

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Lois Hansen)	State File No. A-25010
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
J. Graham Goldsmith)	
)	For: R. Tasha Wallis
)	Commissioner
)	
)	Opinion No. 35-00WC

APPEARANCES:

Hearing held in Montpelier on August 16, 2000
Record closed on September 25, 2000

Robert S. Behrens, Esq. for the claimant
Andrew C. Boxer, Esq. for the defendant

ISSUES:

1. Was there an agreement between the claimant and Aetna/The Travelers to continue to pay medical benefits to the claimant after she had reached a third party settlement?
2. Did Aetna/Travelers waive its rights under 21 V.S.A. § 624 to claim a credit against future medical bills?

EXHIBITS:

Claimant's Exhibits A: Binder of miscellaneous documents identified as follows:

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| 1. | 4/8/93 notes of PDJ | 14. | Aetna computer notes 10/11/93-9/15/95 |
| 2. | Notes of annuities | 15. | Aetna computer notes 11/25/95-10/29/97 |
| 3. | Notes undated | 16. | Email from Ronan |
| 4. | Undated notes of PDJ | 17. | 10/11/93 letter from JL |
| 5. | 10/5/93 notes of PDJ | 18. | 10/15/93 letter from Terry |
| 6. | Undated notes of PDJ | 19. | 10/27/93 letter from Keith Kasper |
| 7. | Undated notes of PDJ | 20. | 10/28/93 letter from JL |
| 8. | Undated notes | 21. | 11/15/93 from Terry Bradley |
| 9. | 11/2/93 notes of RG | 22. | 11/29/93 notes from Aetna file |
| 10. | 12/3/93 notes of RG | 23. | 11/30/93 letter from JK |
| 11. | 12/27/93 letter re: settlement | 24. | 12/30/93 notes from CD |
| 12. | 1/4/94 letter to Aetna | 25. | 12/6/93 letter from Bradley |
| 13. | 1/7/94 letter from JK to RG | 26. | 12/29/93 note to CD |

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| 27. | 12/9/93 letter to CD | 39. | 8/1/97 letter to Ronan from Hansen |
| 28. | 12/21/93 letter to Aetna | 40. | Twin Oaks receipt |
| 29. | 1/3/94 letter to Aetna | 41. | 5/21/97 letter to Ronan from Hansen |
| 30. | 1/7/94 letter to Young | 42. | 10/31/97 letter from Hansen to Ronan |
| 31. | 10/16/95 letter to Pierce | 43. | 10/29/97 letter from Ronan to Hansen |
| 32. | 10/9/95 letter to Pierce from Rippa | 44. | 10/28/97 letter from Ronan to DOL |
| 33. | 9/11/95 letter from Pierce to Hansen | 45. | same as 44 |
| 34. | Copy of DOL file | 46. | Form 27 10.29/97 |
| 35. | 10/1/97 letter to Ronan from Hansen | 47. | 11/4/97 letter from Hansen to Ronan |
| 36. | 9/5/97 letter to Ronan from Hansen | 48. | 11/6/97 letter from Ronan to Hansen |
| 37. | 11/1/97 letter to Ronan from Hansen | 49. | 11/6/97 letter from Ronan to Hansen |
| 38. | 7/3/97 letter to Ronan from Hansen | 50. | 11/14/97 letter from DOL |

- Defendant's Exhibit A: Order from Judge Katz, dated 11/19/93
 Defendant's Exhibit B: General Release dated 11/15/93
 Defendant's Exhibit C: Disbursement schedule dated 12/31/93
 Defendant's Exhibit D: Handwritten notes
 Defendant's Exhibit E: 11/10/93 letter from Attorney Coffrin to Attorney Goldsborough

Judicial Notice is taken of the following official Department forms:

- Form 1: Employer's First Report of Injury, filed 5/27/88
 Form 6: Notices and Applications for Hearing, filed 4/13/92, 11/30/92
 Form 10: Certificates of Dependency, filed 6/17/88, 10/10/90
 Form 13: Affidavits as to Payment of Compensation, filed 6/23/89, 1/20/94, 12/24/97
 Form 21: Agreements for Temporary Total Disability Compensation, approved 6/21/88, 2/13/91
 Form 22: Agreement for Permanent Partial Disability Compensation, approved 12/20/93
 Form 24: Agreements for Temporary Partial Disability Compensation, approved 7/14/88, 12/20/93
 Form 25: Wage Statements, filed 6/17/88, 10/10/90
 Form 27: Notices of Intention to Discontinue Payments, filed 12/18/91, 10/15/93, 9/13/95, 10/30/97
 Form 28: Notices of Change in Compensation Rate, approved 6/28/88, 7/11/91, 12/20/93

FINDINGS OF FACT:

1. On May 18, 1988, in the course of her employment, the claimant fractured a kneecap after slipping and falling on stairs.
2. Aetna (now Travelers) was the workers' compensation insurance carrier for the claimant's employer, J. Graham Goldsmith. Aetna accepted the claim and paid workers' compensation benefits to the claimant. Temporary total benefits continued until a Form 22 was filed with the Department on December 3, 1993.
3. In 1991, the claimant filed a civil suit against Kilburn & Gates, the designer of the stairs where she slipped. In July 1993, Kilburn & Gates brought a third party complaint against I.C.V. Construction, the company responsible for maintaining the stairs. On October 22,

1993, I.C.V. brought a fourth party complaint against J. Graham Goldsmith, the claimant's employer.

4. As of November 1, 1993, Aetna had a worker's compensation lien of approximately \$100,000 for benefits paid to the claimant.
5. Claimant's attorneys at the time of the settlement were Richard Goldsborough and Paul Jarvis. Goldsborough testified that on November 2, 1993 he spoke with Jim Leary, Aetna workers' compensation adjuster, regarding settlement of the workers' compensation lien. He further testified that at the time, Aetna owed the claimant a permanent partial disability award of \$20,738.90. Goldsborough testified that he orally made the following proposal to Leary:
 - Claimant would settle her claim against Kilburn & Gates and all other parties for approximately \$212, 500 and would dismiss her civil suit;
 - The claimant would pay \$50,000 to Aetna from her settlement proceeds towards the workers' compensation lien;
 - The claimant was entitled to and would receive a permanent partial award of \$20,738.90 but would reimburse this amount to Aetna as part of her obligation to repay Aetna on its lien;
 - In exchange for the promises, Aetna agreed to compromise the remainder of its lien; Aetna would settle the worker's compensation case on a Form 22; and that Aetna would remain obligated to continue paying the claimant's ongoing medical, nursing and home help care.
6. Goldsborough further testified that Leary said he would check with his supervisor, Cheryl Donovan, and would get back to him. According to Goldsborough, a few days after the November 2, 1993 conversation, Leary contacted him and accepted all the terms previously outlined. Shortly thereafter, Leary left Aetna and Jane Kroese took over the file.
7. At the hearing, Jim Leary testified that he had no recollection of Lois Hansen's file. He did not remember Richard Goldsborough or any conversation he may have had with him.
8. Leary also testified that he typically wrote down important information in a computer ledger regarding a given case. The absence of a computer note stating that medical benefits would be kept open in Lois Hansen's file case suggested to him that no such agreement had been made.
9. Ms. Kroese-Perkins testified that in 1993, she could not have waived a lien without her supervisor's approval. Her supervisor, Cheryl Donovan, did not testify.
10. On November 15, 1993 the claimant signed a release in settlement of her personal injury case against Kilburn & Gates and I.C.V. Construction, Inc. in the civil action for \$212,500. Of that total, Kilburn & Gates contributed \$187,000 and I.C.V contributed \$25,000.
11. On November 16, 1993, Judge Katz, sitting in Chittenden County Superior court, entered judgment for third party defendant, I.C.V. Construction, in an action brought by Lois

Hansen to amend her complaint. That order did not remove I.C.V. from the civil suit, however, because it did not effect the action Kilburn & Gates had taken against it. And, as noted above, I.C.V. contributed to the third-party settlement.

12. Aetna's computer entry from December 16, 1993 notes that Kroese was awaiting "response from state of Vermont to pay the claimant's PP in full at which time this file will be referred to the RRC in Providence".
13. On December 20, 1993, a Workers' Compensation Specialist as the Commissioner's designee approved a Form 22 Agreement for Permanent Partial Disability for 43 weeks of compensation. The permanency calculation was based on Dr. Vargas's opinion that the claimant had reached a medical end result with a 15-25% loss of function of the left lower extremity. Claimant Lois Hansen and Cheryl Donovan, as "Supervisor" at Aetna, signed that agreement which unequivocally provided that the insurance carrier/employer would continue to provide the claimant with "medical, hospital, surgical and nursing services and supplies in accordance with the provision of 21 V.S.A. § 640..."
14. On December 27, 1993, a paralegal at the office of Jarvis and Kaplan prepared a memorandum of all outstanding medical bills.
15. In Aetna's files is a December 29, 1993 note from Jane Kroese indicating that the file would remain open to receive \$50,000 and the permanent partial disability funds. Kroese-Perkins testified that as soon as the company received the recovery check, her plan was to close the file and send it to the Regional Recovery Center (RRC) in Providence. She testified that she would not have planned to close the file had there been an agreement to keep medical benefits open.
16. On December 30, 1993 Jane Kroese received a note from her supervisor, Cheryl Donovan, instructing her to "close all disability types but keep occurrence diary open to follow up on check." Jane Kroese testified that "all disability types" included medical benefits. Cheryl Donovan did not testify.
17. On a disbursement schedule dated December 31, 1993 and signed by Lois Hansen and Paul Jarvis is this statement: "Only those medical expenses reflected on his schedule will be paid out of the settlement proceeds. All other medical expenses remain the responsibility of Lois Hansen." Among the expenses listed on that disbursement schedule were payments to MCHV, UHC, CHP, and a Visiting Nurse.
18. On January 4 Kroese wrote in her computer note that "the file will be closed." On January 7 she said that she was " sending [a] letter [to] the attorney that the check represe[nts] satisfaction of Aetna's lien and file will be closed ... all payments other than ongoing medical have been paid." On January 17, 1994, she noted, "Settled and closed."
19. Kroese testified that her reference to "all payments other than ongoing medical" referred to medical expenses incurred prior to the date of the settlement, but not yet paid. She further testified that if future medical bills were going to be paid, the file would not have been closed. In general, Kroese explained that medical benefits could be paid on a closed

file and that the general practice was to close a file unless a claimant was actively treating.

20. On January 4, 1994, Attorney Goldsborough sent a letter, with an enclosure, to Cheryl Donovan, which stated in its entirety:

Lois Hansen has settled her third party lawsuit. Pursuant to the Workers' Compensation Lien Agreement between Aetna and Ms. Hansen, I enclose a check to Aetna from our trust account in the amount of \$70,734.60. This check represents satisfaction of Aetna's claim under 21 V.S.A. § 624. Please send me a letter confirming receipt of this repayment and lien satisfaction.
21. Appended to the copy of Goldsborough's January 4 letter that is a part of Claimant's Exhibit A is an attachment identified as "Second Disbursement Schedule." The schedule listed specific amounts for gross recovery, attorney's fees and costs, payment to Aetna of \$70,738.90 and payments to the claimant. Whether the schedule was part of the "enclosure" in Attorney Goldsborough's letter to Aetna is unclear.
22. On January 7, 1994 Jane Kroese sent a letter to Attorney Goldsborough's attention at Jarvis and Kaplan. That letter stated in its entirety, "In regard to the above workers' compensation claim, Aetna is in receipt of your check for \$70,734.60. ***This check represents satisfaction of Aetna's claim under 21 V.S.A. § 624.***" (emphasis added)
23. Kroese testified that in confirming Goldsborough's letter, she used his language, but did not understand what she meant when she wrote "satisfaction of Aetna's claim under 21 V.S.A. § 624."
24. On January 19, 1994, Judge Katz signed an order dismissing with prejudice all claims in the action captioned: "Lois Hansen v. Kilburn & Gates Industries, Inc. v. I.C.V Construction, Inc. v. J. Graham Goldsmith, Individually and J. Graham Goldsmith Architects, P.C., Great Northern Construction, Inc., and Craig Brown, d/b/a Brown's Certified Welding."
25. Aetna continued to pay the claimant's medical and home help bills until 1997 when Robert Ronan took over this file and learned of the third party settlement. Mr. Ronan filed a Form 27 to terminate all benefits. Upon this Department's approval of the Form 27 on November 14, 1997, the claimant requested a formal hearing.
26. Robert Ronan testified that in the fall of 1993 and into 1994 he was the regional manager of Aetna and supervised Cheryl Donovan who in turn supervised Leary and Kroese. Ronan at the time had twenty years experience adjusting Massachusetts and Vermont workers' compensation claims and was familiar with the differences in the two states' laws. According to Ronan, during the fall of 1993, Jim Leary, Jane Kroese and Cheryl Donovan were experienced in adjusting workers' compensation claims in Massachusetts, but were inexperienced in handling Vermont claims. He explained that in Massachusetts where medical benefits were expected to be kept open, there would have been no need for a computer note to reflect an agreement to that effect.

27. An objective review of the computer ledger demonstrates that medical benefits had been kept open after the third part settlement, even though the records do not reflect a specific agreement to do so.
28. Paul Jarvis and Lois Hansen testified that it was very important that medical benefits be kept open in this case. Goldsborough testified that he had a conversation with Leary who agreed to leave those benefits open. And he testified that he confirmed his understanding of that agreement in his letter of January 4, 1994.
29. Aetna paid medical and home help costs for Lois Hansen from the date of the settlement on January 4, 1994 through November 14, 1997. Travelers, who bought Aetna in 1996, maintains that it had been a mistake to make those payments.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1962). The Travelers argues that the traditional burden of proof applies in this case and that the claimant has the burden of proving that a contract to pay ongoing benefits existed.
2. The claimant argues that under Rule 18 of the Vermont Workers' Compensation and Occupational Disease Rules and clear departmental and judicial precedent, the employer has the burden of proving that it has grounds for termination of benefits. *Merrill v. University of Vt.* 133 Vt. 101 (1974); *Cormier v. Capital Candy Co.* Opinion No. 60-96WC (Oct. 25, 1996).
3. Assuming, without deciding, that the claimant has the burden of proof on the contract at issue, she has met that burden.
4. The issues are whether there was an agreement that Aetna/Travelers would continue to pay the claimant medical benefits and whether the Travelers waived a right to a credit under 21 V.S.A. § 624 for any amounts Lois Hansen received from her third party settlement. To answer these questions it is necessary to examine the nature of the Form 22 as well as the disputed language in the January 4 letter from Attorney Goldsborough to Aetna and the January 7, 1994 letter from Aetna to him. Both agreements support the claimant's position that the carrier remains responsible for medical benefits.

Form 22

5. When approved by the commissioner, an agreement for compensation payable under the Workers' Compensation Act shall be enforceable. 21 V.S.A. § 662(a). Such an agreement, a Form 22, was signed by the parties and approved by the commissioner in this case on December 20, 1993. Nothing on the Form 22 references a settlement agreement or a waiver of future medical benefits. Consequently, any agreement to subsequently limit benefits would have to be approved by the commissioner, after determination that it was in the best interest of the claimant. Absent such a

commissioner-approved agreement, the carrier's responsibility for medical benefits continues pursuant to § 662.

Subsequent Agreement

6. Next, is an examination of the statutory authority that governed subsequent actions. Specifically, 21 V.S.A. § 624(e) provides that an employer has the right to be paid its entire lien amount from the proceeds of a third party settlement. However, parties have the right to compromise, which clearly they did in this case when Aetna agreed to accept \$70,734.60.
7. Travelers argues that it compromised only past benefits and did not waive any credit toward future medical benefits. It suggests that the claimant's failure to assert specifically that medical benefits would continue when she entered into a subsequent agreement with the carrier means that those benefits terminated. To the Travelers, the language "satisfaction of Aetna's claim under 21 V.S.A. § 624 "is inapplicable to any future credit.
8. At the time of the injury at issue here, § 624 (e) provided:

In an action to enforce the liability of a third party, the injured employee may cover any amount which the employee or the employee's personal representative would be entitled to recover in a civil action. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.
9. Without an agreement between Aetna and the claimant, § 624 would have given Aetna a credit toward future workers' compensation benefits up to the amount the claimant had recovered in her third party action. Travelers argues that Aetna's workers' compensation unit had no incentive to waive its lien at all, let alone waive its right to a credit. It also argues that there would have been no need for anyone at Jarvis and Kaplan to have prepared a list of outstanding medical bills if the parties had intended to leave the medical benefits open.
10. Travelers also argues that by its terms, Goldsborough's January 4, 1994 letter requesting confirmation of receipt and "lien satisfaction" asked for confirmation only that Aetna's lien on the recovery was satisfied, not that Aetna had waived any right to a future credit.
11. Travelers attempts to create separate transactions from a single, basic contract. Goldsborough offered Aetna \$70, 734.60 if Aetna would waive its lien under § 624. Because a waiver of § 624(e) necessarily was a part of that offer, with its specific reference to "future payment" of benefits, Aetna could not have accepted it without agreeing to waive its right to future credits.

12. When Kroese, for Aetna, wrote to Goldsborough with the clear statement that "This check represents satisfaction of Aetna's claim under 21 V.S.A. § 624," she accepted Goldsborough's offer and a contract was sealed. The plain language of that January 7, 1994 letter waived any claim under § 624, whether it was for past due amounts or a credit for future medical bills.
13. The arguments that Kroese did not understand what she wrote and that she had no authority to waive a lien without her supervisor's approval cannot be accepted. Aetna is bound by what its employees wrote. And in this case, it cannot be overlooked that Goldsborough made the offer to Kroese's supervisor, Cheryl Donovan, and would have had no reason to believe that the direct response to that letter arrived with no authority from Aetna.
14. Furthermore, even if I accept that Aetna made a mistake, such a unilateral mistake will not allow for rescission of a contract where the mistake "has resulted solely from the negligence or inattention of the party seeking relief, and the other party is without fault ... absent unusual circumstances that would make enforcement of the contract manifestly unjust (citations omitted)." *Town of Lyndon v. Burnett's Contracting Co.*, 138 Vt. 102, 107 (1980). Any mistake in this case would have resulted from inattention on the part of Aetna's employees who accepted an offer that did not specifically state that, despite its waiver of rights under § 624, it had a credit against future medical payments. Lois Hansen is without fault. And the defendant has failed to assert unusual circumstances that would make enforcement of the contract as written manifestly unjust, especially in light of its continuation of medical payments for more than three years.
15. Because I do not find that the contract was ambiguous, there is no need to look beyond the contract's plain meaning. However, even if it were construed as ambiguous, permissible extrinsic evidence would support the same conclusion. See, *Breslauer v. Fayston School Dis.* 163 Vt. 416 (1995). (If a contract is ambiguous, extrinsic evidence may be relied upon to construe it.)
16. The adjusters' familiarity with Massachusetts law where medical benefits are automatically kept open explains the lack of a computer entry specifically stating that those benefits would continue. Medical benefits in fact continued uninterrupted after the settlement for more than three years.
17. Less reliable on this subject is the testimony from the claimant and her attorneys that necessarily relied on recollection of events more than six years old.
18. Whether I consider only the plain language of the contract or that language together with parole evidence, the inescapable conclusion is the same: Aetna agreed to continue to pay Hansen's medical bills and waived its claim under 21 V.S.A. § 624.

Waiver

19. The burden of establishing waiver is on the party asserting it, in this case the claimant. *Eastman v. Pelletier*, 114 Vt. 419, 423 (1946). She argues that the carrier's delay in raising the issue that it did not agree to pay ongoing medical bills constitutes waiver

under the common law definition of waiver. "[W]aiver requires proof of a voluntary and intentional relinquishment of a known and enforceable right." *Kanaan v. Kanaan*, 163 Vt. 402, 413 (1995). The essence of a waiver is a voluntary choice. And thus the party must have acted with a knowledge of all the material facts. *Eastman* 114 Vt. 419. Aetna knew that Lois Hansen had reached a total third party settlement. After Kroese specifically agreed that Aetna waived its rights under § 624, Aetna continued to pay for the claimant's medical benefits, as well as benefits associated with help she needed around her house. The parties had signed a Form 22 for Permanent Partial Disability Benefits, which by its term leaves medical benefits open. Several times Aetna/Travelers challenged the reasonableness and necessity of the treatment the claimant was receiving and sought the intervention of this Department. However, not until 1997 did it claim that it had not waived its right to a future credit. By sleeping on its potential rights, Aetna/Travelers has lost its ability to contest them.

20. In sum, I conclude that the parties entered into a Form 22, which kept medical benefits open and that Aetna/Travelers waived its claim to a credit against future medical payments.
21. Under Rule 10 and 21 V.S.A. § 678 (a), the Commissioner may award the claimant reasonable attorney's fees. In this case, given the time required to meet the defense that was mounted, the fee requested is completely reasonable and is awarded in the amount of \$4404.

ORDER

Based on the Foregoing Findings of Fact and Conclusions of Law, the carrier's claim for a credit against future medical benefits is DENIED.

Dated at Montpelier, Vermont, this 25th day of October 2000.

R. Tasha Wallis
Commissioner