

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 029529-99

Robert E. Cleveland
Corporate Limousine Service
Worcester Insurance Company
Workers' Compensation Trust Fund

Employee
Employer
Insurer
Insurer

REVIEWING BOARD DECISION

(Judges Wilson, Maze-Rothstein and McCarthy)

APPEARANCES

Dorothy L. Gruenberg, Esq., for the insurer
Vincent F. Massey, Esq., for the Trust Fund at hearing
Robert L. Rickey, Esq., for the Trust Fund on brief
Thomas M. Wielgus, Esq., for the Trust Fund at oral argument

WILSON, J. The Workers' Compensation Trust Fund ("Trust Fund") appeals from a decision in which an administrative judge ordered it to reimburse the insurer, under § 37, for amounts paid pursuant to a § 48 lump sum agreement within the first one hundred and four weeks of the death of the employee.¹ The Trust Fund contends that the

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.

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

decision is contrary to law, since § 37 bars reimbursement for “any amounts paid” within that period. Because we conclude that § 37 specifically limits the bar, in such circumstances as the present case presents, to “payments *due* during the first one hundred and four weeks from the date of the onset of disability or death,” we reject the Trust Fund’s contention and affirm the decision. (Emphasis added).

We recite only the facts necessary to address the Trust Fund’s single argument on appeal. The parties stipulated to all of the first paragraph prerequisites to § 37 reimbursement. (Dec. 2.) See n. 1, supra. The judge found that the employer had knowledge of the employee’s pre-existing impairment, arteriosclerotic disease, as required by the statute. Id. The employee suffered a fatal heart attack while carrying luggage on the job on December 28, 1997. (Dec. 5.) The employee’s spouse filed a claim for § 31 death benefits, which the parties settled by § 48 lump sum agreement on February 24, 1999. The insurer filed its petition for § 37 reimbursement on June 15, 1999. (Dec. 1.)

Regarding the Trust Fund’s assertion that the insurer was precluded from § 37 reimbursement of any amounts paid in the lump sum settlement, since the settlement was

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 physical 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. No reimbursement shall be made for payments due during the first one hundred and four weeks from the date of onset of disability or death, whether paid under an agreement, decision, or lump sum settlement.

paid within the first one hundred and four weeks of the employee's death at work, the judge made the following pertinent findings:

To read the statutory language in the fashion suggested by the [Trust Fund] would unreasonably deter insurers from settling cases within the two-year period for which benefit entitlement was established, and would by necessity require more cases to be tried before an Administrative Judge. Such a reading would be contrary to the beneficent design of the statute, [*Henderson's Case*, 349 Mass. 683 (1965)], and would not be cost-effective. I decline to follow such an interpretation.

...

Mrs. Cleveland's claim for ongoing Section 31 benefits was resolved when the parties mutually agreed to a reasonable approximation of the value of those future indemnity payments in the Lump Sum Agreement of February 24, 1999. Her weekly benefit under Section 31 of \$665.55 per week would have amounted to \$69, 217.20 for the excluded first one hundred and four week period. After deducting that amount from the net settlement, the \$90,782.80 that was left is properly attributed to the compromised present value of weekly benefits which would have been due and payable after the first one hundred and four weeks. Based on the above analysis and subsidiary findings of fact, I find that the insurer is entitled under the provisions of Section 37 to reimbursement not to exceed 75% of that portion of the amount paid to Mrs. Cleveland for Section 31 benefits under the Lump Sum Agreement of February 24, 1999, or \$68, 087.10.

(Dec. 7-8, emphasis in original.)

The Trust Fund contends that the decision is contrary to law. The Trust Fund argues that any amounts paid by way of a lump sum settlement during the first one hundred and four weeks of disability or death are not reimbursable. The Trust Fund's argument is based on a selective, and erroneous, reading the provisions of § 37. The Trust Fund relies on language contained in the second paragraph of the statute: "[N]o reimbursement shall be made for any amounts paid during the first one hundred and four weeks from the onset of disability or death." Given the plain meaning of this language, the Trust Fund avers, "any amount paid" in a lump sum settlement within the designated time period must be barred from consideration for § 37 reimbursement. The argument might prevail if that provision were the only one in § 37 addressing the one hundred and four week bar on reimbursement. It is not. There is a second provision, contained in the

fourth paragraph of § 37: “No reimbursement shall be made for *payments due* during the first one hundred and four weeks from the date of the onset of disability or death, *whether paid under an agreement, decision or lump sum settlement.*” (Emphasis added). This more specific and relevant provision casts a long shadow of ambiguity over the plain meaning of the earlier provision.²

There is a great deal of difference between “any amounts paid” and “payments due.” Certainly “payments due” can be the same as “amounts paid,” but they need not be. The Act is full of examples where they are not. See, e.g., § 8(1)(“Any failure of an insurer to make all *payments due* an employee . . .”); § 8(2)(d)(“if *due*, compensation shall be paid under section thirty-five . . .”); § 31 (“The total *payments due* under this section shall not be more than . . .”); § 50 (“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 payment 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.”) (Emphases added). All of the examples indicate *entitlement* to payments due, not *receipt* of amounts paid. See also Dufresne’s Case, 51 Mass. App. Ct. 81, 87 (2001)(reference to “unpaid amount due” to compensation insurer in § 15 Hunter-offset context); Diaz v.

² We are troubled by the Trust Fund’s inaccurate citation to the statutory language on page six of its brief. Whether by oversight or legerdemain, the Trust Fund merges the two provisions to form an unambiguous – and self-serving – hybrid. The Trust Fund states:

An Insurer is not entitled to reimbursement under the “New Act” provisions of Section 37 where the Insurer did not and was not required to make payments to the injured or deceased employee beyond the first 104 weeks from the date of onset of disability or death. As amended, Section 37, in relevant part, states:

“...no reimbursement *shall* be made *for any amounts paid* during the first one hundred and four weeks from the date of onset of disability or death, *whether paid under* an agreement, decision or *lump sum settlement.*”

(Trust Fund’s Brief, 6, emphasis in original.) While the Trust Fund does correctly quote the statute later in its brief, this inaccurate announcement of the premise upon which it bases its argument on appeal only undermines the Trust Fund’s posture.

Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 533 (1995)(reading "due" as meaning "owed by right"). As it is axiomatic that none of the words in the statute are to be rejected as surplusage, Meunier's Case, 319 Mass. 421, 423 (1946), we consider that the failure of the Trust Fund to account for the "payments due" provision indicates a notable weakness in its argument.

Not only is the distinction between "paid" and "due" clear, but it is dispositive of the issue before us. If it is only *payments due* during the first 104 weeks – the entitlement to benefits coterminous with that period – that are not reimbursable, then a lump sum settlement executed within that time frame can still contain reimbursable amounts. Those are any amounts that can be allocated to the designated sections in § 37, beyond the first 104 weeks. "A lump sum settlement under § 48 is 'as near as possible to the present value of all the compensation payments which the employee would be entitled to receive *in the future.*' " Henderson's Case, 349 Mass. 683, 685 (1965), quoting Paltsios' Case, 329 Mass. 526, 529 (1952)(emphasis added). See Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166, 172-173 (2001)(§ 37 reimbursement available for potential liability under designated sections redeemed in § 48 agreement). Under such an interpretation of § 37, the earlier provision barring all reimbursement for any amounts paid in the first 104 weeks is inapplicable to lump sum settlements such as the present one that are paid within that time frame. See Sullivan v. Boston University, 11 Mass. Workers' Comp. Rep. 406, 408 (1997)(similar analysis of § 13A [10] provision, "amount payable to the employee within the first month from the date of the . . . decision" as reference to benefits attributable to that time period).

A well-established rule of statutory interpretation informs our choice of the specific provision on "payments due" in the first 104 weeks paid under a lump sum settlement over the general provision on "any amount paid" in the first 104 weeks. "If a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute." Perreira v. New England LNG Co., Inc., 364 Mass. 109, 118 (1973). "[G]eneral statutory language must yield to that which is more specific." Risk Management Foundation of the Harvard Medical Insts., Inc. v. Commissioner of

Insurance, 407 Mass. 498, 505 (1990). See Archer v. Turner Trucking & Salvage, 10 Mass. Workers' Comp. Rep. 166, 174 (1996)(applying specific over general statute where two provisions of § 13A applied and conflicted: § 13A(5) and § 13A(9)). Because the fourth paragraph of § 37 specifically addresses lump sum settlements, it should govern the dispute. We agree with the judge that there is no reason to require employees and insurers to wait for an arbitrary two years before settling a claim. In order to be able to tap § 37 reimbursement, the insurer should be able to rely upon its claims adjustment and risk management.³ The result urged by the Trust Fund "would not be in the 'best interests of the employee' and would frustrate the purpose of § 48 in allowing settlements." Henderson's Case, *supra*. As such, we conclude that only payments due for the first 104 weeks are barred for consideration regarding § 37 reimbursement; the actual payment of the lump sum settlement amount within that time frame is irrelevant.⁴

Accordingly, we affirm the decision.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: **January 4, 2002**

William A. McCarthy
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

³ Employers also benefit from prompt settlement of claims, with efficient filing of petitions for § 37 reimbursement following closely (as in this case), as experience modification is favorably affected by such reimbursement.

⁴ The inference may be drawn from the above analysis that the phrase in the second paragraph, "any amounts paid," refers to ongoing weekly indemnity benefits, along with medical benefits, paid under the sections enumerated in that same paragraph.