COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 059942-90**
Kristine Dodge	Employee
Massachusetts General Hospital	Employer
Massachusetts General Hospital	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Philip B. Kraft, Esq., for the employee
Joseph S. Buckley, Esq., for the self-insurer

MCCARTHY, J. The self-insurer, Massachusetts General Hospital (MGH), appeals from a § 11 hearing decision in which an administrative judge concluded that MGH was not entitled to claim an offset under G. L. c. 152, § 15, against future c. 152 benefits payable to Kristine Dodge. Dodge was injured in a work-related motor vehicle accident on October 18, 1990. MGH accepted the claim and paid weekly indemnity and medical benefits. (Dec. 2.) Ms. Dodge brought a third-party tort action in the United States District Court for the Southern District of New York in 1993. Between the date of the accident and the time of settlement in November 1994, MGH paid the employee approximately $150,000.00 in c. 152 benefits. The tort action was settled prior to trial for $440,000.00. The administrative judge summarized the facts surrounding the settlement as follows:

> On November 21, 1994, the employee's attorney, Mr. Kreinder, notified MGH counsel, by fax that presiding Judge Preska in the employee's third party action had ordered a hearing on November 23 "to address the validity and amount of the Massachusetts General Hospital lien." [Citation omitted.] MGH made no objection to the jurisdiction of the New York court, nor did it claim that it would not have an opportunity to be heard. On the morning of November 23, 1993, prior to recitation in Court of the Settlement Stipulation, Attorney Timothy Nevils, on behalf of MGH, conferred by telephone from Boston in the matter of its lien with

> regard to the third party settlement with Judge Preska, Attorney Kreindler, and Attorney Glascot, appearing for the defendant, all of whom were convened in the Judge's chambers in New York. That same morning, a hearing was held and the terms of the settlement were placed on the record. MGH was to be paid $75,000 in 'full and final satisfaction of the lien' it currently holds in this action. . . . Settlement of this case, and payment of $75,000 to Massachusetts General will not curtail or limit in any way Massachusetts General's obligation to make continuing workers' compensation payments to Kris Dodge as those payments become necessary." . . .
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> On November 28, 1994, Attorney Kreindler sent a transcript of the Settlement Stipulation to all parties concerned, including MGH. [Citation omitted.] The Judge entered an order on November 29, 1995, approving the settlement "as reflected by the transcript . . .." [Citation omitted.] MGH counsel had an opportunity to review the hearing transcript prior to the judge's order and voiced no objection to the conditions represented therein. Following the judge's order approving the settlement as reflected by the transcript of November 23, 1994, there is no evidence that MGH either objected to the conditions of the settlement or filed a Motion to Amend the Judge's Order. I find that, by its silence, MGH agreed to and ratified the terms of the settlement

(Dec. 3.) (emphasis in original.)

The judge reasoned that MGH in consideration of the compromise payment to it of $75,000.00 in discharge of its lien, also waived its right to offset against any future entitlement by Dodge to c. 152 benefits. (Dec. 5.) Along the way to this conclusion the judge held that:

> Section 15 requires a finding at the time of the settlement hearing on the amount of excess which will be subject to offset against any future benefits. Having been heard at the time of the settlement hearing and having not required that such a determination be made the time of the settlement, the insurer failed to comply with § 15, thereby neglecting to establish the amount of statutory excess subject to the Hunter offset. A finding of the specific amount of excess at the time of the settlement, as required by § 15, is essential.

(Dec. 4.) (Emphasis in original.)[1]

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[1] Section 15 states in relevant part:

> At such hearing the court *shall inquire and make a finding* as to . . . the amount, if any, to which the insurer is entitled out of such settlement by way of

Because this reasoning is at odds with the Supreme Judicial Court's construction of § 15, we reverse the decision. Percoco's Case, 418 Mass. 136 (1994).

Though neither party challenges it, we note as a preliminary matter that the judge had jurisdiction to hear this dispute and render a decision. Section 15 specifically provides that "[e]xcept in the case of settlement by agreement by the parties to, *and during a trial of,* such an action at law [against a third-party], 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 and the insurer have had an opportunity to be heard." § 15, emphasis added. This conferral of concurrent jurisdiction is distinct from the treatment the statute accords third-party claims which have gone to trial, for which jurisdiction resides "only [in] the justice presiding at the trial." § 15. In the present case, the record establishes that the parties reached settlement prior to trial. (Statement of Agreed Facts, Ex. B, 2.) Therefore, since any administrative judge or administrative law judge at the department could have originally handled the approval of the § 15 aspect of the settlement, such authority did not disappear, and was rightly exercised by the judge in the decision now on appeal.

The parties here did not enter into a written agreement delineating their respective obligations under the provisions of § 15. MGH contends that there was no waiver and the offset provisions of § 15 operate as a matter of law. The plaintiff/employee, pointing to the record transcript of the settlement terms, claims that MGH waived its offset entitlement. The waiver, says the employee, is found in the statement that "[s]ettlement of this case, and payment of $75,000 to Massachusetts General will not curtail or limit in any way Massachusetts General Hospital's obligation to make continuing workers'

> 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.*

(Emphasis added.)

compensation payments to Kris Dodge as those payments become necessary." (Emphasis supplied.) (Dec. 3.)

We think that this language, which falls well short of an outright waiver of MGH's offset rights, fails to define MGH's precise "obligation" with respect to ongoing workers' compensation payments. There is statutory excess here so the legal "obligation" is to pay only a percentage of each c. 152 claim in proportion to the ratio of legal fees and costs to the third-party recovery until the total amount of the claims equals the statutory excess, in accordance with § 15 as interpreted in Hunter v. Midwest Coast Transport, Inc., 400 Mass. 779 (1987). There is nothing to suggest that MGH committed to something greater than that. Willingness to accept a somewhat reduced portion of its lien does not adversely impact the question of offset. Turner v. Thomas Dwyer, Inc., 41 Mass App. Ct. 704, 707 (1996).

The judge grounds her denial of offset to MGH at least in part on the failure by MGH to establish at the settlement conference the amount of excess subject to offset. Putting aside the question of who had the burden of fixing the dollar amount of the excess, the judge's ruling does not square with the Supreme Judicial's Courts holding in Percoco, supra, where the plaintiff recovered a jury verdict in the amount of $273,500.00 plus interest. The amount of the legal fee and costs were also part of the record in the case. The first issue before the Percoco court was whether a workers' compensation insurer must obtain approval from a court or the Department of Industrial Accidents prior to effectuating its offset rights. The court, without explanation, "[c]oncluded that the insurer had no obligation under § 15 to obtain approval from the department prior to offsetting the injured employee's future compensation claims against the excess of the third party judgement . . .." Percoco at 136, 137.

The Percoco court recognized that under the provisions of § 15, when a third party action is settled prior to trial, "the board, the reviewing board, or the court in which the action has been commenced after a hearing in which both the employee and the insurer have an opportunity to be heard" must approve the settlement agreement. Percoco argued that by not first obtaining approval from the department, the workers' compensation

carrier improperly terminated weekly benefits. The court, however, pointed out that the amount of the judgment against the third party, the amount of the workers' compensation carrier's § 15 lien and the amount of Percoco's attorney's fees and costs were ascertained on the entering of judgment in the third party action.[2] Id. at 140-141. Rejecting the argument that prior approval was necessary, the court wrote that:

> Wausau was thus able to proceed to offset Percoco's future compensation claims without any further guidance. In the absence of express provisions in c. 152 or in the department's regulations, there is no rational basis to require prior approval before an insurer can effectuate its offset rights in an excess judgement. Wausau legally discontinued Percoco's weekly benefits. The board correctly held that the discontinuance was not illegal.

Id. at 141.

Percoco does not go so far as to say that no "approval" of a § 15 settlement is necessary. The court only talks about approval prior to offsetting the injured employee's future c. 152 benefits against the excess of the third-party judgment. It would seem that § 15 requires that *at some point* a determination must be made ". . . on the amount of excess that shall be subject to offset against any further payment of benefits under this chapter. . .."

Guided then by Percoco, we conclude that the decision before us is contrary to law. The failure of the United States District Court judge to make a finding on the amount of excess which shall be subject to offset does not deprive MGH of its offset right. The hearing judge construed § 15 as being primarily for the protection of the employee. "[I]n the event that the finding [on the statutory excess] is not made at the settlement hearing and a dispute later arises as to the amount of the statutory excess, the employee could be seriously prejudiced when the third party has been dismissed and a trial is no longer an option." (Dec. 4.) However, the statute places the compensation insurer's interests on the same footing as the interests of the employee. Indeed, the insurer's entitlement to full reimbursement from the third-party proceeds was paramount

[2] These figures were also ascertainable in the case at hand.

in the Supreme Judicial Court's seminal interpretation of § 15 in Richard v. Arsenault, 349 Mass. 521 (1965).

> "It is a principle underlying the Workmen's Compensation Law that there shall not be double recovery for injury – once by way of compensation and once by way of damages." [Citation omitted.] . . . Although the statute [at that time was] silent on the effect the excess has on the obligation of an insurer to make future payments, we think full effect will be given to the general policy against double recovery and the reimbursement provisions of § 15 by treating the excess as an offset against future compensation payments.

Id. at 524-525. There is nothing in the transcript record of the third-party settlement to support the finding of a waiver by MGH of its offset right.[3] The "obligation" of MGH was to pay ongoing claims reduced by the offset.

Accordingly, we reverse the decision of the administrative judge. MGH may take advantage of the offset provisions of § 15. If the parties cannot agree as to the percentage of each claim which must be paid by MGH or on the gross dollar amount to be offset, either party may file a claim and a § 15 hearing will be held to resolve those issues.[4]

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William A. McCarthy
Administrative Law Judge

Filed: **August 9, 2000**

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

[3] It goes without saying that a compensation insurer may agree to waive some or all of the offset.

[4] Section 10 provides in pertinent part that "on the receipt of a claim for compensation, a complaint from the insurer requesting a modification or discontinuance of benefits, o*r a complaint from any party requesting resolution of any other issues arising under this chapter,* the division of administration shall notify the parties that it is in receipt of such claim or complaint . . . *" (emphasis added.)* Clearly a dispute under § 15 is an issue arising under c. 152.