COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013349-16**

Mary Lamport	Employee
Draper Place	Employer
Safety National Casualty Corp.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge Rosado.

APPEARANCES

John J. Sheehan, Esq., for the employee
John J. Canniff, Esq. for the insurer at hearing
Robert S. Martin, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a hearing decision ordering payment of medical benefits for the treatment of a left shoulder injury. The left shoulder claim was filed after a lump sum settlement that specifically limited liability to a right shoulder and neck injury. For the following reasons, we reverse the decision and dismiss the claim.

The employee filed an initial claim for a right shoulder injury sustained on April 10, 2016, while working for the employer as a Certified Nursing Assistant (CNA). Her job duties involved lifting and assisting elder residents with activities of daily living. (Dec. 5, 6.) The claim for the right shoulder was ultimately accepted by the insurer's withdrawal of its appeal from the September 2016 conference order of payment. On February 3, 2017, the employee underwent a repair of her right rotator cuff tear. The insurer's subsequent complaint for modification of benefits and the employee's joined claim for cervical MRI/EMG diagnostic testing were conferenced in September 2017. Modification of benefits was denied, and cervical diagnostic testing was ordered. Following the insurer's appeal however, the case settled with a § 48 lump sum agreement

that was approved on February 13, 2018. (Dec. 5.) The accepted diagnosis and narrative stated in the approved lump sum is as follows:

> Right Shoulder Rotator Cuff Tear; S/P Right Shoulder Arthroscopy; Cervical Sprain/Strain and Exacerbation of Pre-Existing Cervical Degenerative Disc Disease.

(Ex. 6.)

On February 11, 2019, the employee filed a new claim for payment of medical treatment for a *left* shoulder surgery, stemming from the same injury date as that approved in the lump sum.[1] The administrative judge denied the claim at a § 10A conference, and the employee timely appealed. (Dec. 3.) Following the hearing, a decision dated August 28, 2020, ordered the claimed left shoulder medical benefits. (Dec. 8.)

As the insurer consistently argued below,[2] the lump sum settlement precludes the award of benefits for the claimed left shoulder injury, since the employee was aware of the left shoulder injury at the time of the settlement. By excluding or failing to reserve the known condition and body part in the lump sum settlement agreement, the parties specifically limited the insurer's liability to the right shoulder and neck injuries. (Insurer br. 6-7; Ex. 6.) In support of its argument, the insurer cites the clear and unambiguous agreement in the lump sum indicating responsibility for future medical treatment of the employee's neck and right shoulder only, the absence of acceptance of liability for the left-sided body parts, and the exclusion of the left shoulder from the accepted diagnoses, despite complaints existing prior to the lump sum approval. (Insurer br. 6.) We agree.

An employee is precluded from filing a claim for known but unspecified injured body parts stemming from an industrial accident known prior to a lump sum settlement.

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[1] Rizzo v. MBTA , 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file).

[2] Cf Bordeleau v. M.C.I. Concord, 35 Mass. Workers' Comp. Rep. __ (5/14/21), (affirmative defense of lump sum settlement barring employee's claim waived if not properly raised below).

In Wilson v. Southworth Milton, Inc., 28 Mass. Workers' Comp. Rep. 195 (2014),[3] a case with a similar factual background, we observed that, although the employee had been aware of his left shoulder complaints since the alleged date of injury, he would have failed to preserve his right to pursue a claim for benefits pertaining to that body part had the insurer raised the affirmative defense of the lump sum settlement as a bar to his claim. See Mueller's Case, 48 Mass.App.Ct. 910 (1999). See also Duarte v. Trelleborg Sealing Solutions, 28 Mass. Workers' Comp. Rep. 129 (2014)(failure to reserve rights in lump sum settlement agreement bars claim). But see LaFleur v. C.C. Pierce Co., Inc., 398 Mass. 254, 259 (1986)(doctrine of mutual mistake will allow parties to seek rescission of lump sum agreement in Superior Court where "unknown injury" exists).

In the instant case, in support of the decision to award benefits, the judge wrote:

> The lump sum presented and approved was devoid of any reservation, restriction, exclusion and/or identification of potential for the Employee's newly claimed [] **left** shoulder impingement injury… due to overuse of the left shoulder while recovering from right shoulder surgery/injury of April 10, 2016.

(Dec. 6.) However, these findings lead to the opposite conclusion from that reached by the judge. The administrative judge's rationale places a burden on an insurer to explicitly exclude all body parts not accepted in a lump sum settlement. As a matter of law, in order to be claimed later, the injury must be specifically reserved in the lump sum. Once an administrative judge has approved an agreement, payment made by the insurer is a full settlement of all compensation due the employee under the Act unless a benefit is specifically reserved in the settlement papers. If the parties intend to reserve the right to claim an injury or

[3] We note the employee's argument questioning the insurer's application of the *dictum* in Wilson, supra, due to the reversal by the Appeals Court. (Employee br. 11-12.) However, the employee fails to recognize that the Appeals Court reversed the decision on entirely different grounds. The inquiry on appeal focused on whether the § 11A examiner provided irreconcilable opinions on causation. The Appeals Court decision contains no discussion on the impact of the lump sum settlement. See Wilson's Case , 89 Mass. App. Ct. 398 (2016).

body part, they must specifically state so in the lump sum settlement. Fluet v. Drilex Environmental, Inc., 33 Mass. Workers' Comp. Rep. 121 (2019). "[I]t is incumbent upon the parties to articulate what is not intended to be covered by a lump sum settlement. [The] 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, 20 Mass. Workers' Comp. Rep. 325, 326 (2006).

Here, the lump sum settlement clearly described the accepted industrial injury as well as what was to be specifically included as the insurer's responsibility. Neither party reserved the left shoulder injury. (Ex. 6.) Attempts at reopening a case to add new body parts to an approved lump sum settlement have been repeatedly barred. See Terrell v. McDonald's, 14 Mass. Workers' Comp. Rep. 224 (2000). See also Sylvia v. Burger King Corp., 6 Mass. Workers' Comp. Rep. 272 (1992)(attempts to reopen lump sum to add § 36 benefits barred).

Similarly misplaced is the administrative judge's observation that the insurer and employee had knowledge, or should have had knowledge, of the employee's left shoulder injury and its potential causal relationship, thereby reserving the claim post-lump sum settlement. (Dec. 7.) Once again, the opposite is true. A known condition not accounted for in a lump sum is, in fact, waived.[4] It would be especially egregious to allow the added claim since the left shoulder injury was known by the employee prior to, and at the time of, the lump sum settlement approval. Despite this knowledge, there is no mention or reservation of

[3] The employee testified at the hearing that she encountered problems with her left shoulder and was aware of them long before the lump sum was approved. (Tr. 26-28.) Medical evidence submitted, consisting of an office visit with Dr. Kasparyan on January 5, 2017, for a chief complaint of left shoulder pain from work-related injuries as well as the employee's indication to § 11A examiner Dr. Wolf of increasing left shoulder pain nine months after her February 2017 right shoulder surgery, indicates a timeline consistent with the employee's awareness of her left shoulder injuries prior to the lump sum approval in February of 2018. (Ex. 1, 4.) Despite this knowledge there is no mention or reservation of the left shoulder within the lump sum settlement. (Insurer br. 11; Ex. 6.)

the left shoulder within the lump sum settlement. (Insurer br. 11; Ex. 6.) The employee cannot now raise an injured body part that was voluntarily relinquished in the lump sum settlement. See Lisby v. EDM Construction, Inc., 32 Mass. Workers' Comp. Rep. 183 (2018)(failure to reserve the right to bring back claim arising out of same incident on same date covered in settlement agreement in and of itself bars future litigation on that claim), citing Duarte v. Trelleborg Sealing Solutions, 28 Mass. Workers' Comp. Rep. 129 (2014); Laroche v. G & F Indus. Inc., 27 Mass. Workers' Comp. Rep. 51 (2013), *aff'd* Laroche's Case, 84 Mass. App. Ct. 1132 (2014); Franklin v. Banner Truck Leasing Co., 14 Mass. Workers' Comp. Rep. 371 (2000). Having had a full and fair opportunity to raise a left shoulder claim in the earlier proceedings, the lump sum settlement of those proceedings without expressly preserving the left shoulder claim, forecloses that claim.

Finally, we address whether the insurer's approval and payment for two left shoulder MRIs as well as a diagnostic left shoulder epidural steroid injection and medical office visits (Dec. 7) was a concession as to liability. It has long been established that voluntary payments made by an insurer in the absence of a written agreement to pay or a prior determination of liability, are not an admission of liability. McHugh's Case, 1 Mass. App. Ct. 803, 804 (1973). We have previously held that the payment of medical benefits does not constitute an acceptance of liability. Klama v. Nat'l Envelope Corp., 19 Mass. Workers' Comp. Rep. 324, 327 (2005)(payments for psychiatric services do not impose acceptance of psychiatric claim). "To say that an enforceable obligation under the Act is created by payment of medical bills might discourage treatment." Id. at n.1, citing Locke, Workmen's Compensation 2nd ed., (1981), § 417 n.28.[5] Payment by the insurer for left shoulder treatment in the past does not, by itself, establish liability.

[5] Updated: Nason, Koziol and Wall, Workers' Compensation 3d ed., Vol. 29, § 13.11 n. 5.

For the above reasons, we reverse the decision of the administrative judge. The claim for § 30 medical benefits related to the employee's left shoulder injury is denied and dismissed.

So ordered.

Bernard F. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **May 20, 2021**