitted by either party. (Dec. 2.) In his hearing decision, the judge found that the employee worked under the Old Republic wrap policy for one day in February, 2011, and there was no evidence the employee was injured during that day. (Dec. 6.) The judge credited the employee's testimony that he was injured on June 20, 2011, and on September 23, 2011, while working for the employer, and found that, on both days, Zurich was the insurer on the risk. Id. The judge also credited the employee's testimony that he was "instructed to falsely tell the health care providers that he had injured himself at home rather than at work."[7] (Dec. 6.) The judge rejected Zurich's assertion that proper jurisdiction lay with the Superior Court, due to its sole power under G. L. c. 152, § 19(2) to vacate or modify lump sum agreements on grounds of law or equity.[8] Citing Lincoln v. Fairside Trucking, 8 Mass. Workers' Comp. Rep. 218, 224-225 (1994), the judge found the matter was properly before him, due to the inherent power of the Department to construct an equitable remedy under § 15A to relieve an insurer of its mistaken obligation to pay compensation. (Dec. 7.)

In regard to the issue of reimbursement, the judge noted that "the statute and regulations do not address this scenario." (Dec. 6.) He held that the requirement in

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[7] The employee testified at hearing that his employer discouraged the claim and instructed him to tell medical personnel that he injured himself in a "non-work" setting. (Tr. 34-35, 39, 46-48, 49.)

[8] A lump sum agreement approved under § 48 is considered as a § 19 Agreement. Maxwell v. North Berkshire Mental Health, 16 Mass. Workers' Comp. Rep. 108, 114 n.7 (2002).

Fairside, supra, that the insurer seeking reimbursement had the burden of proving there was a compensable injury, did not apply, as in that case the insurer had voluntarily, but mistakenly, accepted liability. (Dec. 7.) In this case Old Republic had consistently denied liability and had been ordered to pay compensation. (Dec. 7.)

> The fact of the matter is that there is no good solution to this situation. On the one hand, Zurich American was not aware of or involved in defending against the employee's claim until more than 2 years following the alleged date of accident, and the Impartial Physician examination had already taken place. On the other hand, Old Republic has been ordered to pay benefits for an insurance claim for an injury that does not fall within the ambit of its coverage under the "wrap" policy.

(Dec. 8.) Without further analysis, the judge found "that the more equitable result is that the insurer of Drilex Environmental, Inc. should be the provider of the workers' compensation benefits on the claimed dates of injury. That insurer was Zurich American." Id. Accordingly, the judge ordered Zurich to reimburse Old Republic for all monies paid on the employee's behalf. Id.[9] The case is before us on Zurich's appeal.

Zurich raises nine arguments on appeal.[10] However, one is dispositive. Zurich argues that the two without liability lump sum agreements with the employee ended the Department's jurisdiction to hear further claims in this matter, as there were no issues before the judge. We agree.

It is axiomatic that, once the Department approves a lump sum settlement agreement, the Board has no authority to revise, revoke or otherwise inquire into the merits of the controversy between the parties. That authority lies solely with the Superior Court. Ellis v. Comm'r of Dep't of Indus. Accidents, 88 Mass. App. Ct. 381, 385 (2015);

[9] The judge recited the amount listed in the "Total Payments" line of the Lump Sum Agreement entered into by Old Republic as approximately $56,461.75 (Tr. 4), but made no finding in the decision as to an exact amount Zurich had to reimburse Old Republic. He merely ordered reimbursement "for all monies paid and all benefits provided to or on behalf of Jeremiah Fluet under any section of Massachusetts General Laws, chapter 152." (Dec. 8.)

[10] Zurich's individual grounds for appeal are set forth in its brief and often overlap one another. (Zurich br. 10-28.)

Hansen's Case, 350 Mass 178, 180 (1966). Moreover, "[w]here § 48 allows for redemption of liability for payment of compensation 'in whole or in part,' . . . it is incumbent upon the parties to articulate what is not intended to be covered by a lump sum settlement. Absence of such language necessarily means that the lump sum agreement redeems liability for any and all compensation payable under the act." Williams v. Material Handling Installations, 20 Mass. Workers' Comp. Rep. 325, 326 (2006); see also Duarte v. Trellenborg Sealing Solutions, 28 Mass. Workers' Comp. Rep. 129, 132 (2014)(employee's decision to settle case with insurer without reservation of rights against it, leaves him without a remedy). It follows that a settlement reached while a case is on appeal renders moot the issues raised for judicial review. Teehan's Case, 7 Mass. App. Ct. 846 (1979).

Here the employee settled with both Zurich and Old Republic. Zurich's lump sum contained no reservation of rights which would allow further litigation of liability. In fact, the addendum to the lump sum stated,

> There are allegations of aggravations during the subsequent work activities while Old Republic Ins. Co. and Great Divide Ins. Company are on the risk. By this settlement, Zurich American Ins. Co. is resolving all claims and potential claims for injuries during this employees [sic] work at this employer for all dates covered by Zurich American Ins. Co's coverage. The employee understands the risks and benefits of settling with Zurich American Ins. Co. and proceeding against Old Republic, if all outstanding claims are not resolved by way of a lump sum. The employee understands that if he does not prevail in any claim against Old Republic, Old Republic may seek recoupment of benefits paid against the employee which may result in the employee owing money back to the insurer Old Republic. The employee understands these risks and ask [sic] the court to approve this resolution with Zurich American Ins. Co.

(Lump sum agreement between Zurich and Employee, approved April 16, 2015.)

The settlement with Zurich left Old Republic the option of continuing to defend the employee's claim against it, and then seeking recoupment from the employee, if the judge found Old Republic did not cover the employee on the alleged dates of injury, or if it prevailed at the hearing in the other defenses it raised, including liability, disability and

causal relationship. See G.L. c. 152, § 11D.[11] However, Old Republic chose to settle its case with the employee prior to hearing, specifically waiving its rights of recoupment against the employee, thereby leaving no remaining issue before the judge. The statement in Old Republic's lump sum agreement that it "does not affect Old Republics[sic] . . . rights against Zurich," is of no avail, because Old Republic had no right of recoupment against Zurich. As Zurich's lump sum acknowledged, Old Republic's right of recoupment was against the employee, pursuant to § 11D. Once Old Republic settled with the employee, there was nothing before the judge for Old Republic to litigate. Teehan's Case, supra.

In Stillman v. General Dynamics, 23 Mass. Workers' Comp. Rep. 121 (2009), we addressed a situation where an insurer (Electric) settled with the employee, and the judge went forward with a hearing involving another insurer (ICSP), which had been ordered at conference to pay benefits for the same injury. Although Electric was a non-party to the hearing and had settled its case with the employee, the judge ordered ICSP to reimburse it. In reversing the decision, we held,

> [W]hen Electric settled the employee's claim against it, it relinquished all other rights and recourses it could have pursued against the employee . . . 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

[11] General Laws chapter 152, § 11D states, in relevant part:

> (3) An insurer that has paid compensation pursuant to a conference order shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee. Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.

> both the plain language of § 48 and these general precepts underlying the nature of settlement. . . .
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> 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 and perhaps proceed with the voluntary mechanism for adjudicating successive insurer cases afforded by G.L. c. 152, § 15A. (citation omitted).
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> 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.

Stillman, supra at 125-126.[12]

As in Stillman, § 15A's voluntary mechanism for adjudicating disputes between insurers might have been available here, had the employee not settled with Zurich without a reservation of rights, and had the two insurers *agreed* that the employee's injury was compensable by one of them. Here, there was no such agreement, and § 15A was thus not properly invoked.

In the absence of such an agreement as to compensability, the only provision of § 15A which could have applied was the last sentence, which essentially provides for an expedited hearing to determine *liability* and compensability. See Fairside, supra ("Where one insurer disputes the employee's entitlement to benefits, § 15A provides for an expedited decision-making process" for the "prompt adjudication of liability"). However, as already discussed, the lump sum settlement between the employee and Zurich, with no reservation of rights as to liability, precluded any hearing or decision on that issue. By contrast, in Fairside, Commercial Union, the insurer which the judge found liable at hearing, settled its case with the employee after hearing, but specifically reserved

[12] It is irrelevant that Zurich was a party to the hearing in this case, as it objected to being joined and objected to going forward at hearing, claiming § 15A was inapplicable and there was no issue before the judge due to the lump sum settlements. (Tr. 7-11, 21-24.)

all of its rights against the other insurer, National Union. Id. at 221-221. For this reason and others discussed above, the judge's reliance on Fairside, supra, to fashion an equitable remedy under § 15A, was inapposite.

Accordingly, because the two lump sum agreements effectively ended the dispute before the judge, he had no jurisdiction to proceed with the hearing. We therefore vacate the decision.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **May 28, 2019**