

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 013511-04

Robert McCauley  
Keystone Associates  
ACE USA  
Workers' Compensation Trust Fund

Employee  
Employer  
Insurer  
Third Party Respondent

### **REVIEWING BOARD DECISION** (Judges Carroll, Horan and Fabricant)

### **APPEARANCES**

Dorothy M. Linsner, Esq., for the insurer  
Karen S. Fabiszewski, Esq., for the Trust Fund

**CARROLL, J.** This case arises from cross-appeals by the Workers' Compensation Trust Fund ("Trust Fund") and the insurer. The Trust Fund appeals that aspect of the administrative judge's decision holding that the insurer's § 37 petition for reimbursement was not time-barred. The insurer appeals the judge's holding that it was not entitled to § 50 interest on the reimbursement. We affirm the decision insofar as it orders the Trust Fund to reimburse the insurer pursuant to § 37, but reverse the holding that § 50 interest was not due.

At hearing, the parties stipulated to all elements necessary for the insurer to be reimbursed pursuant to § 37.<sup>1</sup> (Dec. 2; Joint Ex. 1, Section 37 Joint Hearing Stipulation.) The employee here suffered a "subsequent injury" within the meaning of the statute, on April 27, 1988, (Dec. 2), and the insurer filed its petition for reimbursement on or about May 24, 2004. (Ex. 1.) The Trust Fund's

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<sup>1</sup> Section 37 provides reimbursement to insurers for up to 75% of total payments made after the first 104 weeks to employees with a known physical impairment who suffer a subsequent injury resulting 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." G. L. c. 152, § 37, as appearing in St. 1991, c. 398, § 71.

only defense to the insurer's petition was that the claim was time-barred, (Dec. 3), even though the applicable version of § 37, enacted in 1985, contains no explicit statute of limitations.

Relying on our decision in Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep. 151 (2002), the judge held that the insurer's § 37 petition for this date of injury was not subject to a statute of limitations, and ordered the Trust Fund to reimburse the insurer for the stipulated amount (\$302,144.40 through March 14, 2006, plus 75% of benefits paid thereafter). (Dec. 3.) However, pursuant to our decision in Carmilia v. General Electric, 15 Mass. Workers' Comp. Rep. 261 (2001), the judge found the Trust Fund was not liable to pay § 50 interest on the reimbursement. (Dec. 3.)

The Trust Fund acknowledges that the decision of the Appeals Court in Oakes's Case, 67 Mass. App. Ct. 81 (2006), is dispositive of its argument that the two-year statute of limitations inserted by the 1991 amendment<sup>2</sup> is applicable here. (Trust Fund br. 5.) In Oakes's Case, the court held that the 1991 amendment had been specifically designated as substantive and therefore applied only prospectively to injuries occurring on and after its effective date. Nevertheless, the Trust Fund argues that the judge should have "borrowed" a statute of limitations from an analogous claim. Specifically, the Trust Fund advocates that the four-year statute of limitations contained in G. L. c. 152, § 41, or the three-year statute of limitations governing claims against the commonwealth, is appropriate. (Trust Fund br. 19-23.) In Walsh, supra, relied on by the judge, we addressed and rejected these arguments, as well as others advanced by the Trust Fund. We see

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<sup>2</sup> General Laws c. 152, § 37, as amended by St. 1991, c. 398, § 71, provides, in relevant part:

Any petition for reimbursement under this section shall be filed no later than two years from the date on which the benefit payment for which the reimbursement request is being filed was made.

no need to revisit that decision.<sup>3</sup> Accordingly, we affirm the administrative judge's decision insofar as it held the insurer's § 37 petition was not barred by any statute of limitations.

However, consistent with our recent decision in Morales v. Lutheran Home of Brockton, 20 Mass. Workers' Comp. Rep. 219 (2006), we reverse the judge's holding that the insurer is not entitled to § 50 interest on the reimbursement amount. In Morales, we reversed our earlier decision in Carmilia, supra, in which we had concluded that sovereign immunity barred interest awards against the Trust Fund:

Because the bargain between employers/insurers and the Commonwealth/Trust Fund established by § 37 is a *quid pro quo* 'of a contractual nature,' [citation omitted] sovereign immunity does not apply to bar the imposition of § 50 interest on the award of second injury fund reimbursement.

Morales, supra at 222. Accordingly, we reverse that part of the decision denying interest on the insurer's § 37 reimbursement, and order that interest be paid in accordance with § 50.

So ordered.

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Martine Carroll  
Administrative Law Judge

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Mark D. Horan  
Administrative Law Judge

Filed: **March 8, 2007**

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Bernard W. Fabricant  
Administrative Law Judge

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<sup>3</sup> In Oakes's Case, supra, the court also noted that the Trust Fund's "policy argument" in favor of imposing a statute of limitations on § 37 petitions "is unavailing in the face of the Legislature's clear expression of intent in § 106 of the Reform Act." Id. at 86 n.9