COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037100-92**

Peter Zinkevich (deceased)	Employee
Delores Zinkevich[1]	Claimant
Woolworth Corporation	Employer
Insurance Company of North America	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine)

APPEARANCES
John F. McGrail, Esq., for the claimant
David D. Dowd, Esq., for the insurer

COSTIGAN, J. In 1995[2] the employee accepted the insurer's oral offer to settle his workers' compensation case for $50,000. The proposed lump sum settlement was to be presented to an administrative judge on February 23, 1995, for approval pursuant to G. L. c. 152, § 48.[3] The employee died on February 22, 1995.[4] Neither the employee nor the insurer had signed a lump sum settlement agreement prior to the employee's death. When the insurer learned of the employee's death, it informed his attorney that it would not honor its agreement to settle. Over the ensuing seven years, the administrator of the employee's estate sought to enforce the oral agreement in both this department and the

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[1] As administrator of the estate of Peter Zinkevich.

[2] Neither the agreed statement of facts on which the enforcement claim was tried, (Joint Exhibit 1), nor the administrative judge's decision reflects the date in 1995 on which the oral settlement agreement was reached. It appears to have been on or shortly prior to February 21, 1995, when the employer's written consent to the settlement was executed. (Joint Exhibit 1, par. 5.)

[3] The record indicates that the proceeding scheduled on February 23, 1995 was a § 10A conference on a claim. (Exhibit A to Joint Exhibit 1.) Our review of the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), reflects that the employee was claiming permanent and total incapacity benefits under § 34A. It appears that the settlement agreement was reached in compromise of that claim.

[4] There is no contention that the employee's death was causally related to his 1992 orthopedic industrial injury for which he was receiving weekly incapacity benefits at the time of his death.

superior court. See G. L. c. 152, § 12. This tortuous procedural trek is summarized in the "Agreed Statement of Facts," executed by the parties on April 8, 2002, on which this case was tried before the administrative judge whose decision we review:

1. On or about July 29, 1992, Peter Zinkevich (hereinafter referred to as "the Employee") sustained an industrial accident resulting in a fractured calcaneus while in the employ of Woolworth Corporation (the Employer). Additionally, on September 11, 1993, the Employee's leg gave way and he fell, injuring his shoulder.

2. Insurance Company of North America ("INA"), thereafter Century Insurance Company (hereinafter referred to as "the Insurer"), subsequently accepted the employee's injuries as compensable and commenced payment of weekly disability benefits.

3. In 1995, the Employee's counsel, Constance Morrison, Esquire, reached an oral agreement with the Insurer redeeming liability for the Employee's injuries in the amount of $50,000.00.

4. A Section 10A conference was scheduled for February 23, 1995. . . .

5. The Employer signed Form 116A, consenting to the settlement amount of $50,000.00. . . .

6. On the evening of February 22, 1995, the date before the scheduled conference, the Employee became ill and died. . . .

7. Attorney Morrison prepared lump sum papers . . . which were unexecuted and unfiled at the time of Mr. Zinkevich's death and had not been transmitted to the Insurer.

8. When apprised of Mr. Zinkevich's death, Defense Counsel Jennifer Hylemon expressed inability to proceed on a lump sum hearing. Subsequently, the Insurer denied liability for the lump sum and the experience-modified Employer rescinded its consent to the lump sum settlement.

9. The matter was subsequently reassigned before Administrative Law Judge William A. Pickett on April 5, 1996.

10. Administrative Law Judge Pickett declined to approve the settlement for the reasons set out in his letter of April 25, 1996. . . . ["Since the papers

presented to me on April 5, 1996 have no signature, I assumed the agreement to lump sum was all oral . . . The Department of Industrial Accidents lacks authority to enforce its order or decisions. While it may approve or disapprove proposed lump sum agreements, the Department (of which the Reviewing Board is a part) has no recourse authority [sic] to determine whether or not a binding oral contract for lump sum has been entered into this case [sic]. In my view, there is no administrative remedy within the Department of Industrial Accidents. So ordered."]

11. Attorney Morrison then filed suit against Century in Worcester Superior Court. Century's Motion to Dismiss was allowed and judgment entered in its favor on December 8, 1997.[5]

12. Subsequently, Attorney Morrison sought to have the matter heard by the Reviewing Board of the Department of Industrial Accidents . . . but was informed by Joseph W. Jennings, III., then Senior Judge, that the Reviewing Board had no jurisdiction over the issue involved. . . .

13. A claim was subsequently filed with the Department of Industrial Accidents. . . .

14. That claim was denied at § 10A conference. . . .

15. The denial of the claim was appealed and scheduled for hearing.

16. The claim was amended prior to hearing to add a claim for benefits under M. G. L. Chapter 152, Section 31. The amended claim and the claim to enforce lump sum were withdrawn when reached for Section 11 hearing on October 14, 1999.

17. Another claim was filed on or about September 8, 2000, seeking approval of the settlement agreement. . . .

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[5] Because this stipulation did not reveal the nature of the suit, as we are permitted to do, see footnote 3 supra, we have examined the contents of the board file. The claimant filed suit against the workers' compensation insurer seeking damages under G. L. c. 93A for an alleged violation of the oral lump sum settlement agreement to pay the employee $50,000. The insurer moved to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(1) and (6) on the grounds that the Department of Industrial Accidents had exclusive subject matter jurisdiction over the claimant's/plaintiff's action and that the exclusivity provisions of G. L. c. 152 barred such an action under c. 93A. Holding that the dispute over the lump sum settlement agreement fell within the exclusive jurisdiction of the reviewing board, subject to review by the Appeals Court, the court allowed the insurer's motion and dismissed the complaint.

> 18. That claim was conferenced on June 25, 2001 following which a DENIAL OF PAYMENT was filed on June 26, 2001. . . .
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> 19. That Denial of Payment was appealed in a timely fashion. . . .

(Joint Exhibit 1.) The administrative judge found the facts as agreed by the parties. (Dec. 4.)

The parties also agreed that the issues in controversy were: 1) can the proposed lump sum agreement be approved under the circumstances?; 2) if so, should the lump sum be approved?[6] (Dec. 3.) As to the first issue, the judge stated:

> I find that an oral agreement to lump sum combined with a signed consent that has not been transmitted to the employee does not constitute an offer and acceptance in a form sufficient to bind the insurer. Had the employee submitted the draft agreement to the insurer or a written confirmation of the terms of the settlement and the insurer responded by obtaining employer's signed consent, which references "The terms of such settlement are more fully set forth in the attached lump sum agreement" then I would find that sufficient writings were exchanged to bind the parties. In the instant case no writings transmitted between the parties are in evidence. I do not find the consent to be a sufficient written confirmation because it was not in response to a written confirmation of the terms of the orally agreed settlement and it was not transmitted to the employee's counsel prior to the employee's death and prior to the insurer's refusal to proceed with the proposed settlement.

Based on these findings, the judge ruled as a matter of law that the employee and the insurer had not entered into a legally enforceable lump sum agreement. (Dec. 6.) Thus, he did not reach or decide the second issue in controversy.

Because the insurer had raised the defense of res judicata to the claim, the judge made additional findings of fact:

> I find that Administrative Law Judge Pickett declined to approve the settlement; that a suit was filed on behalf of the employee in Worcester Superior Court to enforce the proposed lump sum agreement; and that the Superior Court

[6] A third issue set forth in the decision appears to be scrivener's error: "Does Section 35B apply to the November 5, 1991 date of injury of CNA?" As neither the date of injury cited, nor the insurer named, nor the applicablility of the statute mentioned, was involved in the claim before the judge, and the decision is otherwise silent, we are satisfied that this issue was not before the judge for adjudication.

> dismissed the suit and issued judgment in favor of the insurer. I find this judgment is final and prevents further action at the Department of Industrial Accidents.
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> I find that the employee brought a claim for enforcement of the lump sum; that the Honorable Richard J. Heffernan denied the claim at Conference on May 11, 1998; that the employee appealed the denial and then the appeal was withdrawn. I find this unappealed denial is final and precludes further action at the Department of Industrial Accidents.

(Dec. 5.) Based on these findings, the judge ruled as a matter of law that "the employee's [sic] claim is barred by the principal [sic] of res judicata both as a result of the Judgment entered in the Superior Court and the Conference Order entered by Judge Heffernan from which the appeal was withdrawn." He denied and dismissed the claimant's claim, (Dec. 6), and she appeals, arguing that the judge's decision was contrary to law and based upon facts not in evidence. We affirm.

The claimant urges us to follow our decision in Donovan v. STW Nutmeg, Inc., 14 Mass. Workers' Comp. Rep. 252 (2002), arguing that it governs the outcome here. We decline to do so because the facts of the two cases are distinguishable[7] but, more importantly, because in Donovan's Case, 58 Mass. App. Ct. 566 (2003), the Appeals

[7] Mr. Zinkevich, like Mr. Donovan, had reached an oral agreement with the insurer to lump sum settle his claim, and he, too, died before the lump sum conference. In both cases, an administrative judge declined to act on the proposed settlement because the insurer refused to sign the lump sum agreement. There, however, the factual similarities end. In Donovan, the employee's attorney had sent the insurer a letter memorializing the terms of the oral settlement agreement. Donovan, supra at 253. There was no such written confirmation of the terms of the settlement offer Mr. Zinkevich accepted. (Dec. 4.) Mr. Donovan had signed the lump sum agreement, as well as an affidavit in lieu of his appearance at the lump sum conference, and other related documents. Donovan, supra at 253-254. Mr. Zinkevich signed no settlement-related documents before his death. (Joint Exhibit 1; Dec. 4.) After a hearing on the claim filed by Donovan's estate for enforcement and approval of the § 48 lump sum agreement, a different administrative judge found that, absent the insurer's signature on the settlement agreement, it did not satisfy the requirement under § 19 that any payment of compensation shall be by written agreement by the parties, and thus could not be approved *ex post facto* by the department. Donovan, supra at 254. In the decision before us, the administrative judge found that there was no legally enforceable lump sum settlement agreement, not simply because neither the employee nor the insurer had signed the lump sum agreement drafted by the employee's attorney, but because there was in evidence no writing, exchanged between the parties, sufficient to confirm the terms of the oral lump sum agreement. (Dec. 4.)

Court held that, among the many grounds cited by the reviewing board in reversing the judge's decision,[8] one factor was dispositive: induced by the settlement offer, the employee withdrew his appeal of a § 10A conference order which had reduced his weekly incapacity benefits. The court held that the employee's abandonment of his claim for § 34 benefits in an administrative appeal under § 10A(3) constituted detrimental reliance on the settlement offer, which called "for the application of the doctrine of equitable estoppel."

> The effective application of that doctrine "requires: (1) '[a] representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made[;] (2) [a]n act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made[;] (3) [and d]etriment to such person as a consequence of the act or omission.' Celluci v. Sun Oil Co., 2 Mass. App. Ct. 722, 728 (1974)[,S.C., 368 Mass. 811 (1975)]." Boylston Dev. Group, Inc. v. 22 Boylston St. Corp., 412 Mass. 531, 542 (1992). *In the context of a lump sum offer, the induced act or omission must be something more than an ordinary agreement to redeem liability pursuant to G. L. c. 152, § 48.*

Id. at 568-569. (Emphasis added.) The detriment was not made moot by Donovan's death in that his estate could have pursued the claim for § 34 benefits to the date of his death. Id. at 569. The court ruled that "[t]he remedy here is to regard [the insurer] as estopped from relying on the absence of its signature from the lump sum settlement agreement signed by Donovan before he died and to treat that agreement as enforceable." Id. at 569-570.

[8] The reviewing board reversed the judge's decision on several grounds, including that the letter which the employee's attorney sent to the insurer's adjuster confirming the amount of the offer and the employee's acceptance of the offer, constituted a written agreement under § 19; that neither § 19 nor § 48 requires that written agreements be signed; that at no time prior to the lump sum conference did the insurer repudiate its settlement offer; and that, induced by the settlement offer, the employee's withdrawal of his appeal of a conference order reducing his weekly benefits constituted detrimental reliance which rendered the settlement agreement enforceable under traditional contract theory. Donovan v. STW Nutmeg, Inc., supra at 257. The insurer's appeal under G. L. c. 30A, § 14, of our decision brought the case before the Appeals Court.

Unlike Mr. Donovan, Mr. Zinkevich took no action, induced by the insurer's settlement offer, which resulted in detriment to him. Nothing in the record indicates that the § 34A claim which was scheduled for conference on February 23, 1995 was formally withdrawn, even after the employee died. Thus, his estate could have pursued permanent and total incapacity benefits to the date of his death.[9] See G. L. c. 152, § 1(4)("Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable").

The facts of this case are more akin to those in Bertocchi's Case, 58 Mass. App. Ct. 561 (2003). There, the insurer made, and the employee accepted, a lump sum settlement offer, but the agreement was not committed to writing prior to the employee's death from a massive heart attack unrelated to his industrial injury. In seeking enforcement of the oral settlement agreement before this department, the administrator of the employee's estate argued that the "meeting of the minds" was sufficient, and that there was no statutory requirement that a § 48 lump sum settlement be in writing.

The reviewing board upheld the administrative judge's denial of enforcement, Bertocchi v. Nibur Carpet Co., Inc., 14 Mass. Workers' Comp. Rep. 55 (2000), and the Appeals Court affirmed. The court held that even though the 1989 version of § 48, applicable to Bertocchi's claim, did not explicitly require a lump sum agreement to be in writing,[10] payment of a lump sum constituted a "payment of compensation" requiring a

[9] The board file reflects that the § 34A claim was filed on or about October 24, 1994, supported by a medical report dated October 13, 1994. At that time, the employee had not exhausted the 156-week statutory maximum for temporary total incapacity benefits under § 34, and would not do so until some five months after the February 23, 1995 conference on his claim. Section 34A, as amended by St. 1991, c. 398, § 60, provides for payment of permanent and total incapacity benefits "following payment of compensation provided in sections thirty-four and thirty-five." Prior to the Appeals Court's decision in Slater's Case, 55 Mass. App. Ct. 326 (2002), the statute was interpreted as requiring exhaustion of § 34 benefits prerequisite to a § 34A claim. That the employee's § 34A claim might have been denied at conference as premature only bolsters the conclusion that he suffered no detriment when the insurer repudiated the settlement agreement.

[10] As amended by St. 1991, c. 398, §§ 74 to 75, and therefore applicable to Mr. Zinkevich's lump sum settlement, § 48 expressly requires "an agreement pursuant to section 19."

written agreement under § 19: "Any payment of compensation shall be by written agreement by the parties and subject to the approval of the department." The court held that the requirement of a written agreement of the parties was not satisfied by the document filed with the department twenty days after the employee's death - - a lump sum agreement form signed by the administrator of the employee's estate and the attorney who had represented him prior to his death, but not by the employee or the insurer's attorney.[11]

> To the extent that Bertocchi's administrator relies on a common law "meeting of the minds" analysis, it suffices to note that "[s]ince the parties were subject to the [workers'] compensation act, 'all their rights arising under it are to be settled by the agencies there provided and not as in actions at common law.' Young v. Duncan, 218 Mass. 346, 351 [1914]." Conlon v. Lawrence, 299 Mass. 532. Similarly, while we are mindful that "[t]he Workers' Compensation Act is to be construed liberally for the protection of an injured employee," Hepner's Case, 29 Mass. App. Ct. 208, 212 (1990), this guiding principle does not control when the statute prescribes a specific procedure that an administrative agency or tribunal must follow. See Levangie's Case, 228 Mass. 213, 217 (1917); Taylor's Case, 44 Mass. App. Ct. 495, 498 (1998). Also, although the DIA's interpretation of its governing statute is not binding upon us, "it is entitled to weight and deference." Hepner's Case, supra. In the circumstances, the strict enforcement of the requirement of a written agreement called for under c. 152, § 19, see Weitzel v. Travelers Ins. Cos., 417 Mass. 149, 153 (1994), reflects the reality that oral settlement agreements occasionally unravel before formal presentation to a

[11] In the instant case, the administrative judge found that "an oral agreement to lump sum combined with a signed consent that had not been transmitted to the employee does not constitute an offer and acceptance in a form sufficient to bind the insurer." (Dec. 4). That ruling was correct, even though the consent form references the $50,000 settlement of the employee's claim and was signed by a representative of the employer on February 21, 1995, one day before the employee died. Although the signed consent form (Exhibit A to Joint Exhibit 1) states that, "[t]he terms of such settlement are more fully set forth in the attached lump sum agreement," there was no evidence offered at hearing that a written lump sum agreement was attached when the employer's representative signed the form on February 21, 1995. To the contrary, we note that the "Agreed Statement of Facts" in evidence (Joint Exhibit 1), places the signing of the consent form, (id., par. 5), chronologically before the employee's death, (id., par. 6), and before his attorney's preparation of the lump sum agreement, (id., par. 7.) Moreover, the parties agreed that the "lump sum *papers* . . . were unexecuted and unfiled at the time of Mr. Zinkevich's death and had not been transmitted to the Insurer." (Id.; emphasis added.)

tribunal or court.

Bertocchi's Case, supra at 565. This case represents such an occasion.

We hold that, in the context of the insurer's lump sum settlement offer, the employee's "induced act" was nothing "more than an ordinary agreement to redeem liability pursuant to G. L. c. 152, § 48." Donovan's Case, supra at 569 (for doctrine of equitable estoppel to apply, more is required). The administrative judge was correct as a matter of law in finding that the employee and the insurer had not entered into a legally enforceable lump sum agreement. Accordingly, we affirm his decision denying and dismissing the claimant's claim.[12]

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: **October 29, 2003**

[12] Because we decide this case on other grounds, we do not address the other argument advanced by the claimant on appeal -- that the administrative judge erred in applying the doctrine of res judicata to bar her claim for enforcement of the oral lump sum settlement agreement.