STATE OF VERMONT
DEPARTMENT OF LABOR

Kevin Holbrook

v.

Kennametal, Inc.

Opinion No. 16-20WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. Y-60018

RULING ON DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT

APPEARANCES:

Ronald A. Fox, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant bound by the terms of the agreement that the parties reached in mediation to sign settlement documents for filing with the Commissioner?

EXHIBITS:

Defendant's Statement of Undisputed Facts dated July 15, 2020[1]
Claimant's Statement of Undisputed Facts dated August 7, 2020

Joint Exhibit I: Settlement Terms signed on January 16, 2020

FINDINGS OF FACT:

The following facts are undisputed:

1. Claimant injured his right wrist on March 8, 2007 while working as Defendant's employee. *Defendant's Statement of Undisputed Facts* ("*Defendant's Statement*") ¶ 1.

2. On May 21, 2018, after a formal hearing, the Commissioner determined that Claimant failed to prove that he was permanently and totally disabled as a result of his compensable wrist injury. *Holbrook v. Kennametal, Inc*., Opinion No. 07-18WC (May 21, 2018); *Defendant's Statement* ¶¶ 2-4. Claimant did not appeal that determination. *Defendant's Statement* ¶ 5.

[1] Although Defendant filed an enforcement motion, not a summary judgment motion, both parties filed statements of undisputed facts. Those statements reveal no factual disputes between the parties. Accordingly, I treat their statements as stipulations of fact for the purposes of this motion.

3. In January 2019, the parties participated in an informal conference concerning the continued provision of vocational rehabilitation services. The Department's specialist ordered services to continue. *Defendant's Statement* ¶¶ 6-7.

4. Defendant appealed the specialist's determination, and the specialist forwarded the matter to the formal hearing docket in February 2019. *Defendant's Statement* ¶ 8. Defendant's objection to the proposed Return to Work Plan was added to the formal docket in March 2019. *Id.* ¶ 9.

5. A pretrial conference took place in April 2019. The administrative law judge set a mediation deadline of October 15, 2019 and a hearing date of December 18, 2019 on the vocational rehabilitation disputes. *Defendant's Statement* ¶ 10; *Claimant's Statement of Undisputed Facts* ("*Claimant's Statement*") ¶ 1.

6. On November 6, 2019, Defendant's counsel informed Claimant's counsel that her client was unwilling to settle the case other than on a full and final basis including the closing out of medical benefits coupled with the funding of a Medicare Set Aside ("MSA") agreement. *Claimant's Statement* ¶ 2.

7. On November 14, 2019, Claimant's counsel emailed Defendant's counsel that Claimant was willing to discuss a full and final settlement but needed to assess whether any medical expenses covered by workers' compensation might not be covered by either an MSA or Medicare. *Claimant's Statement* ¶ 3.

8. On November 19, 2019, Defendant's counsel notified the Department that the parties had not yet mediated. She also emailed Claimant's counsel that she did not see how they would be able to attempt to settle before the December 18, 2019 hearing and reiterated that Defendant was not willing to discuss settlement of just the vocational rehabilitation claim. *Claimant's Statement* ¶¶ 4-5.

9. On November 20, 2019, Claimant's counsel notified the Department that mediation was delayed and that the hearing might need rescheduling because Defendant was only interested in a full and final settlement, which would require an MSA. *Claimant's Statement* ¶ 6.

10. On November 21, 2019, the Department revised the scheduling order to provide a mediation deadline of January 3, 2020 and a new hearing date of January 29, 2020. *Defendant's Statement* ¶ 11; *Claimant's Statement* ¶ 8.

11. On December 18, 2019, Claimant's counsel emailed Defendant's counsel with concerns about the upcoming mediation deadline and the fact that the parties had not yet selected a mediator or had any settlement discussions. *Claimant's Statement* ¶ 9.

12. On December 23, 2019, Defendant's counsel emailed Claimant's counsel an MSA allocation report and requested a settlement demand. *Claimant's Statement* ¶ 10.

13. Two hours later, Claimant's counsel emailed Defendant's counsel raising a concern about the proposed MSA. In his view, the MSA vendor had "underfunded"

Claimant's prescriptions by $6,044.00. He requested permission to speak with the vendor about this, as well as about whether there were any health care services or medications covered by Claimant's workers' compensation insurance that would not be covered by Medicare. *Claimant's Statement* ¶ 11.

14. Over the next few weeks, the parties made efforts to engage a mediator. *Claimant's Statement* ¶ 12.

15. On January 6, 2020, Claimant's counsel again emailed Defendant's counsel seeking permission to speak with the MSA vendor. He wrote: "I never heard back from you about speaking with [the vendor] who drafted the MSA. If your client's position is to close medical benefits as a precondition to the mediation, I need to discuss the apparent exclusion of medications and confirm nothing else was excluded." Defendant's counsel then gave her permission. *Claimant's Statement* ¶¶ 13-14.

16. On January 8, 2020, Claimant's counsel emailed the MSA vendor and asked to speak with someone about the vendor's discounting of Claimant's medications by fifty percent in the MSA allocation report and about whether there were likely any future medical charges not covered by Medicare. *Defendant's Statement* ¶ 12; *Claimant's Statement* ¶ 16.

17. On January 9, 2020, attorney Bonnie Badgewick agreed to mediate the case. *Claimant's Statement* ¶17.

18. On Friday, January 10, 2020, Claimant's counsel spoke with the vendor regarding the MSA allocation. *Defendant's Statement* ¶ 13. The vendor confirmed that it discounted Claimant's medication expense by fifty percent, or $6,044.00, because his medications were prescribed on an "as needed" basis. *Claimant's Statement* ¶ 18.

19. The parties mediated on Monday, January 13, 2020. *Defendant's Statement* ¶ 14.

20. At the mediation, the parties agreed to resolve the claim on a full and final basis, as set forth in a document entitled "Settlement Terms" signed by Claimant, Claimant's Counsel and Defendant's Counsel. *Joint Exhibit I*; *Defendant's Statement* ¶¶ 15-16; *Claimant's Statement* ¶ 19; *see also Mediator's Report filed January 17, 2020.*

21. The Department cancelled the hearing scheduled for January 29, 2020. *Defendant's Statement* ¶ 18.

22. As set forth in the Settlement Terms, medical benefits were to remain open subject to (1) CMS' approval of the MSA in the amount proposed, or (2) Defendant's election to leave medical benefits open or fund an MSA in a higher amount, if CMS approved the MSA in a higher amount.[2] *Joint Exhibit I*; *Claimant's Statement* ¶ 19.

[2] The Centers for Medicare and Medicaid Services (CMS) is a federal agency within the U.S. Department of Health and Human Services.

23. Following the mediation, Defendant submitted the MSA to CMS for approval. *Defendant's Statement* ¶ 19.

24. On January 22, 2020, Defendant's counsel emailed draft settlement documents to Claimant's counsel. *Defendant's Statement* ¶ 17; *Claimant's Statement* ¶ 20. Claimant's counsel did not respond to this email. *Defendant's Statement* ¶ 21.

25. On January 27, 2020, Claimant's counsel emailed the MSA vendor with two concerns. First, the MSA stated that Claimant took one hydrocodone pill and one ibuprofen pill per day, when he actually took two per day of each medication. Second, Claimant's pharmacy charged more for each medication than the amount set forth in the MSA.[3] *Claimant's Statement* ¶ 21.

26. On January 29, 2020, the vendor replied that it reduced the amount of medication in the MSA because Claimant's medications were prescribed "as needed." Further, it priced the medications using CMS' average wholesale pricing tool. The vendor explained that it does not consider pharmacy retail prices in preparing MSAs. *Claimant's Statement* ¶ 22.

27. On or about February 9, 2020, CMS approved the MSA as prepared by the vendor in the exact amount proposed. *Defendant's Statement* ¶¶ 19-20. This amount was based on medication quantities that are one-half the amounts that Claimant takes daily. *Claimant's Statement* ¶ 23.

28. On February 18, 2020, Claimant's counsel called the MSA vendor to ask how Medicare would cover medication expenses if the MSA were depleted in a given year. Counsel spoke with the vendor on February 20, 2020 and March 2, 2020. The vendor provided counsel with a price quote. *Claimant's Statement* ¶¶ 24-25.

29. On March 19, 2020, Claimant's counsel analyzed the price quote and concluded that, over his lifetime, Claimant would pay $4,719.60 more for medications because he currently takes twice as much medication as the vendor built into the MSA. Claimant's counsel thought that Claimant should insist on revising the MSA to include the number of pills he was currently taking. Further, Claimant's counsel wanted the MSA to include additional funding to cover Claimant's out-of-pocket costs if the MSA were depleted in any given year.[4] *Claimant's Statement* ¶ 26.

30. Claimant's counsel first voiced objections to the MSA on March 24, 2020 in a telephone call initiated by Defendant's counsel. *Defendant's Statement* ¶ 22.

31. That same day, Claimant's counsel emailed Defendant's counsel to argue that the MSA was "underfunded" by $4,700.00; he wrote that Claimant would not sign the

[3] The MSA listed the cost of hydrocodone as $13.50 per month and the cost of ibuprofen as $8.40 per month. Claimant's pharmacy charged $78.00 per month for hydrocodone and $33.00 per month for ibuprofen. *Claimant's Statement* ¶ 21.

[4] If the MSA ran out of funds in any given year, Claimant would purchase his medications through his Medicare Part D supplement plan. That plan requires him to pay deductibles and co-payments.

settlement documents until he was "made whole." *Claimant's Statement* ¶ 27. Claimant's counsel also sent Defendant's counsel a spreadsheet listing medication costs not covered by the MSA. He told Defendant's counsel that Claimant was willing to proceed with the settlement if the MSA were revised to include the amount of medication he was taking daily and additional funding to insulate him against out-of-pocket costs in the event that he purchased medications through his Medicare Part D supplement plan. *Claimant's Statement* ¶ 28.

32. On March 25, 2020, Defendant's counsel emailed Claimant's counsel a proposed Compromise Agreement ("Form 16 Agreement") and Addendum.

33. The Department's standard Compromise Agreement form explicitly states: "This Compromise Agreement shall not be binding or operative until it is approved by the Commissioner of Labor or designee." *See* Compromise Agreement (Form 16).

34. The Form 16 Agreement prepared by Defendant included the following language:

> This settlement shall not be binding or operative unless and until this Modified Full and Final Form 16 Settlement Agreement with Addendum and the attached Modified Full and Final Form 16 Addendum Settlement and Release Agreement which is incorporated and made a part hereof are approved by the Commissioner of Labor or designee.

Claimant's Statement ¶ 29.

35. The Addendum prepared by Defendant stated that Claimant would release any and all claims "after the Commissioner of Labor's approval of both the Form 16 and this Addendum." The Addendum also included the following:

> Employee acknowledges that he has read the Form 16 and Addendum and understands all of its terms, and has entered into and signed the Form 16 and Addendum knowingly, voluntarily and of his own free will and volition.

Claimant's Statement ¶ 29.

36. In the absence of a signed Form 16 Agreement and Addendum, Defendant's counsel requested that the matter be returned to the formal hearing docket on April 13, 2020. *Defendant's Statement* ¶ 23. A hearing on the parties' vocational rehabilitation dispute is currently scheduled for December 9, 2020.

37. Defendant contends that the Settlement Terms obligate Claimant to sign the proposed Form 16 Agreement and Addendum and submit them to the Commissioner for review. Defendant acknowledges that the Commissioner might find that the proposed settlement is not in Claimant's best interest, in which case he would not approve it. Nevertheless, Defendant asks the Department to enforce the Settlement Terms by

ordering Claimant to sign and submit the proposed Form 16 Agreement and Addendum for the Commissioner's review.

38. Claimant contends that he is not bound by the Settlement Terms to sign the Form 16 Agreement and Addendum prepared by Defendant. He asks the Department to deny Defendant's motion.

DISCUSSION:

1. The legal question presented here is whether Claimant is bound by the Settlement Terms signed by the parties at mediation, which purportedly require him to sign a proposed Form 16 Agreement and Addendum for the Commissioner's review. As set forth in *LaBrie v. LBJ's Grocery*, Opinion No. 29-02WC (July 10, 2002), the Department has jurisdiction to consider this question.

Provisions Governing Settlement in the Workers' Compensation Statute and Rules

2. Vermont's workers' compensation statute, 21 V.S.A. § 662(a), requires that the parties to a settlement agreement file "a memorandum thereof" with the Commissioner for review and approval. Approval is conditioned on a determination that the settlement terms conform to the provisions of the workers' compensation statute. *Id.* Further, the Commissioner must find that "the best interests of such employee will be served thereby." *Id.* "If approved by the Commissioner, such agreement shall be enforceable" and thereafter will be subject to modification only in limited circumstances. *Id.*; *see also* Workers' Compensation Rule 13.1500.

3. Workers' Compensation Rule 13.1600 identifies the Compromise Agreement (Form 16) as the form that satisfies the statute's "memorandum" requirement. The rule provides that the parties to a negotiated settlement shall submit a Form 16 Agreement to the Commissioner, accompanied by a letter containing the additional information outlined in Workers' Compensation Rules 13.1610 through 13.1660, including the reason why the proposed compromise agreement is in the injured worker's best interest. *See* Workers' Compensation Rule 13.1660. Although not required by the rule, it is common practice for parties to submit an addendum to the Form 16 Agreement containing additional settlement terms as well.

4. Thus, the statute and rules set the conditions for a binding and enforceable settlement agreement. First, the parties must submit their agreement to the Department on Form 16, accompanied by a so-called Rule 13 letter. Next, the Commissioner must review the proposed settlement to determine whether it complies with the statute and is in the injured worker's best interest. If so, the Commissioner approves the settlement, and it becomes binding and enforceable.

Application of the Statute and Rules to the Parties' Purported Settlement

5. The Department's Compromise Agreement form explicitly states: "This Compromise Agreement shall not be binding or operative until it is approved by the Commissioner of Labor or designee." *See* Finding of Fact No. 33 *supra*. The proposed Form 16

Agreement prepared by Defendant here not only included this language but expanded its scope to cover a proposed Addendum and a proposed Release Agreement as well. *See* Finding of Fact No. 34 *supra.*

6. Although the parties signed Settlement Terms at mediation, they did not sign and submit a Form 16 Agreement to the Commissioner, nor did the Commissioner review and approve any such agreement. Accordingly, none of the conditions for a binding settlement set forth in 21 V.S.A. § 662(a) and Workers' Compensation Rule 13.1600 have been met. *See LaBrie v. LBJ's Grocery*, Opinion No. 29-02WC (July 10, 2002) (Commissioner approval required for an enforceable compromise agreement); *Walker v. Johnson Fuel Service*, Opinion No. 07D-99WC (February 16, 1999) (same).

7. Accordingly, there is no enforceable settlement agreement here.

Enforceability of the Settlement Terms Reached at Mediation

8. Defendant views this matter as a two-step process: step one is enforcement of the Settlement Terms reached at mediation, and step two is the review and approval process set forth in 21 V.S.A. § 662(a) and Workers' Compensation Rules 13.1500 through 13.1700. Defendant contends that, despite the lack of Commissioner approval, the Settlement Terms themselves are enforceable and should be enforced by ordering Claimant to sign the proposed Form 16 Agreement and Addendum.

9. The Settlement Terms, set forth in seven short paragraphs, provide that Defendant shall pay Claimant a specific dollar amount and shall submit the MSA to CMS for approval. They specify what will happen if CMS approves the MSA as proposed or at a higher or lower dollar figure. They further provide that the parties "shall work together to draft and file settlement documents" with the Department. *Joint Exhibit I.*

10. To carry out the provision that the parties shall work together to draft settlement documents, Defendant prepared a proposed Form 16 Agreement and Addendum for Claimant's consideration. Only excerpts from those documents are in evidence here, but even those excerpts contain additional terms beyond those set forth in the Settlement Terms. *See* Finding of Fact Nos. 34-35 *supra.* Thus, the Settlement Terms did not contain the entire agreement between the parties but were rather an "agreement to agree."

11. In *Miller v. Flegenheimer*, 2016 VT 125, the Vermont Supreme Court considered whether "agreements to agree" are enforceable contracts. The Court found that such a determination depends on two factors: intent to be bound and definiteness of terms. *Id.* at ¶ 13, citing *Wolvos v. Meyer*, 668 N.E.2d 671, 675 (Ind. 1996). Further, the Court cited a Second Circuit case recognizing a "strong presumption" against finding a binding obligation in a preliminary agreement. *Miller*, *supra*, at ¶ 14, citing *Arcadian Phosphates, Inc. v. Arcadian Corp*., 884 F.2d 73 (2d Cir. 1989).

12. First, considering whether the parties intended to be bound by the Settlement Terms, I note that those terms specifically provide that the parties will "work together" to draft and file settlement documents. This provision indicates that the parties intended to be

bound by those future documents, rather than the Settlement Terms themselves. *See Miller, supra*, at ¶ 18 ("a reference to a future writing shows intent not to be bound"). Further, Claimant's counsel's ongoing efforts to evaluate the MSA after mediation also evidence an intent not to be bound by the Settlement Terms.

13. Further weighing against the parties' intent to be bound is the fact that not all terms of their purported agreement were set forth in the Settlement Terms. *See Miller, supra*, at ¶ 21. Although the proposed Form 16 Agreement and Addendum are not in evidence, the portions included in Claimant's Statement of Undisputed Facts set forth additional terms that do not appear in the Settlement Terms, including reference to a Release Agreement.

14. Finally, the parties know that under Vermont's workers' compensation statute and rules, no settlement is binding and enforceable until it is set forth on Form 16 and approved by the Commissioner. Therefore, parties could not reasonably have expected to be bound by a settlement that did not undergo that procedure. *See Miller, supra,* at ¶ 23. Based on all these factors, I conclude that the parties did not intend to be bound by the Settlement Terms reached during mediation.

15. Second, considering the definiteness or indefiniteness of the agreement's terms, *see* Conclusion of Law No. 11 *supra*, the Settlement Terms provide that the parties would "work together" to draft settlement documents. That provision implies that the parties will negotiate additional terms in the future. As the Second Circuit has noted, the "actual drafting of a written instrument will frequently reveal points of disagreement, ambiguity, or omission which must be worked out prior to execution." *Winston v. Mediafare Entertainment Corp*., 777 F.2d 78, 80 (2d Cir. 1985). I accordingly conclude that the Settlement Terms lacked definiteness as well.

16. Therefore, the Settlement Terms provided a framework for future agreement, rather than constituting an enforceable agreement on their own.

Claimant's Ability to Rescind an Unapproved Settlement

17. If Claimant were ordered to sign the proposed Form 16 Agreement and Addendum, he would still be able to rescind the agreement prior to the Commissioner's approval, assuming that rescission would restore the parties to the position they occupied before they executed the documents. *See Quinones v. State of Vermont*, Opinion No. 04-16WC (February 9, 2016). Even if weeks or months had passed, the Commissioner "would be hard pressed to enforce an agreement absent the commissioner's prior review and approval." *Id.*

18. The purpose of requiring the Commissioner's approval of settlements is to advance and foster adequate protection of an injured worker's rights. *Walker v. Johnson Fuel Service*, Opinion No. 07D-99WC (February 16, 1999). Allowing an injured worker to rescind a settlement prior to approval is accordingly in keeping with the humane purpose of the Workers' Compensation Act. *See St. Paul Fire and Marine Ins. Co. v. Surdam*, 156 Vt. 585 (1991); *see also Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 781 (5th Cir. 1988) (unambiguous purpose of allowing claimants to withdraw from

unapproved settlements under the Longshore and Harbor Workers' Compensation Act is to protect their rights).

19. As an injured worker can rescind a fully executed Form 16 Agreement prior to the Commissioner's approval, I see no reason why he or she cannot rescind a proposed agreement at an earlier stage in the process. Further, ordering Claimant to sign the Form 16 Agreement only to allow him to rescind it after signature would be pointless. The law does not require a futile act. *State v. Tribble*, 2012 VT 105, ¶ 30, citing *Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980), *overruled on other grounds*, 541 U.S. 36, 60-69 (2004).

Conclusion

20. I conclude that Claimant is not bound by the terms of the agreement that the parties reached in mediation to sign settlement documents for filing with the Commissioner.

ORDER:

Defendant's Motion to Enforce Settlement Agreement is hereby **DENIED**.

DATED at Montpelier, Vermont this 6th day of October 2020.

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Michael A. Harrington
Commissioner