**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 2405899**

| | |
|---|---|
| Barbara Theis | Employee |
| Mill Hill Nursing Home | Employer |
| Hartford Insurance | Insurer |
| Workers' Compensation Trust Fund | Insurer |

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

**APPEARANCES**

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

**MAZE-ROTHSTEIN, J.** The Workers' Compensation Trust Fund ("Trust Fund") appeals from a decision that awarded the insurer G.L. c. 152, § 37, reimbursement, for benefits paid in a lump sum agreement. The Trust Fund contends that it was error to award § 37 reimbursement without allocating a portion of the lump sum settlement for § 35 partial weekly incapacity benefits. For the reasons stated in Cosgrove v. Penacock Place, 15 Mass. Workers' Comp. Rep. 166 (2001) and Carmilia v. General Elec., 15 Mass. Workers' Comp. Rep. ___ (May 16, 2001), we disagree. The Trust Fund also contends error in the judge's award of interest pursuant to G.L. c. 152, § 50. We apply the doctrine of sovereign immunity and agree with the Trust Fund's § 50 argument. We therefore reverse the decision with respect to the § 50 interest ordered and affirm as to the § 37 reimbursement award.

On July 6, 1994, the employee, Barbara Theis, sustained an industrial injury to her back in the course of her employment as a licensed practical nurse. (Dec. 342.) She began working for the employer in 1982, injuring her back in 1983 and 1985 which caused her to undergo four back surgeries between 1987 and 1991. (Dec. 342.) A § 11 A

doctor examined the employee on two occasions in 1997 and opined that the employee was permanently and totally disabled. (Dec. 343.) The insurer's doctor reached the same conclusion. (Dec. 343.) In early July 1997, the employee's § 34 temporary total incapacity compensation was exhausted resulting in her claim for § 34A benefits. (Dec. 342.)

During the pendency of that claim, the insurer agreed to commence § 35 benefits at the maximum rate until the matter was heard. At a § 10A conference ongoing § 35 benefits were awarded. (Dec. 342.) Shortly thereafter, the parties settled the claim for $190,000. An administrative judge approved the lump sum on September 10, 1998. The employee received $153,000 after her attorney took a fee of $37,000. (Dec. 343.) The insurer filed a claim for § 37 reimbursement that was opposed by the Trust Fund. After a de novo hearing, on the basis of the foregoing history and the parties' stipulations the administrative judge determined that the requisite elements of § 37 liability had been established.[1] See Cosgrove, supra.

After determining that amounts paid in the lump sum agreement were reimbursable under § 37, the judge provided the following analysis:

> [T]he insurer cannot create a § 37 reimbursement merely by claiming in a lump sum agreement that monies paid are attributable to future § 34A liability. The Trust Fund needs only to reimburse § 34A claims that were reasonably paid. Whether or not a lump sum agreement creates a § 37 reimbursement of § 34A liability is a question of fact. If an administrative judge finds that the allocation of funds paid in a lump sum agreement are more reasonably attributable to a period of § 35 partial disability compensation, or some other form of nonreimbursable compensation, then no § 37

[1] The following stipulations were entered into by the parties: 1) prior to July 6, 1994, the employee suffered a prior injury; 2) the employer had personal knowledge of the employee's prior injury in accordance with § 37; 3) on or about July 6, 1994, the employee suffered an injury arising out of and in the course of her employment with Mill Hill Nursing Home; 4) on or about September 10, 1998, the DIA approved a lump sum agreement between the employee and the insurer in the amount of $190,000. At the time of the lump sum agreement the employee had exhausted her § 34 benefits and was receiving § 35 partial disability compensation. After deducting $37,000 in attorney's fees, the remaining amount of the lump sum is $153,000, 75% of which is $114,750. The insurer paid the lump sum agreement shortly after approval of the settlement by the DIA; 5) On or about November 16, 1998 the insurer filed a § 37 petition in accordance with G.L. c. 152, § 37 and its corresponding regulations 452 Code Mass. Regs. §§ 3.05(1) and 1.07(2)(L). (Dec. 338-339.)

reimbursement is warranted.

> The issue then is this: In the absence of payments made to the employee pursuant to § 34A, can a reasonable inference be taken as to what the lump sum agreement was to redeem? A close examination of the facts and numbers involved in this case suggest that the employee was paid § 34A benefits with her lump sum agreement. There is no evidence that the $148,000 is attributable to the redemption of any other potential liability (say § 8, 14 or 28) so one is left with the inescapable conclusion that the $148,000 must have redeemed the insurer's § 34A liability.

(Dec. 345-347.)

Accordingly, the judge awarded the insurer § 37 reimbursement at the maximum allowable rate of 75% on $148,000 net amount paid in the lump sum agreement, plus interest pursuant to § 50. (Dec. 351.)

We turn first to the Trust Fund's appeal and the contention that an order of § 50 interest on an award of § 37 reimbursement is in error.[2] We agree.

The Trust Fund argues that it is an instrumentality of the Commonwealth that has not waived its sovereign immunity, therefore, it can not be assessed interest under § 50. (Trust Fund's Brief, 4, citing Carmilia v. General Electric, 15 Mass. Workers' Comp. Rep. ____ (May 16, 2001)).

In Carmilia, supra, we rejected the argument that the Trust Fund could be assessed interest under § 50, holding that the Trust Fund, in its administration of the § 37 second injury reimbursements, serves the governmental function of insurance regulation within the workers' compensation system, and is thus, an instrumentality of the Commonwealth and protected by sovereign immunity. Id. at __. Moreover, the Trust Fund does not have a quasi-private, proprietary nature due to its independent funding mechanism and that, given the Second Injury Fund's explicit purpose of encouraging the hiring of impaired

[2] General Laws c. 152, § 50, as amended by St. 1991, c. 398, § 77, provides in pertinent part:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision.

workers, characterizing the Trust Fund as an instrumentality of the Commonwealth furthers the overall beneficent design of the Act. Id. at __. In the instant case, we are equally unpersuaded by the insurer's arguments against the Trust Fund's status as a government instrumentality.

Additionally, we reject the insurer's arguments that exceptions to the doctrine of sovereign immunity authorize an order of interest in § 37 reimbursement awards. We reasoned in Carmilia that no inference of inclusion of interest in G.L. c. 152, § 65(2)(c), could be made from the exclusion of interest in G.L. c. 152, § 65(2)(e)(ii), as such inferential reasoning in statutory construction can not be argued as to a waiver of sovereign immunity, Onofrio v. Department of Mental Health, 411 Mass. 657 (1992); that there existed no contractual obligation between the parties amounting to an improper detention of money warranting the accrual of interest (because there is no payment due in a contested § 37 claim until the reimbursement amount is known) and, that all of the insurer's other arguments on § 50 interest, particularly its attempt to apply the Tort Claims Act in this non-tort area, were meritless. Since the arguments here are identical, we reverse the judge's decision as to the order of §50 interest on the award of § 37 reimbursement. Carmilia, supra at __ .

We now turn to the Trust Fund's challenge of the reasonableness of the award of § 37 reimbursement to the insurer. The Trust Fund contends that because the employee in the underlying case was receiving § 35 pursuant to a conference order on the employee's claim for § 34A, it was unreasonable for the hearing judge not to allocate any of the lump sum agreement to § 35. (Trust Fund's Brief, 5.) The response to this contention is governed by our recent decision in Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166 (2001). We affirm and endorse the judge's statutory interpretation, as well as his analysis of the reasonableness of the lump sum agreement and its allocations to the sections specified in § 37. Id.

In Cosgrove, we were faced with an issue of first impression arising out of the 1991 amendment of § 37, which narrowed Second Injury Fund reimbursement by eliminating it for temporary incapacity benefits paid under §§ 34 and 35 of the Act. In

that case, because the employee and insurer had entered into a lump sum agreement for redemption of liability for the employee's lower back injury prior to any payment of weekly permanent and total incapacity benefits under § 34A, the judge denied the insurer's petition for reimbursement under § 37. We reversed the judge's decision and held that the insurer's right to § 37 reimbursement is not contingent on actual prior payment of § 34A benefits but instead, the inquiry should be whether any amount paid under the lump sum agreement could reasonably be allocated as payment in redemption of future § 34A benefits and, if so, a determination as to what percentage of that amount, *up to* seventy-five percent, should be calculated. Id. at 171-175.

Under Carmilia, we again rejected a bright line exclusion of reimbursement when no § 34A had been paid by agreement or judicial determination and reasserted the reasonableness standard established in Cosgrove. Carmilia, supra at __ . We are satisfied that this reasonableness standard was sufficiently applied to the facts and evidence presented here.

Specifically, the judge here reasoned that "the administrative judge may rely on the representations included in the lump sum agreement concerning the allocation of funds to redeem § 34A liability in cases where § 34A compensation has never been paid, so long as the allocation of funds is based on sufficient facts to establish that § 34A compensation could be appropriately paid, and that the amount paid was reasonable." (Dec. 350.) "In this case, the clear intent of the lump sum agreement was to redeem § 34A liability, as can be seen in the express language of the lump sum document." (Dec. 350-351.) The judge further found that "the employee's long history of back injuries and the medical opinions of the § 11A impartial medical examiner and the insurer's doctor, combine to establish that the redemption of § 34A liability was not unreasonable in this case." (Dec. 351.)[3] He also noted that express statements of § 34A benefits redemption

[3] Also noted in the decision was the amount of the lump sum agreement, $153,000, about eight years of § 34A compensation, an amount perceived by the judge as "not unreasonably high for a 52 year old, five times injured woman, and it is not so low as to suggest redemption of § 35 liability or the redemption of some other liability." (Dec. 351.)

standing alone in the lump sum documentation are insufficient to establish that fact, but found that given the then 14 month exhaustion of § 34, during which time Ms. Theis received § 35 payments, obviated the need for any § 34 apportionment. (Dec. 346.) The judge also found that the cash amount of the settlement far exceeds a § 35 redemption. (Dec. 346.)[4] We have similarly analyzed the nature of reaching and entering into a lump sum settlement: "the assessment of future risks in light of the benefit limits" and reaching a compromise "when these future contingencies are assessed and a corresponding present value of the case is assigned, 'discounted by the likelihood of success.' " Carmilia, supra at __ quoting MacQuarrie v. Secretary of Health & Human Services, 639 F.Supp. 1357, 1362 (D.Mass. 1986).

In analyzing the lump sum agreement, the judge asked and carefully answered the pivotal question, "can a reasonable inference be taken as to what the lump sum agreement was to redeem?" (Dec. 346.) After a close examination of the facts and calculation of the benefit involved, he ineluctably concluded that the $148,000 redeemed the insurer's §34A liability. (Dec. 346-347.) These findings withstand the Trust Fund's challenge and indicate no error.

We reverse the decision as to the order of payment of § 50 interest and otherwise affirm the decision.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Filed: December 20, 2001

[4] The employee received $153,000 in cash, $5,000 of that was nonreimbursable § 36 loss of function compensation, and the remaining $148,000 would account for more than 589 weeks of § 35 compensation available to her. Instead, the judge attributed this payment to eight years of § 34A compensation, taking into account the present day value of the money, and the employee's life expectancy of about 30 years, which, far exceeds the eight years of compensation. (Dec. 346-347.)

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge