COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENT	**BOARD NO. 04607098**
Richard Hayden	Employee
Reebok International, LTD	Employer
Arrow Mutual Liability Insurance Company	Insurer
Workers' Compensation Trust Fund	Respondent

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

APPEARANCES
John T. Underhill, Esq., for the insurer
Danielle L. Salvucci, Esq., for the Trust Fund

WILSON, J. The insurer appeals from a decision of an administrative judge that denied reimbursement under G. L. c. 152, § 37, because the underlying claim had been settled by a § 48 lump sum agreement on a without establishment of liability basis. As this case is governed by our decision in Walsh v. GTE Govt. Sys., 15 Mass. Workers' Comp. Rep. ___ (December 24, 2001), we vacate the decision and recommit the case for further findings on the other elements necessary for § 37 reimbursement.

Richard Hayden, age 47 at the time of hearing, had a pre-existing impairment of his right leg caused by childhood polio. On May 1, 1990, he alleged he slipped and fell, injuring his left leg. He filed a claim for compensation benefits alleging back, left leg and head injuries, as well as chest pain. (Dec. 4.) He claimed to be disabled as a result of his orthopedic impairments as well as by "stress related and fall related development of coronary artery disease symptomatology." (Ex. 5 C(3), Employee's Claim Form within Petition for Reimbursement.) The insurer denied liability for both the orthopedic and cardiac injuries, questioning whether the fall occurred at work or at home and whether the cardiac complaints were causally related to the employee's work activities. (Dec. 4.) Prior to a § 10A conference and prior to payment of any weekly benefits, the parties

agreed to settle the employee's claim by way of a lump sum agreement, without establishment of or acceptance of liability.

The insurer filed a petition for § 37[1] reimbursement in the amount of $35, 919.47, based on the amounts paid in the lump sum and excluding the first 104 weeks of payments. (Dec. 2, 3, 5; Ex. 5.) The claim went to a hearing before an administrative judge, at which the parties stipulated to the first element pre-requisite to § 37 reimbursement, i.e., that the employee had a known pre-existing physical impairment of the right leg. They also stipulated to the amount of reimbursement due under § 37, in the event the judge found the insurer entitled to such reimbursement. (Dec. 2-3.)

In her hearing decision, the judge found that "[t]he lump sum of the underlying case on a non-liability basis precludes reimbursement under § 37." (Dec. 6.) She did not decide whether any of the § 37 elements not stipulated to had been met. We agree with the insurer's argument that this finding is error.

This case was decided and briefs to the reviewing board were filed prior to the issuance of our decision in Walsh v. GTE Govt. Sys., 15 Mass. Workers' Comp. Rep.___ (December 24, 2001), which is dispositive of the instant case. In Walsh, we held that:

> The fact that the parties settled the underlying claim by a § 48 lump sum agreement 'prior to the establishment of liability' or prior to 'insurer acceptance of liability,' . . . does not bar § 37 reimbursement of appropriate amounts paid in the settlement. The § 37 element of 'a personal injury for which compensation is

[1] At the time of the 1990 injury at issue here, § 37 provided in relevant 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 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. The insurer or self insurer shall, however, be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount equal to seventy-five per cent of all compensation paid subsequent to that paid for the first one hundred and four weeks of disability.

G. L. c. 152, § 37, as amended by St. 1985, c. 572, § 48.

> required by' G. L. c. 152 can be satisfied by the redemption of liability for such an injury, without the requirement that it be accepted or established by decision or judicial opinion."

Id. at ___. We explained that "the very same inquiry is at play, for § 37 purposes, in 'without liability' agreements as in 'with liability' agreements: whether the settlement was reasonable in light of the risk exposures inherent in the claim." Id. at ___.

In Walsh, supra at ___, we held that the § 37 element of " 'a personal injury for which compensation is required' " had been established " 'by the insurer's threshold showing of medical evidence in the underlying claim that could have supported an administrative judge's finding of liability against the insurer.' " We pointed out that the Trust Fund could challenge the lump sum on the grounds that there was no compensable personal injury, thus the settlement was unreasonable because the insurer could not be found liable as a matter of law. However, we made clear that the Trust Fund could not challenge the reasonableness of the settlement merely on the grounds that there was a factual dispute. Id. at ___ n.5. In the instant case, the judge stated that there were conflicting medical records regarding whether the employee fell at work or at home, and noted that an emergency room record "referenced the left leg complaints to a fall occurring at work when the employee slipped on paper." (Dec. 4.) The emergency room record certainly is a threshold showing of evidence that could support a finding of liability against the insurer. Therefore, we hold that the § 37 element of "a personal injury for which compensation is required" has been established by that threshold showing of evidence.[2]

Here, the parties stipulated that there was a known physical impairment, the first element necessary for § 37 reimbursement. The second element of a "personal

[2] We note that there is no discussion in the decision of whether any medical evidence was submitted which could have supported the causal relationship of the employee's coronary artery disease to any work injury. However, the § 37 petition does not claim reimbursement for that injury, and the parties have stipulated to the amount of § 37 reimbursement which is due. It appears that whether the employee suffered a cardiac injury at work is a moot issue.

injury" has been established by the emergency room record of a fall at work, (Dec. 4), at least with respect to the orthopedic injuries. The parties have also stipulated to the amount due under § 37. Therefore, the case must be recommitted for a judge to make findings on the other two prerequisite elements to § 37: whether the pre-existing "known physical impairment . . . is, or is likely to be, a hindrance or obstacle to his employment", and whether the resulting "disability . . . 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." G. L. c. 152, § 37.

If the administrative judge finds that the remaining two elements are met, then in this "middle Act" case he must award reimbursement "in an amount equal to seventy-five percent of all compensation paid subsequent to that paid for the first one hundred and four weeks of disability." G. L. c. 152, § 37, as amended by St. 1985, c. 572, § 48. See n.1, supra. Contrast Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166, 174 (2001) (judge in a new Act case under § 37, as amended by St. 1991, c. 398, § 71, has discretion to weigh the facts and assess the appropriate amount of reimbursement).

Accordingly, we vacate the decision and recommit the case for further findings consistent with this opinion. As the administrative judge is no longer with the department, we transfer the case to the senior judge for reassignment to another administrative judge.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **April 10, 2002**

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Susan Maze Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge