A. P. v. Fine Line Drywall (August 26, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

A. P.	)	Opinion No. 55-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Fine Line Drywall	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. R-15267

RULING ON CLAIMANT'S MOTION TO RE-OPEN FORM 15

Thomas P. Aicher, Esq., for the Claimant
Corina N. Schaffner, Esq., for the Defendant

ISSUE:

Is the approved Form 15 invalid due to the absence of a settlement brief?

FINDINGS OF FACT:

1. Claimant was a drywaller employed by the defendant from 1992 to 1998. On October 23, 1998, he sustained a fracture to his left elbow when some scaffolding, which he was using, collapsed.

2. Defendant paid the claimant workers' compensation benefits including TTD and medical expenses from October 24, 1998 to November 1, 1999, and placed claimant at a medical end result with a rating of 4% whole person. Defendant paid the permanency benefits to claimant based on his then applicable weekly wage of $416.28.

3. Several months after being placed on a medical end result, claimant began to experience problems with his elbow. A CT scan in August 2000 revealed continuing degeneration of the claimant's elbow. In February 2002, claimant's specialist performed a second surgery.

4. Despite some improvement after the second surgery, in January 2003, Dr. Adam Shafritz recommended a third surgery, which was performed on April 2, 2003.

5. Following this surgery in June 2003, claimant made a claim for 9 weeks of TTD benefits. The claim indicated a new average weekly wage of $1000, which the carrier rejected. The carrier did not pay any TTD benefits to the claimant at this time. Claimant was also assessed a new impairment rating, which added 2% to his previous 4% rating. The carrier did not pay any benefits associated with his new impairment rating.

6. This dispute continued into the fall of 2004, when counsel for the claimant convinced the carrier to pay at least the benefits due to the claimant based on his former average weekly wage of $416.28, as well as benefits associated with the rise in the claimant's new impairment rating. The carrier agreed to pay the April 2003 TTD benefits and permanency benefits, but left open the issue of the claimant's average weekly wage.

7. On December 20, 2004, Attorney Aicher sent adjuster Hurley a demand letter based on a Form 15. He outlined his arguments as to what his demand was based on and demanded $10,000 on a form 15.

8. The department set up an informal conference with the parties on December 22, 2004. The purpose of this conference was to discuss the status of the case, and its readiness for transfer to the formal hearing docket, to delineate disputed issues and benefits and to discuss any potential settlements.

9. The parties never proceeded to this informal conference, as both adjuster Melissa Hurley and Attorney Aicher notified the department that a settlement agreement had been reached.

10. On December 31 2004, adjuster Hurley forwarded settlement documents to Attorney Aicher, including a Form 15 and addendum for review. On January 6, 2005, Attorney Aicher returned the form to adjuster Hurley with a change in the addendum. On or about January 10, 2005, adjuster Hurley sent the completed Form 15 and addendum with Attorney Aicher's letter to the department for review and approval. Neither adjuster Hurley nor the claimant submitted a specific letter outlining the claim.

11. On March 14, 2005, the department sent an approved Form 15 to both parties. In a letter included with the Form 15, the department reminded the parties to include a settlement brief with all Form 14's and Form 15's, and that failure to do so may result in rejection or delay of the Form 15.

12. The addendum attached to the approved Form 15 outlined that the form released the defendant from any liability to pay any and all disputed temporary total, temporary partial indemnity payments, as well as any future medical expenses arising from the claimant's work related injury. All parties, including the claimant, signed the addendum.

13. On April 6, 2005, Attorney Aicher sent a letter to adjuster Hurley indicating that they had received the settlement check. At that point, the claimant notified Attorney Aicher of his concern about waiving his future medical benefits. He inquired whether

defendant would agree to modify the Form 15 to leave medicals open. Claimant did not cash the settlement check.

14. Claimant now claims that the agreement was invalid because a settlement brief was not included.

CONCLUSIONS OF LAW:

1. The sole issue to decide is whether the Form 15 settlement agreement is invalid due to the absence of a settlement brief required by WC Rule 17.6.

2. The department, in its rule making capacity, outlines that certain forms "once executed by the parties and approved by the division, these forms shall become binding agreements and absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof." WC Rule 17.000.

3. Specifically, a form 15 "may be used to settle a genuine dispute over the compensability of a claim and/ or the extent of benefits due. Once executed by the parties and approved by the commissioner, this form shall relieve the employer of all further liability for compensation benefits related to the injury. This form must be accompanied by a letter identifying the disputed issues, detailing the parties' respective positions (supported by adequate medical documentation if necessary), and fully explaining the terms of the proposed settlement. The agreement shall not be approved unless the commissioner is convinced that the best interests of the claimant are served thereby, and under no circumstances should a claimant be promised this will occur." WC Rule 17.600.

4. The claimant argues that the form 15 is not valid, despite the fact that the form was signed by both parties and approved by the commissioner. Claimant notes that no "letter identifying the issues and detailing the parties' respective positions and fully explaining the terms of the proposed settlement" was every submitted with the Form 15. Claimant argues that the plain language of rule 17.600 requires this letter, and therefore, even with the commissioner's approval, he is not bound by the agreement.

5. However, this argument is unpersuasive. Although technically no "settlement brief" was submitted with the Form 15, there is no evidence presented that any material mistake of fact occurred, or that the commissioner would have ruled otherwise had such a letter been included with the Form. The Vermont Supreme Court has previously ruled on the issue of harmless error, most notably ruling that evidence not properly admitted constituted harmless error in that the board's ruling would have been the same, regardless of such error. See, *LeBarron v. Department of Employment and Training*, 150 Vt. 193 (1988); *Harrington v. Department of Employment Security*, 142 Vt. 340 at 344 (1982) (admission of new evidence at board hearing was harmless error where it had no impact on board's decision.)

6. In the present case, I find no evidence of error, fraud or mutual mistake in the Form 15. The department was well aware of the issues surrounding this case at the time the decision was made to approve the Form 15. Furthermore, the reason behind such a requirement is so that the commissioner may be able to make a decision based on the best interests of the claimant. The claimant and his attorney had discussed the defendant's release from paying future medical expenses, this was also clearly outlined in the addendum. Apart from a change of heart about the agreement based on the possibility of a future event, claimant has not provided any evidence demonstrating a cause for reversible error.

ORDER:

Therefore, based on the foregoing findings and conclusions the claimant's motion to re-open Form 15 is DENIED.

Dated at Montpelier, Vermont this 26th day of August 2005.

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Thomas W. Douse, Deputy Commissioner
as Designee for Patricia A. McDonald Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.