

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS**

Aldo Lavinio
Transport Exchange
Cigna Insurance Cos.
Workers' Compensation Trust Fund
BOARD NO. 014809-99

Employee
Employer
Insurer
Insurer

REVIEWING BOARD DECISION

(Judges Wilson, Levine & Carroll)

APPEARANCES

Dorothy M. Linsner, Esq., for the Insurer
Thomas M. Wielgus, Esq., for the Trust Fund

WILSON, J. The insurer appeals from a decision of an administrative judge denying its § 37 reimbursement petition against the Workers' Compensation Trust Fund ("Trust Fund"), on the basis that the underlying claim was settled by way of a § 48 lump sum agreement, prior to an adjudication of § 34A liability or payment of § 34A benefits. After the decision was filed, the reviewing board published its opinion in Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166 (2001), which reversed a hearing decision denying § 37 reimbursement on the same basis, and recommitted the case for the judge to assess the reasonableness of the insurer's settlement of the claim for future § 34A and inchoate right exposure and the appropriate amount of § 37 reimbursement therefor. Id. at 172-174. Following Cosgrove, we reverse the decision and recommit the case for the applicable analysis, so long as the petition is otherwise sound.¹

We briefly recount the background to the claim. The employee suffered an industrial accident on October 7, 1993, for which the insurer paid benefits for temporary,

¹ The Trust Fund stipulated to none of the first paragraph elements comprising a prima facie valid § 37 petition. (Dec. 4.) See Cosgrove, supra at 171. The judge on recommitment must, of course, make findings on these elements.

total incapacity until they were exhausted on October 8, 1996.² The insurer and employee settled the employee's case for \$110,000.00 on April 15, 1998. Contending that the employee's injury fell within the scope of § 37, the insurer filed a petition for reimbursement on July 29, 1998. The Trust Fund denied the insurer's petition. The judge denied the claim both at the § 10A conference and after the hearing. (Dec. 3.)

The judge's reasoning in denying the § 37 petition in the present case mirrors that which the reviewing board reversed in Cosgrove, supra:

Because § 34A benefits were not established by the employee, paid by the insurer, or accepted by the insurer in this instance, the insurer is not entitled to claim § 37 reimbursement.

...

There has been no adjudication by the Department to suggest payment of § 34A benefits; one will never know whether the claimant would have been deemed entitled to § 34A benefits because the parties settled the matter via lump sum prior to a hearing on the question of § 34A eligibility and after a conference order that had denied § 34A entitlement.

...

In the present case, because the benefits that were paid by the insurer are not clearly and specifically from one of the sections of the Act for which reimbursement is designated, its petition for reimbursement should be denied.

(Dec. 7-8.) In Cosgrove, supra, we discussed our earlier § 37 opinion in Diliberto v. New England Elec. Co., 11 Mass. Workers' Comp. Rep. 123 (1997), and stated:

We analogized [in Diliberto, supra] the § 37 relationship between the insurer and the Trust Fund to indemnification law, and concluded that the [lump sum] settlement was not a bar to the Trust Fund's right to contest the merits of the underlying claim. . . . The court in Berke Moore Co. [v. Lumbermen's Mut. Casualty Co.], 345 Mass. 66 (1962) spoke of the party seeking indemnification as having "full liberty of determination whether to settle or to try": "What is reasonable to do they should be permitted to do." Id. at 70-71. . . . A lump sum settlement, in and of itself, can be the basis for a successful claim for [§ 37] indemnification/reimbursement, so long as it is "reasonable."

Cosgrove, supra at 173-174.

² The administrative judge erroneously found that § 35 benefits were paid prior to the lump sum settlement. See Exhibit 13; Dec. 9.

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We therefore reverse the decision and recommit the case for further proceedings and findings consistent with this opinion. Cosgrove, supra at 169. See also Carmilia v. General Electric Co., 15 Mass. Workers' Comp. Rep. ____ (May 16, 2001).

We summarily affirm the judge's denial of § 50 interest as the Trust Fund is an instrumentality of the Commonwealth and, in the absence of specific statutory authority, is exempt from an award of interest under § 50. Carmilia, supra, slip op. at 5-14.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: **December 21, 2001**

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge