COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007435-99**

Elizabeth Woodman	Employee
Sun Life of Canada	Employer
CNA Insurance Company	Insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and Carroll)

APPEARANCES
Dorothy M. Linsner, Esq., for the insurer
Pedro Benitez-Perales, Esq., for the Trust Fund

WILSON, J. CNA Insurance Company appeals the decision of an administrative judge whereby the insurer was awarded only partial § 37 reimbursement for a lump sum settlement that redeemed liability for permanent and total incapacity benefits under G. L. c. 152, § 34A. It is noteworthy that the administrative judge did not have the benefit of our holding in Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166 (2001), when she issued her decision in this matter. Following Cosgrove, we affirm the decision in part and recommit the case in part for the applicable analysis and findings.

We briefly set out the background to the claim. The employee suffered a concussion and a tibial fracture of the left knee in a fall at work on September 8, 1993, for which the insurer paid § 34 benefits for temporary, total incapacity until they were exhausted on September 6, 1996. (Dec. 1, 2, 4.) The insurer and the employee, who was seventy-one years old at the time of hearing, settled the employee's case for $70,000.00 and, on October 1, 1996, the lump sum settlement was approved pursuant to § 48. No § 35 benefits were paid prior to the settlement. (Dec. 2, 6.)

Contending that the employee's injury fell within the scope of § 37, the insurer filed a petition for reimbursement of $45,694.40 on August 14, 1997, which the Trust Fund denied. The matter was presented for conference before an administrative judge, who denied the insurer's claim for reimbursement. The insurer appealed to a hearing de novo. (Dec. 3.)

In her decision, the administrative judge correctly determined that an insurer can allocate § 34A benefits within a § 48 lump sum for purposes of § 37, even though there has been no finding of liability for § 34A. (Dec. 7.) This determination is consistent with Cosgrove, supra at 171. The administrative judge then reduced the amount eligible for reimbursement to a fraction of what was requested by the insurer by deducting the maximum potential entitlement to § 35 benefits.[1] (Dec. 7-8.) The insurer challenges this result on the basis that the judge's opinion omitted a balanced consideration of the evidence before her concerning the reasonableness of the allocation to § 34A and the probability of success in a proceeding on a § 34A claim. (Insurer brief 5-9.) We agree it is appropriate to recommit the case for further findings. See Cosgrove, supra; Carmilia v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 261, 265-267, 276 (2000) (the reviewing board endorsed the judge's approach to addressing the reasonableness of a § 34A allocation).

In Cosgrove, supra at 173-174, we set out some of the factors that a judge should weigh in addressing the reasonableness of an allocation in the settlement, and in Carmilia, supra, we pointed out that the judge's analysis of the facts before him, together with consideration of the likelihood of success on a § 34A claim, was "a particularly good road map" for analyzing the reasonableness of the parties' assessment of the case.

As support for her calculation that deducted the maximum entitlement to

[1] Section 37, as amended by St. 1991, c. 398, § 71, allows reimbursement "in an amount not to exceed seventy-five percent of all compensation due under sections thirty-one, thirty-two, thirty-three, thirty-four A, thirty-six A, and . . . section thirty[.]"

§ 35 benefits from the amount sought by the insurer, the judge focused on the reference in the lump sum agreement to the employee's "uncertainty as to the outcome of any § 34A litigation" and inferred that the employee "had concerns that she would not achieve more than § 35 benefits if the matter had been litigated."[2] (Dec. 7.) To be sure, all litigation is uncertain, a factor we recognized in Cosgrove, supra at 173-174. But that factor needs to be analyzed and weighed together with other evidence in this case, including medical evidence of the employee's worsening knee and vertigo, (Exhibits 2C(2)(d) and (f)), as well as the statements in the lump sum agreement that the parties agreed that the employee's work capacity was "[n]one" and that her present medical condition was "[p]ermanently and totally disabled." The lump sum language also stated: "in likelihood of total disability, this settlement anticipates redemption of permanent and total disability over the life expectancy of the employee of 14.7 years." (Ex. 2B(4).)

To qualify for § 34A benefits, a claimant need only demonstrate that the same level of impairment continues following the exhaustion of § 34 benefits. There is no need to show a worsening of the disabling condition. Goden v. Phalo Corp., 9 Mass. Workers' Comp. Rep. 720, 721 (1995). Here, however, the claimant introduced evidence of a worsening in her causally related disability. (Ex. 2C(2).) This alone, underscores the insurer's prudence in settling the case and suggests that the value attributable to potential § 34A benefits may exceed that allotted by the judge. In the written lump sum agreement, the employee and insurer agreed that the employee did not have a work capacity and that her present medical condition is "[p]ermanently and totally disabled." (Ex. 2B(4).) No evidence has been presented by the Trust Fund to counter these assertions.

We summarily affirm the judge's finding that an insurer may proceed with a § 37 petition seeking reimbursement of a § 34A allocation in a lump sum

[2] The judge omitted the first part of the referenced sentence, which in its entirety read: "While the employee feels she is unable to obtain and retain meaningful work she realizes the uncertainty surrounding litigation for § 34A benefits." (Ex. 2B (4).)

agreement, notwithstanding the absence of a prior finding of liability for § 34A benefits. Cosgrove, supra at 171. We vacate the allocation to § 35 benefits made by the administrative judge. We find it appropriate to recommit the balance of the case for reconsideration of and for further findings on the reasonableness of the settlement allocation, consistent with this opinion. G. L. c. 152, § 11C. We transfer the case to the senior judge for assignment to an administrative judge as appropriate.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **March 12, 2002**

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge