COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 038546-06

Kieran M. Kelly	Employee
Walsh Hannon & Gladwin Specialists, Inc.	Employer
Arbella Indemnity Insurance Co.	Petitioner
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION

(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge McDonald.

APPEARANCES

W. Frederick Uehlein, Esq., for the petitioner
Jerry E. Benezra, Esq., for the petitioner on appeal
Karen S. Fabiszewski, Esq., for the respondent

FABRICANT, J. The insurer/petitioner in a second injury fund claim pursuant to § 37[1] asserts error, *inter alia*, in the administrative judge's assessment of the allocation of lump sum

[1] General Laws c. 152, § 37, 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.
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> . . .
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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

settlement proceeds under Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166 (2001)(Cosgrove I). Specifically in issue is the judge's consideration of the absence of a pending claim for benefits pursuant to § 34A at the time of the settlement. We disagree with the insurer that Cosgrove I altogether prohibits inclusion of this factor when determining the amount of settlement proceeds subject to § 37 reimbursement. Instead, we conclude that the judge's analysis of the potential exposures under §§ 34, 35, and 34A, compared to the modest net proceeds paid in the lump sum settlement, rationally yielded a denial of the insurer's petition. Accordingly, we affirm the decision.

The employee received § 34 benefits for an aggravation injury to his back at work.[2] He ultimately settled this claim, pursuant to § 48, with the insurer for $68,500, less attorney fees and expenses of $13,000, and $1,000 for inchoate rights. (Dec. 3-4.) The settlement occurred while the insurer's appeal from the § 10A conference order awarding § 34 total incapacity benefits was pending. (Dec. 4, 6.)

Because this injury constituted a "second injury" within the meaning of § 37, the insurer sought reimbursement of up to 75% of the total amount of proceeds in the settlement attributable to § 34A exposure.[3] The parties stipulated to all elements of § 37, but for the amount of § 34A benefits represented in the lump sum agreement. The insurer claimed that such amount was $43,826.46, the entire net payment to the employee, minus disqualified weeks of § 34 up to 104 weeks, 75% of which was $32,869.85. (Dec. 4-6.)

> 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, however . . . 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.

[2] The employee sustained a compensable injury to his back on March 4, 1997 with this employer. Granite Insurance Company was on the risk at the time and paid for the employee's medical treatment (which included surgery) and his compensation prior to his subsequent return to work. (Dec. 3)

[3] Eligibility in this case for reimbursement pursuant to § 37 required that at least part of the lump sum paid pursuant to § 48 be attributable to § 34A.

The judge denied the insurer's petition for reimbursement, (Dec. 12), reasoning:

> The insurer has not met its burden of persuasion that it is reasonable to allocate any portion of the June 13, 2006, lump sum settlement to § 34A, and thereby be entitled to reimbursement from the Trust fund pursuant to § 37.
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> "Settlements by their nature contain elements of compromise with respect to outcomes which at the time are uncertain." Cosgrove, supra. In the present matter, there were several potential outcomes: liability for payment of compensation could have been found against [the insurer]; the employee could have been awarded § 34 benefits, § 35 benefits, or some combination of those two benefits. The employee could not be awarded § 34A benefits.
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> "The question on which the insurer must shoulder the burden . . . is whether, taking what was known at the time into consideration, the insurer's decision to settle on the basis of the proffered allocations was reasonable."
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> Id. This requires an objective analysis of the insurer's position at the time of the settlement in light of the circumstances then in place, the procedural posture of the case, and the state of the evidence. Id. At the time of the settlement, the matter was scheduled for a § 11 hearing at which the issues would have been which of two insurers is liable for the payment of compensation to the employee, and whether the employee's disability was total or partial. The medical evidence at that time opined the employee was permanently disabled from returning to his previous job as a laborer, but there was no medical opinion that the employee was totally disabled from all occupations.
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> The insurer's remaining exposure under § 34 alone was approximately $45,504. Considering these circumstances at the time of settlement, I find that it is not reasonable to allocate any portion of the lump sum settlement to § 34A.
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> The possibility that at some future time the employee might file a claim for § 34A benefits, or that he might be found eligible for such benefits is certainly a consideration that an insurer would have in deciding to settle a case. There was not, however, at the time the case settled a reasonable basis to anticipate such an outcome, and the amount of $67,500 does not reflect such a consideration in view of the exposure a finding of § 34A benefits would contain.

(Dec. 10-11.)

The insurer argues the judge's reasoning runs afoul of the analysis set out in Cosgrove I. We disagree. In Cosgrove I, we reversed a decision in which the judge denied the insurer's § 37 petition; the judge's rationale for the denial was that "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 any type of determination of § 34A eligibility. . . ." Id. at 170. Reading the judge's decision as imposing a condition precedent to the recovery of § 37 reimbursement from lump sum proceeds, we concluded there was no "prerequisite of *actual payment* of any of the [enumerated] sections" in § 37, in order for an insurer to recover reimbursement. Id. at 171 (emphasis in original).

However, Cosgrove I does not stand for the proposition that a judge is prohibited from considering the viability of a § 34A claim by the employee as *a factor* in assessing the reasonableness of the § 34A allocation in the lump sum agreement. It simply is not dispositive in the manner that the judge in Cosgrove I applied it.

As to the allocation analysis in the present case, Cosgrove I is distinguishable because the exposures and their value relative to the settlement are significantly different. In Cosgrove II, 16 Mass. Workers' Comp. Rep. 406 (2002), where we largely affirmed the judge's allocation on recommittal, reimbursement was set at the remainder of the lump sum proceeds after full entitlement pursuant to §§ 34 and 35 was subtracted.[4]

In the present case, the employee's average weekly wage of $1,185 yields a maximum remaining exposure of approximately $156,000 in §§ 34 and 35 temporary incapacity benefits at the time of settlement.[5] However, the net lump sum proceeds, after subtracting the twelve weeks remaining in § 34 disqualified proceeds, total only approximately $44,000. On the other hand, the maximum §§ 34 and 35 exposure in Cosgrove was only about $39,000 of the approximately $70,000 in lump sum proceeds. Additionally, as noted by the judge below, the employee here

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[4] Affirming in part upon appeal, a single justice of the Appeals Court agreed with the criteria for evaluation established by the reviewing board, but decided those criteria were not appropriately applied by the administrative judge. (Cowin, J., Docket No. 02-J-614, February 2, 2005.)

[5] The total value of three years of § 34 benefits and four years of § 35 benefits is approximately $222,000. It was stipulated that 92 weeks of § 34 benefits had been paid prior to settlement, (Dec. 10), thus reducing the potential future exposure to approximately $156,000.

could anticipate, at best, an award of § 34 and ongoing maximum § 35 benefits. (Dec. 10.) One year of § 34 benefits alone was worth about $37,000.

The burden was on the insurer to prove its entitlement to § 37 reimbursement, one component of which was to show the reasonableness of the § 34A lump sum allocation.[6] The judge's function as fact-finder is not to serve merely as a rubber stamp for the insurer's proffered allocation. The absence of a § 34A claim was a relevant factor under the circumstances presented in this petition, and the judge's reference to that factor was not error. The insurer, whose witnesses the judge did not credit, (Dec. 8-9), simply did not prove its claim.

The insurer's myriad other arguments on appeal have been considered, and we summarily affirm the decision with respect to all of them.

Accordingly, the decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: December 2, 2009

[6] Where the total net proceeds are as modest as in this lump sum settlement, comparison to the § 34A potential exposure provides a compelling case for this analysis. The judge determined the value of a § 34A claim to exceed $1.4 million. (Dec. 7.)