COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 057423-95**

Lori C. Cosgrove	Employee
Penacook Place	Employer
Managed Comp Insurance Co.	Insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Maze-Rothstein and Levine)

APPEARANCES

Mark J. Nevils, Esq., for the insurer on brief
Jerry E. Benezra, Esq. and W. Frederick Uehlein, Esq., for the insurer at oral argument
Susan Saucier, Esq., for the Trust Fund at hearing
Robert L. Rickey, Esq., for the Trust Fund on brief
Jessica Coccoli, Esq., for the Trust Fund at oral argument

MCCARTHY, J. The insurer's appeal of an administrative judge's decision in favor of the Workers' Compensation Trust Fund brings to the reviewing board an issue of first impression arising out of the 1991 amendment of G.L. c. 152, § 37,[1] which narrows

[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.

Second Injury Fund reimbursement by eliminating it for temporary incapacity benefits paid under §§ 34 and 35 of the Act. The judge denied the insurer's petition for § 37 reimbursement, 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. We agree with the insurer that its right to § 37 reimbursement is not contingent on actual prior payment of weekly § 34A benefits. Instead, the inquiry in this § 37 reimbursement case 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, what percentage of that amount, up to seventy-five percent, should the Trust Fund pay? See G.L. c. 152, § 37, paragraph 2. We therefore reverse the decision, and recommit the case for findings establishing an appropriate amount of § 37 reimbursement.

The parties stipulated to the elements underlying a valid petition for § 37 reimbursement: that the employee had a pre-existing physical impairment that was or was likely to be a hindrance or obstacle to her employment; that the employer had personal knowledge of such pre-existing physical impairment; that the employee suffered an industrial injury on October 9, 1995; and that the disability resulting from that industrial

---

> 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 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.
>
> 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.
>
> . . .
>
> 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.

injury was made substantially greater by reason of the combined effects of the pre-existing impairment and subsequent injury, than it would have been without the pre-existing impairment. There was also a stipulation that the December 31, 1997 lump sum of $100,000.00 included an allocation of $17,000.00 to attorney's fees and expenses, $5,000.00 to § 36, and $8,369.00 to reach the maximum entitlement under § 34 temporary total incapacity benefits. (Dec. 2-3.)

In the employee's underlying claim for benefits, an administrative judge had ordered at conference that the insurer pay § 34 benefits at the weekly rate of $198.60, from December 27, 1995 to date and continuing. The insurer appealed that conference order. Prior to the § 11 hearing, the parties settled the claim by lump sum agreement approved on December 31, 1997. The insurer seeks § 37 reimbursement from the Trust Fund for the § 34A allocation contained in the lump sum agreement, along with amounts paid in § 30 medical benefits. (Dec. 4.)

In his decision, the judge noted the employee's one year of college, the lack of medical documentation of permanent and total disability status, the lack of a determination with respect to suitability for vocational rehabilitation, and language in the lump sum agreement that $78,000.00 was being allocated as § 34A benefits. (Dec. 5, 7.) The judge then denied the insurer's petition for reimbursement, "[b]ecause benefits were not established by the employee, paid by the insurer, or accepted by the insurer . . . ." (Dec. 5.) The judge reasoned:

> In this case, § 34A was never paid by the insurer to the employee nor was § 34A established by the employee. There was never any order of payment of § 34A benefits. In Diliberto v. New England Electric, 11 Mass. Workers' Comp. Rep. 123 (1997), the Reviewing Board states 'the insurer must show that it was legally obligated to pay [the employee] and that its lump sum settlement with the employee, therefore, was reasonable.'
>
> . . .
>
> 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 any type of determination of § 34A eligibility and even prior to any claim of § 34A benefits by the employee. Any attempt by the insurer to take

> credit for or treat payments made under the Lump Sum Agreement as future § 34A payments is self-serving. The insurer attempts to predict the future, to its benefit[], at the expense of the Trust Fund.
>
> . . .
>
> 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.
>
> It is clear from the insurer's petition that prior, to the lump sum settlement, only § 34 benefits had been paid. Prior to a hearing on the employee's claim for § 34 benefits, the employee settled her claim for $100,000.00.
>
> The insurer contends that the allocation of $78,000.00 for § 34A benefits as reflected in the Lump Sum agreement is sufficient to overcome its threshold burden under § 37 as amended. In this instance there is some amount paid to the employee under the Lump Sum Agreement beyond the exhaustion of § 34 benefits ordered at Conference.
>
> Despite the self-serving language contained in the Lump Sum Agreement, the facts of this case do not support the insurer's contention that this matter was a clear § 34A case. Nor is there any medical report from any doctor stating that the employee is permanently and totally disabled from all employment.

(Dec. 5-7.)

We agree with the insurer that the judge applied § 37 in an overly restrictive manner, and effectively construed the statute as mandating prerequisites for reimbursement that simply do not exist. There need not be an adjudication of § 34A liability, payment of § 34A benefits, or even a § 34A claim filed, in order for the insurer to have a cognizable claim for § 37 reimbursement of § 34A benefits redeemed in a lump sum agreement. Section 37 simply and specifically allows reimbursement for amounts paid in a lump sum agreement, which are credited to any of the sections enumerated in the second paragraph of the statute. See fourth paragraph of § 37. The statute does not impose a prerequisite of *actual payment* of any of the benefits in those sections.[2] The Legislature did create prerequisites for § 37, and they are contained in the first paragraph of the statute – pre-existing known physical impairment, subsequent industrial accident, and the like. A failure to prove any of those first paragraph elements means that the petition for reimbursement fails. However, once the first paragraph elements are

established – as they are here by stipulation – the petition for reimbursement should next be subjected to a quantitative analysis of the "compensation due" under the enumerated sections of the second paragraph of § 37. The statute contains no special rule for those insurers who redeem liability by payment under a lump sum agreement. Compensation is just as much "due" when it is to be paid under the terms of an approved lump sum agreement as it is when it is to be paid in weekly increments. Had the Legislature intended that actual payment of any enumerated benefits be a prerequisite for insurers redeeming liability in a lump sum agreement, it certainly knew how to say that. Cf. § 34A (§ 34A benefits due "*following* payment of compensation provided in sections thirty-four and thirty-five")(emphasis added); Slater v. G. Donaldson Constr., 14 Mass. Workers' Comp. Rep. 117 (2000), appeal docketed, Appeals Court No. 00-P-1733 (interpreting quoted § 34A language as exhaustion requirement). See Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994)(comparing and differentiating treatments in subparagraphs of c. 176D, § 3(9), on basis of "close look at the words of the statute," in particular, what was *not* said: inadequate "offer" cannot be read to be "denial"). We see no basis in the statute for the judge's interpretation of § 37 as requiring actual pre-settlement payment of any of the enumerated reimbursable sections.

The judge disregarded the "insurer[']s attempts to predict the future" in its § 34A allocation in the lump sum agreement as "self-serving." (Dec. 6.) This reasoning is off the mark. Any settlement negotiation involves the assessment of future risks in light of benefit limits, an exercise which is also inherently "self-serving." A compromise of an employee's claim can only be made when these future contingencies are assessed and a corresponding present value of the case is assigned, "discounted by the likelihood of success." MacQuarrie v. Secretary of Health & Human Services, 639 F. Supp. 1357, 1362 (D.Mass. 1986). Nothing in § 37 establishes an especially rigorous standard of practice for lump sum settlements.

The insurer argues that the judge failed to take into account the reviewing board's treatment of § 37 in the case of Pacewicz v. C. Bain Co., 10 Mass. Workers' Comp. Rep.

---

[2] Except for medical expenses paid under § 30. See second paragraph of § 37.

177 (1996). The contention has merit. In Pacewicz, we concluded that a spouse's inchoate rights to future benefits under §§ 31-33 were reimbursable under an earlier version of § 37.[3] We first offered a definition: "Inchoate rights are future rights that are pending or disputed, and not yet payable although potentially so." Id. at 181. We then reasoned:

> An insurer's potential liability under G.L. c. 152 for rights that have not yet arisen may be redeemed by means of a § 48 lump sum settlement. Carrier's Case, 3 Mass. App. Ct. 502, 508 (1975), *aff'd* 370 Mass. 674 (1976); L. Locke, *Workmen's Compensation* § 551 (2d Ed. 1981); see Henderson's Case, 349 Mass. 683, 685 (1965)(narrow view of § 37 would discourage lump sum settlements); see also G.L. c. 152, §48. The judge's approval of the terms of a § 48 agreement constitutes a release of the employee's rights as well as those of his spouse. L. Locke, *supra* § 551, at 677.

Pacewicz, supra at 182. We concluded that the potential liability under §§ 31-33, the inchoate rights of the spouse, were reimbursable, consistent with a harmonious construction of §§ 37 and 48. Id. Similarly, the "potential liability under [§ 34A] for rights that have not yet arisen" should not be treated any differently from those under §§ 31-33.

The judge hinged his rationale on language from the reviewing board decision of Diliberto v. New England Elec., 11 Mass. Workers' Comp. Rep. 123 (1997), that "the insurer must show that it was *legally obligated* to pay the employee, and that its lump sum settlement with the employee was therefore reasonable." Id. at 130 (emphasis added). The judge read "legally obligated" to mean that the insurer needed to show that it had been ordered to pay § 34A benefits, in order to establish a § 37 reimbursement right for such benefits. (Dec. 5.) Diliberto, supra, does not stand for this proposition.

In Diliberto, the Trust Fund challenged the insurer at hearing to prove one of the prerequisite elements of § 37, the existence of an industrial injury. On appeal, the insurer contested that the Trust Fund could even raise that issue in defense of its petition for

[3] There is no difference between that version of § 37, St. 1973, c. 855, § 2, and the present version, St. 1991, c. 398, § 71, with regard to the proposition discussed here.

reimbursement, in view of its lump sum settlement of the employee's claim. Id. at 128.[4] It was this argument that we addressed in the language from Diliberto quoted above, regarding the insurer's legal obligation to pay the employee via a lump sum settlement. We analogized the § 37 relationship between the insurer and the Trust Fund to indemnification law, and concluded that the settlement was not a bar to the Trust Fund's right to contest the merits of the underlying claim, citing to Nolan and Sartorio, Tort Law, § 438.

> The right to indemnification does not necessarily require a judgment or even the commencement of an action against the party seeking indemnification. A may enforce indemnity if he has settled with the third party. However, A must demonstrate that he was legally obligated to pay the third party and that settlement was reasonable. Factors affecting the reasonableness of the settlement are "the likelihood of success or failure, the cost, uncertainty, delay and inconvenience of trial as compared with the advantages of settlement."

Nolan and Sartorio, supra at 187, quoting Berke Moore Co. v. Lumbermen's Mut. Casualty Co., 345 Mass. 66, 71 (1962). The court in Berke Moore 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. Given this context, it is apparent that the judge's citation to Diliberto not only did not support the judge's conclusion, but it actually stands for the exact opposite: A lump sum settlement, in and of itself, can be the basis for a successful claim for indemnification/ reimbursement, so long as it is "reasonable." We read "legally obligated," as used in Nolan and Sartorio, to mean simply that the parties were in a legal proceeding, with the potential for a monetary award against the party now seeking indemnification/reimbursement, i.e., the insurer in a § 37 petition. See also Fireside Motors, Inc. v. Nissan Motor Corp. of U.S.A., 395 Mass. 366, 370-371 (1985); Monadnock Display Fireworks, Inc. v. Andover, 388 Mass. 153, 157-158 (1983); New

[4] Diliberto was affirmed by the Appeals Court in Aetna v. Commonwealth, 50 Mass. App. Ct. 373 (2000). However, the insurer did not argue this issue at the Appeals Court, so the reviewing board decision is still the precedential authority.

York Central & Hudson R.R. Co. v. T. Stuart & Son Co., 260 Mass. 242, 249 (1927)(all cases establishing reasonableness standard under which to view settlement for purposes of assessing right to indemnification).

We therefore reverse the denial of the § 37 petition for reimbursement.[5] We recommit the case for the judge to address the reasonableness of the § 34A allocation in the lump sum agreement, and the appropriate amount of reimbursement. We agree with the judge that certain factors cited in the decision, such as the lack of any medical documentation of permanent and total disability, militate against the overall strength of the insurer's petition for reimbursement. We in no way intend to stifle the authority and discretion of the judge to weigh such factors, and to consider the percentage of reimbursement of such § 34A benefits *up to* seventy-five percent. Nonetheless, the amount of the lump sum agreement in this case appears, as a matter of arithmetic, to contain some amount of § 34A benefits given what had been paid in § 34 benefits prior to the agreement, and the maximum possible exposure to § 35 benefits.[6] We only add that, even though this settlement is fair game for retrospective second-guessing, this does not mean that the agreement reached was unreasonable. To impose the stringent standard espoused by the Trust Fund and adopted by the judge for the purposes of calculating § 37 reimbursement would facially conflict with § 48, which requires that the agreement be "in the claimant's best interests," and with the Act in general, which maintains its beneficent design, even in the face of the cost-saving measures of the 1991 amendments. See, e.g., CNA Insurance Companies v. Sliski, 433 Mass. 491 (2001).

The decision is reversed and the case recommitted for further findings consistent with this opinion.

---

[5] The analysis with respect to the reimbursement of an allocation for future medical expenses would necessarily recognize that the lump sum settlement of an accepted case does not close out the employee's medical claim or right to seek vocational rehabilitative benefits for the statutory period after the lump sum is perfected. See G.L. c. 152, § 48(2).

[6] We note, in passing, that the parties agree that the 104 week "waiting period" for weekly benefit reimbursement has effectively been extended to 156 weeks under the 1991 amendment to § 34A and the majority's interpretation of that section in Slater, supra.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: **May 2, 2001**

_____
Frederick E. Levine
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge