**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 011267-99**

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| James Carmilia | Employee |
| General Electric | Employer |
| Electric Insurance | Insurer |
| Workers' Compensation Trust Fund | Insurer |

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

**APPEARANCES**
Dorothy M. Linsner, Esq., for the insurer at hearing
W. Frederick Uehlein, Esq. and Jerry E. Benezra, Esq., for the insurer on appeal
Thomas M. Wielgus, Esq., for the Trust Fund at hearing
Jessica E. Coccoli, Esq., for the Trust Fund on appeal

**MAZE-ROTHSTEIN, J.** In this case of first impression, the insurer and the Workers' Compensation Trust Fund ("Trust Fund") cross-appeal a decision that awarded the insurer reimbursement pursuant to G.L. c. 152, § 37, for benefits paid in a lump sum agreement.[1] The insurer contends that it is entitled to § 50 interest on the award, which

[1] Section 37, as amended by St. 1991, c. 498, § 71, provides, in pertinent part:

> Whenever an employee who has a known physical impairment which is due to any previous accident, disease or any congenital condition and is, or is likely to be, a hindrance or obstacle to his employment, and who, in the course of and arising out of his employment, receives a personal injury for which compensation is required by this chapter and which results in a disability that is substantially greater by reason of the combined effects of such impairment and subsequent personal injury than that disability which would have resulted from the subsequent personal injury alone, the insurer or self-insurer shall pay all compensation provided by this chapter. If said subsequent personal injury is caused by the preexisting impairment or if said subsequent personal injury of such an employee shall result in the death of the employee, and it shall be determined that the death would not have occurred except for such pre-existing physical impairment, the insurer shall pay all compensation provided by the chapter.
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> Insurers making payments under this section shall be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed seventy-five

was omitted from the order. We apply the doctrine of sovereign immunity in rejecting the insurer's argument. The Trust Fund contends it was error to award any § 37 reimbursement, because the lump sum agreement was executed prior to a payment or a finding and order of weekly § 34A permanent and total incapacity benefits. For the reasons set out in Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. ____ (May 2, 2001), we disagree. The Trust Fund also contends error in the failure to eliminate the lump sum settlement allocation of $95,000.00 to spousal inchoate rights from the pool of reimbursable benefits, and by allowing the § 37 petition to go forward without the requisite proof under 452 Code Mass. Regs. § 1.07 (2)(l). We also disagree with these arguments. We therefore affirm the decision.

James Carmilia sustained an industrial injury to his back while in the course of his employment on September 13, 1994. He had worked for the employer since 1969, and had suffered a series of back injuries throughout his employment. On March 12, 1984, the employee underwent L4-5 surgery. In 1992, an MRI diagnostic test revealed degenerative disc disease at C5-6. In 1994 the employee's back and neck pain worsened, with an MRI revealing a herniation at his L3-4 and nerve impingement at L3. On September 13, 1994, the employee experienced more back pain while pulling on a heavy

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> percent of all compensation due under sections thirty-one, thirty-two, thirty-three, thirty-four A, thirty-six A, and where benefits are due under any of such sections, section thirty; . . . provided, further, that no reimbursement shall be made for any amounts paid during the first one hundred and four weeks from the onset of disability or death.
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> There shall be no reimbursement under this section unless the employer had personal knowledge of the existence of such pre-existing impairment within thirty days of the date of employment or retention of the employee by such employer from either a physical examination, employment application questionnaire, or statement from the employee.
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> . . .
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> The office of legal counsel shall in all instances have the authority to defend claims against the fund. Such office shall have the right to contest any amount accredited to the above named sections which has been redeemed by an insurer by payment of a lump sum agreement pursuant to section forty-eight, but reimbursement shall not require the approval of the lump sum by said office or by the state treasurer.

steel pipe. On October 5, 1994, the employee underwent further surgery at L4-5 and a decompression of the nerve root from L4 to S1. (Dec. 1-2.) On the basis of this history and the medical opinions of a § 11A doctor, who conducted a record review, the judge determined that the requisite elements of § 37 liability had been satisfied. (Dec. 2-3.) See n.1 supra; Cosgrove, supra.

The insurer paid § 34 temporary total weekly incapacity benefits after the September 1994 industrial injury to the 156 week statutory maximum. While awaiting a conference on § 34A permanent and total benefits attributable to that injury, the parties settled the claim for $230,000.00. The lump sum agreement was approved by an administrative judge on October 16, 1997. The approved lump sum contained a $40,000.00 deduction for attorney's fees and allocations for $20,000.00 in permanent loss of function under § 36 and $95,000.00 for spousal inchoate rights under § 31. (Dec. 3.) The remaining $75,000.00 was allocated to future incapacity benefits. The insurer made claim for § 37 reimbursement on March 18, 1998, which was met with the Trust Fund's resistance. The claim went to hearing on March 14, 2000. (Dec. 4.)

After determining that amounts paid in a lump sum agreement were indeed reimbursable under § 37, notwithstanding the Trust Fund's arguments to the contrary, see Cosgrove, supra, the judge analyzed the settlement monies in detail:

> [T]he mere fact that monies paid in a lump sum settlement may be reimbursable under § 37 does not mean that the full amount is necessarily reimbursable or that there should be *carte blanche* for insurers to pass on substantial settlement costs to the § 65 Trust Fund. It must be agreed or found that the lump sum payments were made in lieu of what was due or likely to be due under one or more of the reimbursable sections.
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> This is not always a simple proposition. Such a determination may necessarily involve a degree of art as opposed to science. The numerous factors that go into the parties arriving at a settlement amount and the considerations that go into the allocations of those monies may sometimes serve to obscure what is actually underlying the settlement. The elements involved in the assessment of the value of a case by an insurer may not always mirror the wishes or needs of the employee in allocating those monies received. It may well be, as appears to be the case in this matter, that an insurer's willingness to pay a particular lump sum amount is largely grounded in its assessment of the future incapacity benefits it is likely to pay the employee. Because the employee may be looking at the

> coordination of benefits from various sources (social security, state accidental disability retirement allowances, private disability insurance, etc.) and seeking to minimize properly avoidable offsets, the insurer may accede to an allocation of monies that accommodates that employee need even if that allocation does not mirror the insurer's rationale for paying the settlement amount. The insurer may have been able to negotiate a smaller total settlement amount by acceding to an allocation of the monies that reduces offsets of other benefits and makes for a more beneficial net settlement for the employee. The understanding of such nuance must not be ignored in these cases and embodies the art to which I refer. A purely mechanical approach to evaluating the reimbursability of lump sums would create unfairness to the parties and impediments to settlement being able to truly serve the best interests of the employee, the standard set out in § 48.
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> Here, the circumstances of Mr. Carmilia's lump sum and the significant settlement amount clearly show a recognition by the insurer that there was at least a reasonable likelihood of success of the employee in the prosecution of his § 34A claim. The gross settlement amount is some nine times what the annual payout would be for this employee's § 34A benefits, this prior to any discounting for present value. The gross settlement amount is over three times this employee's maximum eligibility for partial incapacity benefits. I can not find this settlement to represent anything other than the anticipation of Mr. Carmilia's likely receipt of § 34A benefits.
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> While this exercise should not go so far as to be a trial on the merits of the § 34A claim, I do feel it is appropriate to look at the evidence to evaluate the reasonableness of the parties' apparent assessment of the case. Here, it is not unreasonable for the parties, including the insurer, to have seen there to be a sufficient likelihood of success for this employee's § 34A claim such as to warrant the payment of a lump sum settlement that anticipates the payment of § 34A benefits. At the time of the lump sum, Mr. Carmilia was just short of 56 years old, had worked the bulk of his adult life as an industrial plumber, and had exhausted his entire run of § 34 benefits, and had been left by his succession of injuries with persistent pain and was unable to do any lifting, bending or twisting and needed to be able to sit or stand at will. Given his age, background, and physical condition it was not unreasonable for the insurer to conclude there was a substantial likelihood Mr. Carmilia was permanently unable to sustain employment and for it to enter into a settlement reflecting that.

(Dec. 7-9.) Accordingly, the judge awarded the insurer § 37 reimbursement at the rate of 75% on $170,000.00 paid in the lump sum agreement, which amount included the $95,000.00 allocation for § 31 inchoate rights and $75,000.00 in future § 34A benefits. (Dec. 10-11.)

We turn first to the insurer's appeal. The insurer contends error because the decision lacks a § 50 interest order on the award of § 37 reimbursement.[2] We disagree.

The question of whether the Trust Fund is liable for § 50 interest on awards of § 37 reimbursement hinges on the doctrine of sovereign immunity. "The general rule is that the Commonwealth 'cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed . . . [by] statute.' " General Elec. Co. v. Commonwealth, 329 Mass. 661, 664 (1953), quoting Glickman v. Commonwealth, 244 Mass. 148, 149-150 (1923). The doctrine of sovereign immunity applies to Department of Industrial Accidents proceedings in which the Commonwealth is a party. Russo's Case, 46 Mass. App. Ct. 923 (1999). The Russo court reversed the reviewing board's award of interest in an employee claim against the Commonwealth: "Contrary to the conclusion reached by the board, G.L. c.152, § 70, does not either by its express terms or by necessary implication, permit the recovery of interest on an award against the Commonwealth." Id. We must now determine whether the same principle operates to bar interest in § 37 claims against the Trust Fund.

At the threshold lies an inquiry into the nature of the Trust Fund: Is it an instrumentality of the Commonwealth subject to sovereign immunity protection? Context for this inquiry can be had by briefly reviewing the history of the Second Injury Fund.

The Legislature created the Second Injury Fund in 1919, after a case of total blindness due to an industrial loss of sight in an employee's one healthy eye. The decision held the insurer liable for the total blindness based incapacity. Branconnier's Case, 223 Mass. 273 (1916). The statute, (St. 1919, c. 272, §§ 1 and 2), first established

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[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.

the type of reimbursements now contained in § 37, and "was to encourage the employment of persons who have previously suffered certain defined personal injuries by relieving the employer or the insurer from the burden of paying the entire compensation for further disability of the employee due to the combined effect of his previous injury and the one later received in the course of his employment." McLean's Case, 326 Mass. 72, 74 (1950). Under that and the other early versions of § 37, the State Treasurer reimbursed insurers from a segregated fund maintained by assessments on all compensation insurers. Id. The Attorney General represented the Treasurer in reimbursement claims; the Treasurer, as custodian of the Second Injury Fund, was permitted to be a party to the proceedings. Id. at 75.

In 1985, the legislature changed the provisions of the Second Injury Fund as part of the general overhaul of the workers' compensation system. See St. 1985, c. 662, § 32, and St. 1985, c. 572, § 55 (1985 versions of §§ 37 and 65). The Attorney General's role in defending the Second Injury Fund was enlarged. The Legislature created two separate funds under § 65 – a Special Fund for the operating expenses of the Department of Industrial Accidents, and the Workers' Compensation Trust Fund, which was responsible for § 37 reimbursements, and other categories of compensation and reimbursements.[3]

[3] General Laws c. 152, § 65, as amended by St, 1991, c. 398, § 85, provides in pertinent part:

> (1) There is hereby established a special revenue fund in the state treasury, known as the Workers' Compensation Special Fund, the proceeds of which may be expended by the department, subject to appropriation, for the operating expenses of the department.
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> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B; (b) reimbursement of adjustments to weekly compensation pursuant to section thirty-five C; (c) reimbursement of certain apportioned benefits pursuant to section thirty-seven; (d) payment of vocational rehabilitation benefits pursuant to section thirty H; (e) payment of benefits resulting from approved claim against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter; provided, however, that (i) the claimant is not entitled to workers' compensation benefits in any other jurisdiction (ii) no benefits pursuant to section twenty-eight and to interest pursuant to section fifty shall be payable out of the trust fund; (f) reimbursement of benefits

Daly v. Commonwealth, 29 Mass. App. Ct. 100, 102-103 (1990). Revenues for both funds were raised by direct assessments on employers subject to § 65, and the funds continued to be held separately in the State treasury. In 1991, another amendment established the office of legal counsel for the Department of Industrial Accidents to defend the Trust Fund, replacing the Attorney General. See current § 37 (St. 1991, c. 398, § 71). "[T]he new special fund and trust fund are in a line of succession from the old Second Injury Fund . . . ." Daly, supra at 105. See generally L. Locke, Workmen's Compensation § 9.7 (Koziol Supp. 2000).

We now turn to the question of whether the Workers' Compensation Trust Fund, in its role as administrator of § 37 reimbursements for payment of second injury compensation under § 65(2)(c), is an instrumentality of the Commonwealth. The risk-spreading mechanism of the Second Injury Fund is within the governmental function of regulating the business of insurance. See Opinion of the Justices, 271 Mass. 582, 594 (1930)("Powers of the Legislature respecting . . . the regulation of the business of insurance are extensive"). This proposition is particularly apt when it occurs – as here – in the legislatively created system of workers' compensation. The Supreme Judicial Court's opinion critiqued a proposed law to create a state insurance fund that would have supplanted private insurers for workers' compensation: "It is clear . . . that such law would not create a private corporation. [Citations omitted.] Indeed, we are of the opinion that said law would not create a corporation of any kind, but, rather, would create a *governmental instrumentality* – the board of trustees of the State insurance fund – within one of the twenty departments – the department of industrial accidents—in which the executive and administrative work of the Commonwealth is organized . . . ." Opinion of the Justices, 309 Mass. 571, 581-582 (1941)(emphasis added). In that later opinion the court observed:

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> pursuant to section twenty-six; and (g) reimbursement of certain apportioned benefits pursuant to section thirty-seven A. No reimbursements from the Workers' Compensation Trust Fund shall be made under clauses (a) to (g), inclusive, to any non-insuring public employer, self-insurer or self-insurance group which has chosen not to participate in the fund as hereinafter provided.

> The purpose of administering such a fund paid into the State treasury by employers, as premiums for workmen's compensation insurance, for the payment of workmen's compensation benefits is a *public purpose*. With some modifications it is the same purpose as that of the present workmen's compensation law – the constitutionality of which as an exercise of the police power is settled, [citations omitted] – though this purpose is to be carried out by a somewhat different method [than the private insurance system]. This method, however, closely resembles the method prescribed by the unemployment compensation law, under which a fund, consisting of contributions of employers and employees, is administered by an instrumentality of the government of the Commonwealth for the purpose of paying unemployment compensation benefits. This law was held constitutional in Howes Brothers Co. v. Unemployment Compensation Commission, 296 Mass. 275, the court there citing decisions relating to workmen's compensation acts, and saying that in "reason it is difficult to distinguish these decisions from the cases at bar." 296 Mass. Page [sic] 284. See also Mountain Timber Co. v. Washington, 243 U.S. 219, 234 [1919]. In light of these decisions the operation and establishment of a State insurance fund to be administered by an instrumentality of the Commonwealth is not beyond the scope of the police power and does not involve the expenditure of public money for anything other than a public purpose.

Id. at 592-593(emphasis added). In the instant case, the explicit purpose served by the Second Injury Fund is the public policy of encouraging the hiring of impaired workers. See McLean's Case, supra. The purpose militates heavily in favor of characterizing the Trust Fund as an instrumentality of the Commonwealth: Such regulation of workers' compensation insurance furthers the overall beneficent design of the Act. Moreover, the court's citation to the analysis of unemployment compensation law in Howes v. Unemployment Compensation Comm'n, 296 Mass. 275 (1936), provides an informative parallel between the structure of that trust fund and the Workers' Compensation Trust Fund:

> By the unemployment compensation law, in substance and effect great sums of money are to be collected by compulsion of the Commonwealth from employers and employees. These sums are described in the law as "contributions." These contributions are not collected in the ordinary way but are paid to the commission and then paid over to the State Treasurer as a fund to be used to pay benefits under the unemployment compensation law. The State Treasurer is directed to deposit or invest the fund in the "unemployment trust fund" of the United States government . . . . The contributions under the unemployment compensation law

> are not a part of the general revenue of the Commonwealth, although paid into the State treasury. They are raised by the Commonwealth for a particular purpose through the exercise of the police power.

Id. at 288-289.[4]

We are unpersuaded by the insurer's arguments against the Trust Fund's status as a governmental instrumentality. The insurer argues that the Trust Fund has a quasi-private and proprietary nature evidenced by its independent funding mechanism. "[T]he argument proves too much . . . ." Kargman v. Boston Water and Sewer Comm'n, 18 Mass. App. Ct. 51, 59 (1984). Under that analysis, the entire Department of Industrial Accidents would not be considered an instrumentality of government, as it, too, is funded independently through the Special Fund provided by § 65(1). This is an untenable result.

The insurer next asserts that the Trust Fund serves no governmental functions, a proposition as discussed above, that we reject. Finally, the insurer considers the less significant factors of whether the entity can sue and be sued in its own name, take property by eminent domain, and whether it has independent corporate status. (Insurer's Reply Brief, 5.) We are unconvinced that these elements, drawn from federal Eleventh Amendment jurisprudence, see Morris-Knudsen Co., Inc v. M.B.T.A., 573 F.Supp. 698, 700 (D. Idaho 1983), are sufficiently relevant to the common law sovereign immunity issue at hand to supplant the Massachusetts authority that we have cited in our analysis.

We conclude that the Trust Fund, in its administration of the § 37 second injury reimbursements, serves the governmental function of insurance regulation within the

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[4] A later case on deciding a claimant's entitlement to interest and costs on an unemployment benefits award includes absolutely no discussion of the question of governmental instrumentality. See Broadhurst v. Director of Div. of Employment Sec., 373 Mass. 720 (1977). Of course, the defendant in that case was, itself, an administrative agency of the Commonwealth. While the Workers' Compensation Trust Fund is an entity within the Department of Treasury, we note that the distinction was of no moment in the court's analysis of the proposed State insurance fund "paid into the State Treasury." Opinion of the Justices, 309 Mass. at 592.

Of interest, as well, is the continued presence of the State treasury (certainly an instrumentality of the Commonwealth) as a potential payor of reimbursements under the related § 37A, the second injury fund for disabled war veterans, in the event of the insolvency of the Workers' Compensation Trust Fund. See G.L. c. 152, § 37A.

workers' compensation system, and is thus, an instrumentality of the Commonwealth. Since the Trust Fund therefore has the protections of sovereign immunity available to an instrumentality of the Commonwealth, we now turn to the question of whether any exception to that doctrine authorizes the award of interest in § 37 reimbursement awards.

As we have seen, Russo's Case, supra, held that, absent explicit statutory provision, or necessary implication therefrom, no interest may run against the Commonwealth in a workers' compensation claim. Id. It is undisputed that no such explicit statutory provision for the payment of interest on § 37 reimbursement awards exists. Nonetheless, the insurer contends that a provision in § 65(2) necessarily implies that interest must be due on § 37 reimbursement awards. That statutory provision is the specific bar to § 50 interest awards against the Trust Fund in its role as insurer of last resort for employees' compensation claims involving uninsured employers. See § 65(2)(e)(ii)( there shall be "no interest pursuant to section fifty . . . payable out of the trust fund" when making "payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter"). The insurer argues that such a provision for one of the Trust Fund's various § 65 functions, necessarily implies that interest does run against the Trust Fund in its other functions, specifically § 37 reimbursement in § 65(2)(c). This "expressio unius est exclusio alterius" rule of statutory construction would appear to have some merit at first blush. Otherwise, the § 65(2)(e)(ii) provision would look suspiciously like surplusage: If no interest can run against the Trust Fund in any event, why explicitly prohibit it in one of many applications? The query might even carry the day were it not for sovereign immunity.

The authority for the holding in Russo's Case, Onofrio v. Department of Mental Health, 411 Mass. 657 (1992), makes it clear that one cannot adopt such inferential reasoning in statutory construction to argue waiver of sovereign immunity. Onofrio examined whether postjudgment interest was recoverable under the Massachusetts Tort Claims Act (a major abrogation of sovereign immunity in the realm of tort liability).

The court concluded that "absent statutory authority, postjudgment interest is not recoverable." Id. at 658. Pertinently, the court rejected the plaintiff's argument that the statute's explicit exemption of prejudgement interest against the commonwealth, without reference to postjudgment interest, "implies that postjudgment interest is not similarly barred." Id. at 659. The court reasoned:

> Were this not a statute governing waiver of sovereign immunity, the plaintiff's argument might succeed. However, "[t]he rules of construction governing statutory waivers of sovereign immunity are stringent." Ware v. Commonwealth, 409 Mass. 89, 91 (1991), quoting Woodbridge v. Worcester State Hospital, 384 Mass. 38, 42 (1981). We recently rejected the same "expresio unius est eclusio alterius" statutory construction argument in a similar case, Ware, supra. In that case, we held that, because waivers of sovereign immunity must be expressed by the terms of the statute or appear by necessary implication from them, costs could not be recoverable against the Commonwealth because G.L. c. 258 does not expressly provide for their recovery." Postjudgment interest is similarly not recoverable, because, as this court announced in dictum in C&M Contr. Co. v. Commonwealth, 396 Mass. 390, 392 (1985), "General Laws c. 258 contains no provision permitting the award of postjudgment interest either expressly or by necessary implication."

Onofrio, supra at 659. The same rule applies here. Sovereign immunity essentially trumps all other rules of statutory construction. We thus will not infer the inclusion of interest in § 65(2)(c) from the exclusion of interest in § 65(2)(e)(ii).

The insurer also argues that the Trust Fund and the insurer are in an implied contractual relationship, which would automatically waive sovereign immunity, as a matter of law. The legal proposition regarding the contract exception to sovereign immunity is correct. See Monadnock Display Fireworks v. Andover, 388 Mass. 153, 156-157 (1983)(sovereign immunity not a bar where duty imposed by contract). The precept is referred to as the "doctrine of improper detention," and it turns on "the statutory scheme which regulates the relationship of the contracting parties." Perkins School for the Blind v. Rate Setting Comm'n, 383 Mass. 825, 831-832 (1981). Interest will be due on "money . . . owed by the [Commonwealth] to [a claimant] on an actual or implied contract, or a statutory liability, which gave rise to a contractual relationship when [the claimant] rendered services with the [Commonwealth's] knowledge or

approval, or in circumstances which bound it to pay for them." Massachusetts Gen. Hosp. v. Commissioner of Pub. Welfare, 359 Mass. 206, 209 (1971). A direct contractual relationship is not necessary to apply the contract exception to sovereign immunity. First Nat'l Ins. Co. of America v. Commonwealth, 376 Mass. 248, 250-251 (1978)(sovereign immunity no bar to surety company suing Commonwealth, as beneficiary of contract between the Commonwealth and contractor, for reimbursement on its coverage for payment made by Commonwealth with notice that contractor short-changed suppliers). "Although the surety in this case was not a party to a contract with the Commonwealth, its claim arose out of the legal consequences of the acts and relationships arising from a contractual context." Id. at 251. While First Nat'l, supra, outlines a quasi-contractual relationship arguably apposite to a § 37 reimbursement claim (especially where a lump sum agreement is involved), there is a pivotal distinction between the two not to be overlooked.

The "improper detention" of monies owed by the Commonwealth under a contractual obligation, that the insurer would have us apply to its § 37 relationship with the Trust Fund, always involves a sum certain, a liquidated amount that is owed. This factor makes the claim against the Commonwealth more like a collection action than a contract merits action. See Massachusetts Gen. Hosp., supra ("statutory liability, which gave rise to a contractual relationship when [the insurer] rendered services"); First Nat'l, supra (surety sought reimbursement of $38,405.55 on basis that commonwealth should not have paid it to converting contractor). *"Simply stated, there can be no improper detention of money until payment is due."* Perkins, supra at 832 (emphasis added). See also Sargeant v. Commissioner of Pub. Welfare, 383 Mass. 808 (1981)(specific reimbursements due under medical assistance program were "a liquidated debt"). Section 50 interest is not in the nature of that awarded against the Commonwealth in the forgoing cases. Equally simply stated, there is no payment due in a § 37 claim – and, thus, no improper detention of money warranting the accrual of interest – until the reimbursement amount is known. The disputed § 37 claim here, therefore, could not support the type of contractually based interest for improper detention that can defeat sovereign immunity.

Compare Shelby Mut. Ins. Co. v. Commonwealth, 420 Mass. 251 (1995)(Supreme Judicial Court ordered interest on liquidated amounts of § 37 reimbursement awarded by Superior Court, which Trust Fund had refused to pay).

Most similar to the present case is Broadhurst v. Director of the Div. of Employment Sec., 373 Mass. 720 (1977):

> The plaintiffs have also misplaced their reliance on those cases where interest has been allowed as an element of damages for the wrongful detention of money, despite the absence of statutory obligations [i.e. a "statutory authorization for the payment of interest"]. The plaintiffs cite C&R Const. Co. v. Commonwealth, 334 Mass. 232, 233-234 (1956), where this court held that the Commonwealth must pay interest on a contractual obligation where interest would have been charged against a private person. Such a holding based on contract law is not controlling here *where the plaintiffs claim their unemployment benefits via the statutory provisions of G.L. c. 151A and not on contractual obligation.*

Broadhurst, supra at 726-727 (emphasis added). See also C & M Constr. Co., Inc. v. Commonwealth, 396 Mass. 390 (1985)(action on judgement, unauthorized by statute, is not contractual as to waive sovereign immunity for improper detention of money). The statutory provisions of § 37 likewise do not establish a contractual obligation until the Trust Fund and the insurer sign an agreement to pay a sum certain of reimbursement. Section 50 interest therefore does not lie under the contract exception to sovereign immunity. [5] We affirm the decision, as to the lack of an order of interest on the award of

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[5] The doctrine of sovereign immunity has not been repealed by the legislature as it applies in the present area of law. See Russo's Case, supra; contrast G.L. c. 258, enacted by St. 1978 (the Massachusetts Tort Claims Act, which modified sovereign immunity in certain circumstances). Most states have either modified or abolished this status. See Whitney v. Worcester, 373 Mass. 208, 212 (1977).

One commentator has identified the consequence of delays in the processing of § 37 reimbursement claims:

> Delays in resolution of second injury fund claims are costly to both employers and insurers. They are costly to employers because they do have an impact upon an employer's experience modification, which is one element of an employer's premium computation.

L. Locke, supra at 252. The imposition of § 50 interest on § 37 reimbursement awards might ameliorate delays, but this would require legislative action.

§ 37 reimbursement.[6]

The Trust Fund's appeal challenges the award of any § 37 reimbursement. Its central argument is that the judge lacked authority to award § 37 reimbursement without § 34A permanent and total incapacity benefits having been established by an order or decision. The outcome of this position is now governed by our recent decision in Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. ____ (May 2, 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.

Specifically, the judge reasoned that § 37 reimbursement could be recovered for amounts "likely to be due under one or more of the reimbursable sections" that are paid in a lump sum agreement. (Dec. 7.) "Here the circumstances of Mr. Carmilia's lump sum and the significant settlement amount clearly show a recognition by the insurer that there was at least a reasonable likelihood of success for the employee in the prosecution of his § 34A claim. . . . I cannot find this settlement to represent anything other than the anticipation of Mr. Carmilia's likely receipt of § 34A benefits." (Dec. 8-9.) In Cosgrove, we 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.' " Cosgrove, supra, quoting MacQuarrie, supra. Moreover, we specifically rejected – as did the judge in the present case (Dec. 5-7) – the Trust Fund's assertion that benefits under reimbursable sections must have been ordered and/or paid prior to the settling of the case in a lump sum agreement for any amount paid under that agreement to be subject to § 37 reimbursement. See Cosgrove, supra, comparing language of § 34A and Slater v. G. Donaldson Co., 14 Mass. Workers' Comp. Rep. 117 (2000), analysis of § 34A language

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[6] All of the insurer's other arguments on § 50 interest, particularly its attempt to apply the Tort Claims Act in this non-tort area, are meritless.

with § 37 language. Finally, the judge analyzed the "reasonableness of the parties' apparent assessment of the case." (Dec. 9.) This is exactly the approach that we set out in Cosgrove, supra, when we recommitted that case "for the judge to address the reasonableness of the § 34A allocation in the lump sum agreement, and the appropriate amount of reimbursement." All in all, the judge here set out a particularly good road map for navigating these claims. We discern no error in his overall approach.

Nonetheless, the Trust Fund is correct – to a point – in one of its arguments regarding the lump sum allocations. The Trust Fund contests the propriety of the $95,000.00 allocation of the lump sum settlement monies to § 31 inchoate rights, in relation to the $170,000.00 paid to the employee that the judge found subject to § 37. The judge felt scrutiny of the allocation exceeded the scope of his review. "I simply do not see it as correct for me to second guess another administrative judge who approved the settlement with that specific allocation, having reviewed all the provisions of the settlement and presumably having scrutinized that allocation to inchoate rights so as to find it appropriate." (Dec. 10.) It is indeed appropriate for the judge to review the reasonableness of that allocation. See MacQuarrie v. Secretary of Health & Human Services, 639 F.Supp. 1357, 1362 (D.Mass. 1986). We stated as much in Pacewicz v. C.Bain Co., 10 Mass. Workers' Comp. Rep. 177, 182 (1996)("[W]e agree with the Trust Fund that the spousal allocation must be reasonable . . . ."). Here, there is rightly an issue as to the large amount of the spouse's inchoate right allocation in light of the fact that this lump sum was for a back injury, which is unlikely to itself cause the employee's death.

However, the judge corrected his error in the very next paragraph of the decision:

> But even if I were to find that [$95,000.00 allocation to § 31 inchoate rights] not to be an appropriate allocation of the lump sum proceeds, such a conclusion would be tantamount to findings that the $95,000.000 was really payment for future employee disability benefits rather than payment for potential spousal benefits. The overturning of that allocation would only serve to further enhance the insurer argument that there was considerable payment of potential § 34A benefits in this settlement.

(Dec. 10.) Indeed, as the Trust Fund is liable for § 37 reimbursement for either inchoate rights to § 31 benefits or future § 34 A benefits, see Pacewicz, supra, and Cosgrove, supra, quibbling over the characterization of the $95,000.00 in this case would appear to be merely an exercise in form over substance. Any error in the judge's language addressing his review of the allocation to inchoate rights is harmless. See LaPlante v. Maguire, 325 Mass. 96, 98 (1949)(error does not affect final result).

Finally, the Trust Fund argues that the provisions of 452 Code Mass. Regs. § 1.07(2)(l), governing the "documentation [that] must be attached to a claim for benefits, or complaint for modification or discontinuance of benefits before it will be processed by the Office of Claims Administration" for § 37 petitions, establish the prerequisite proof for such a claim at hearing. We decline to read the regulation as restricting the authority of administrative judges to make findings based on the evidence adduced at hearing and on reasonable inferences drawn therefrom. The findings at issue in the present case are the § 37 element of "hindrance or obstacle to employment," and the "substantially greater disability" resulting from the combination of the pre-existing impairment and the industrial injury. As to these elements the judge found:

> [T]here are medical records in which it is recorded that the employee was instructed to exercise caution in lifting and pulling, activities required by his work. Mr. Carmilia returned from his first surgery to a lighter supervisory job and went back to full duty plumbing work only when a reduction in force limited his other opportunities. Given that history, I find his condition to have been an obstacle or hindrance to his employment. His having overcome those obstacles to a significant degree for many years does not negate their presence. It is clear that these injuries presented a hindrance to Mr. Carmilia fulfilling the requirements of his employment.
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> . . .
>
> Dr. Stephen M. Schmitz, who reviewed and evaluated this case in 1998, was of the opinion that the prior impairments combined with the most recent injury to cause a greater disability than would have occurred because of the 1994 injury alone. . . . I am convinced by the opinion of Dr. Schmitz and the other available evidence that the combination of the prior condition and this industrial injury caused a disability greater than the 1994 injury would have alone.

(Dec. 2-3.) These findings easily withstand the Trust Fund's challenge and indicate no error.

We summarily affirm the decision as to all of the Trust Fund's other arguments. Accordingly, the decision is affirmed in its entirety.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: May 16, 2001