COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 091643-86**

Louis Bertocchi (deceased)	Employee
Nibur Carpet Company, Inc.	Employer
Travelers Life & Casualty	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Levine and Carroll)

APPEARANCES
Joseph M. Burke, Esq., for the employee
Leonard Y. Nason, Esq., for the insurer
Dorothy L. Gruenberg, Esq., for the insurer on brief

MAZE-ROTHSTEIN, J. Louis Bertocchi died approximately three weeks before his scheduled lump sum settlement conference. See G.L. c. 152, § 48. We have the appeal of the employee's executor from a decision after remand by the Appeals Court for a determination of whether the parties had an enforceable written lump sum agreement despite the employee's demise. The administrative judge concluded that there was no written agreement statutorily sufficient to render the parties' oral settlement agreement enforceable. We affirm the decision.

The facts of this case on remand were stipulated to or were otherwise undisputed in all material respects. The stipulation provided, in pertinent part, that on July 24, 1989 the insurer offered $105,000.00 to settle the employee's accepted claim for a December 17, 1986 industrial injury. The employee accepted the offer of settlement on the same day. As was statutorily required at the time, [1] the employee's counsel scheduled a lump

[1] General Laws c. 152, § 48, in 1989 read in pertinent part as follows:

> (1) Under the conditions and limitations specified in this chapter, the insurer and employee may by agreement redeem any liability for

compensation, in whole or in part, by the payment by the insurer of a lump sum of an amount to be approved by the reviewing board.

. . .

(3) Prior to approval of any lump sum settlement, the office of education and vocational rehabilitation shall review the following factors with the employee and his attorney:

(a) the employee's rights under this chapter and the effect a lump sum settlement would have upon such rights;

(b) in the case of a lump sum settlement that includes the redemption of future medical benefits, the likelihood that the employee may require such services and the present cost of insurance or other means of defraying such potential expenses;

(c) the total income and financial prospectus of the employee including all means of support;

(d) the purpose for which the settlement is requested;

(e) the employee's post-injury earnings and prospects, including the projected income and financial security of any proposed project of employment, self employment, business venture, or investment and the prudence of consulting with a financial or other expert to review the likelihood of success of such projects; and,

(f) any other information, including the age of the employee and of his dependents, which would bear upon whether the settlement is in the best interest of the claimant.

. . .

(4) No lump sum shall be approved by the reviewing board unless the members of the reviewing board, after receiving a report on the settlement from the office of education and vocational rehabilitation, deem such settlement to be in the employee's best interest in light of the factors reviewed by the office of education and vocational rehabilitation pursuant to subsection (3).

. . .

(6) Whenever a lump sum agreement or payment has been approved by the reviewing board in accordance with the terms of this section, such

sum counseling session for August 29, 1989 and a lump sum conference for September 8, 1989. On August 10, 1989, before either event, the employee died of a massive coronary, unrelated to his work injury. The insurer notified the employee's counsel that it would not honor the proposed lump sum agreement. (Agreed Statement of Facts.)

The judge in the claimant's original action to enforce the proposed lump sum agreement denied the claim, which denial the reviewing board summarily affirmed. (Dec. 3, dated May 24, 1993 [hereinafter Dec. I].) The claimant appealed the case to the Appeals Court, where a single justice affirmed the reviewing board, but the full panel reversed and remanded the case. The case was recommitted to a different administrative judge as the prior judge no longer served with the Department. Upon recommittal, that new administrative judge stated that:

> [t]he case before Judge McGuiness had been tried on an Agreed Statement of Facts. The record presented to the Appeals Court apparently contained various documents, which were not clearly marked and were not identified as exhibits either in the hearing decision or in the Agreed Statement of Facts. The Appeals Court concluded that the Department was in error in deciding that the insurer here had the unilateral right to refuse to honor the lump sum agreement. In its remand order, the Appeals Court stated:
>
> > Because the record before us does not show with any degree of certainty when various forms and documents therein contained were in fact filed and by whom, and because they were not considered by the administrative judge, we conclude that the matter must be remanded to the Department for consideration and answer of the questions (1) whether these documents and form are sufficient to constitute an agreement pursuant to M.G.L. c. 152, section 19 . . . .

> agreement shall affect only the insurer and employee who are parties to such lump sum. . . .

Amended by St. 1986, c. 662, § 36; St. 1987, c. 691, § 12.

(Dec. 2-3, dated October 16, 1998[hereinafter Dec. II].)[2]

The documents and forms referenced by the Appeals Court were entered into evidence by the judge on remand. They consisted of the following: a copy of the proposed lump sum agreement, with an addendum completed by counsel for the employee, both of which were signed by counsel and the administrator of the employee's estate, and dated September 8, 1989 (Employee's Ex. 1); the Request for Lump Sum Proceeding, filed on or about August 4, 1989 by the employee's counsel (Employee's Ex. 2); copies of medical reports (Employee's Exs. 3 and 4); Insurer's Request to Modify or Discontinue the Employee's Weekly Benefits (Insurer's Ex. 1); and the Insurer's withdrawal of that request (Insurer's Ex. 2). (Dec. II, 4-5.)

The remand administrative judge concluded that the forms and the circumstances surrounding their preparation did not amount to a § 19 agreement. (Dec. 5-6). The employee's counsel produced the form lump sum agreement and addendum after the employee had died. He noted, in particular, that the first sentence of the addendum recited that the employee had died, and that only the administrator of the employee's estate signed both forms. (Dec. II, 5.) In answer to the Appeals Court's inquiry the judge found:

> Nowhere in the record or in any of the documents I have found is there any form or combination of forms which would constitute an agreement pursuant to Chapter 152, Section 19. Section 19, as it existed in 1989, provided that, "Except as otherwise provided by Section 7, any payment of compensation shall be by written agreement by the parties and subject to the approval of the Department."

(Dec. II, 5-6.)

The judge therefore denied the claim that the proposed lump sum agreement was enforceable. (Dec. II, 9.) The claimant appeals.

[2] The other question posed by the Appeals Court regarding the best interests of the employee is not relevant to the disposition of this case, as the lack of a written agreement ends the inquiry.

We affirm the decision. The judge correctly applied the law in effect at the time of the proffered lump sum agreement. See City Council of Waltham v. Vinciullo, 364 Mass. 624, 628 (1974)(stage of proceeding analysis where statutory changes are procedural in nature). While § 48, governing lump sum agreements, did not explicitly require a written agreement in 1989, the requirement nonetheless arose from the language of § 19 quoted above. See Rebeiro v. Travelers' Ins. Co., 27 Mass. App. Ct. 1116 (1989)(rescript); Hansen's Case, 350 Mass. 178, 180 (1966)(lump sum agreements to be construed as "agreement in regard to compensation" under § 19's predecessor -- § 6).

The proposed lump sum agreement was not enforceable because, although the lump sum form and addendum constituted a writing, the actions of the parties did not make them, or any of the other proffered documents or forms singly or in combination, into an agreement at the time of the employee's death. Contrast Ferreira v. Arrow Mut. Liab. Ins. Co., 15 Mass. App. Ct. 633, 637 (1983)(employee died before the lump sum conference with a fully executed, written lump sum agreement for which department approval was pending). There may be other factual and documentary permutations where, despite the lack of the insurer's signature, enforcement of a lump sum agreement may be warranted; but they are not present here.

The decision is affirmed.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: February 16, 2000