COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 041968-98**

Robert F. Dudley	Employee
Yellow Freight System, Inc.	Employer
Yellow Corporation	Self-insurer
Workers' Compensation Trust Fund	Insurer

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

APPEARANCES
Michael A. Fager, Esq., for the self-insurer
Vincent F. Massey, Esq., for the Workers' Compensation Trust Fund

LEVINE, J. The self-insurer appeals the decision of an administrative judge denying it reimbursement under G.L. c. 152, § 37, because, prior to settling the case with the employee, the self-insurer opted out of participation in § 37. We affirm the decision.

The parties stipulated to the following facts. Robert Dudley was fifty-three years old at the time of the hearing in this matter. He is a high school graduate who served in the United States Marines where he was a member of the Marine boxing team. In 1967 he was diagnosed with recurrent anterior dislocation of his right shoulder, which is believed to have occurred while Mr. Dudley was on the boxing team. (Dec. 2-3.)

On May 22, 1967, Mr. Dudley underwent surgery to implant staples into the bone of his right shoulder. The surgery was successful. From approximately 1967 to 1988 he was employed as a dockworker and driver for Pilot Freight. After Pilot Freight went bankrupt in 1989, Mr. Dudley went to work as a dockworker for Yellow Freight. He worked for this employer until November 19, 1990 when he reinjured his right shoulder at work. X-rays showed that one of the staples had loosened. Yellow Freight accepted liability for Mr. Dudley's latest injury, paying § 34 temporary total incapacity benefits beginning November 20, 1990. (Dec. 3-4.)

On February 28,1992, and again on March 31, 1992, Yellow Freight, which is self-insured, made written requests to withdraw from participation in the Workers' Compensation Trust Fund effective July 1, 1992. On April 27, 1992 the self-insurer was notified that its non-participation request was conditionally granted pending payment of the remaining fiscal year 1992 assessments. On July 1, 1992, the self-insurer ceased participation in the Trust Fund. (Dec. 4-5.)

On July 31, 1992 Mr. Dudley and the self-insurer settled the employee's claim by way of a lump sum agreement. On or about September 17, 1993 the self-insurer filed a claim for reimbursement pursuant to § 37. The Trust Fund denied the claim and a conference was held pursuant to § 10A. The self-insurer's claim was denied at the conference and the self-insurer appealed to a hearing. (Dec. 1,5-6.) In his hearing decision, the administrative judge found that the self-insurer was not entitled to reimbursement. (Dec. 10.) The self-insurer appeals.

The self-insurer argues that because the lump sum agreement was negotiated prior to July 1, 1992, reimbursement is due. (Self-insurer brief 4-7.) Section 37, as amended by St. 1991, c. 398, § 71, provides, in pertinent part:

> Whenever an employee who has a known physical impairment which is due to any previous accident, disease or any congenital condition and is, or is likely to be, a hindrance or obstacle to his employment, and who, in the course of and arising out of his employment, receives a personal injury for which compensation is required by this chapter and which results in a disability that is substantially greater by reason of the combined effects of such impairment and subsequent personal injury than that disability which would have resulted from the subsequent personal injury alone, the insurer or self-insurer shall pay all compensation provided by this chapter. If said subsequent injury is caused by the preexisting impairment or if said subsequent personal injury of such an employee shall result in the death of the employee, and it shall be determined that the death would not have occurred except for such pre-existing physical impairment, the insurer shall pay all compensation provided by this chapter.
>
> Insurers making payments under this section shall be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed seventy-five percent of all compensation due under sections thirty-one, thirty-two, thirty-three, thirty-four A, thirty-six A, and, where benefits are due under any of such sections, section thirty; provided,

> however, that the insurer is not a self-insurer, a group self-insurer or municipality that has chosen not to be subject to the assessments which fund said reimbursements; and, provided, further, that no reimbursement shall be made for any amounts paid during the first one hundred and four weeks from the onset of disability or death. . . .

The parties agree that the self-insurer opted out of participation in the § 37 reimbursement scheme, effective July 1, 1992. And the self-insurer concedes that it is not entitled to reimbursement for cases settled after it opted out.[1] However, the self-insurer asserts that its claims examiner sent a letter to the employee's attorney on June 22, 1992, accepting the employee $85,000.00 settlement demand: "At this time I will agree to settle the above captioned claim for $85,000.00." (Self-insurer brief 4, 5.) This, the self-insurer argues, shows that the parties had reached a meeting of the minds concerning settlement of the case, effectively forming a contract at that point. And because this occurred prior to July 1, 1992, the effective date for its opting out of participation in § 37, the self-insurer contends that it is entitled to § 37 reimbursement. It also points out that the lump sum conference took place after July 1 simply because of arbitrary scheduling. Id. at 5.

In support of its argument, the self-insurer attempts to analogize the present case to Donovan v. STW Nutmeg, Inc., 14 Mass. Workers' Comp. Rep. 252 (2000), a decision which was issued after the administrative judge rendered his decision in the present case. In Donovan, the employee and the insurer agreed to settle the case by lump sum agreement. As a result, the employee withdrew his appeal of the § 10A conference order. The employee became ill the morning of the scheduled lump sum conference and could not go forward at that time. The matter was rescheduled for three weeks hence. Between the first and rescheduled lump sum conferences, the employee signed an affidavit, a lump sum settlement agreement and other related documents in order to facilitate approval of

[1] See also G.L. c. 152, § 65(2), which in pertinent part states:

> No reimbursement from the . . . Trust Fund shall be made [under § 37] to any . . . self-insurer . . . which has chosen not to participate in the fund as hereinafter provided.

the lump sum agreement and make unnecessary his appearance at the conference. The employee died prior to the rescheduled lump sum conference. Thereafter, the attorney for the insurer refused to sign the lump sum settlement agreement forms. In finding the lump sum agreement enforceable, the reviewing board relied on the traditional contract principles of sufficiency of written memoranda, meeting of the minds and detrimental reliance. Id. at 256-257.

The problem with the self-insurer's position, among others, is that it never raised this basis for recovery at hearing.[2] And issues not raised below cannot properly be raised for the first time on appeal. Jones v. Wayland, 374 Mass. 249, 252-253 n.3 (1978) (different basis for recovery of disability compensation from town will not be considered on appeal when not raised below). Manoli's Case, 12 Mass. App. Ct. 222, 224-225 (1981)(reviewing board's refusal on employee's appeal to expand the record to include a certain medical report was correct because the employee could have introduced that report at the time of hearing before the single member).

Moreover, there is no merit to the self-insurer's argument that, because the Donovan decision was not in existence at the time of the hearing, it did not have the opportunity to raise this theory of recovery at that time. In fact, the theory that there could be an enforceable lump sum agreement despite the death of the employee prior to the lump sum conference was acknowledged in Bertocchi v. Nibur Carpet Co., 14 Mass. Workers' Comp. Rep. 55 (2000), a decision that issued almost a month prior to the start of the hearing in the present case. Although the documents in Bertocchi did not constitute an enforceable agreement, the reviewing board recognized that "[t]here may be other factual and documentary permutations where, despite the lack of insurer's signature, enforcement of a lump sum agreement may be warranted . . . ." Id. at 58. Furthermore, to the extent the self-insurer's theory of recovery is based on general contract law, the

[2] At hearing, the self-insurer argued that it should be entitled to reimbursement because the date of injury in this case preceded the date it withdrew from participation in the Trust Fund. As pointed out above, the self-insurer now concedes that it is not entitled to reimbursement for cases settled after it opted out.

principle that a completed contract can be found based on the circumstances has long been recognized. See 17 C.J.S. Contracts § 71 (1999)("A contract need not be contained in a single writing. Any number of papers may be taken together to make out the written expression of a contract"). Forman v. Gadouas, 247 Mass. 207, 212 (1924)("The two papers . . . signed by the defendant . . . are to be read and treated together in order to ascertain the true nature and legal sufficiency of the memorandum"). Nickerson v. Weld, 204 Mass. 346, 356 (1910)(" 'the letter and receipt, as well as the paper containing the promise, may be used to complete the memorandum in writing required by the statute of frauds to make such a contract binding' ").[3]

Because of the result we reach, we need not consider the other issue which has been raised.[4] The decision of the administrative judge is affirmed.

So ordered.

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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[3] By refusing to consider the self-insurer's argument, we do not suggest that it otherwise has merit.

[4] Left for another day is the question whether a lump sum occurring before the expiration of 104 weeks from the onset of disability, § 37, 2nd para., may still be entitled to reimbursement.