COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 26254-99**

Ronnie Lippett	Employee
New England Patriots	Employer
Travelers Insurance Co.	Petitioner
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Levine, Carroll and Wilson)

APPEARANCES
Mark Nevils, Esq., for the insurer at hearing
Dorothy M. Linsner, Esq., for the insurer on appeal
Thomas M. Wielgus, Esq., for the Workers' Compensation Trust Fund

LEVINE, J. The Workers' Compensation Trust Fund ("Trust Fund") appeals from an administrative judge's award of reimbursement under § 37 for an injury to Ronnie Lippett, a former professional football player, who was hurt in a December 30, 1990 game. Mr. Lippett continued to play football for two more seasons, and then retired. His claim for workers' compensation benefits, filed after his retirement, was settled in a lump sum agreement executed on October 7, 1993. The Trust Fund argues that the judge erred in numerous ways: that the judge relied on matters not in evidence to reach his conclusions; that Mr. Lippett was exempted from classification as an "employee" by operation of § 1(4)(b); that the reimbursement claim was time-barred; and that the award of § 50 interest was contrary to law. We agree with the Trust Fund that, based on our recent decision in Carmilia v. General Elec., 15 Mass. Workers' Comp. Rep. 261 (2001), it was error to award § 50 interest. We therefore reverse the award of interest, but we affirm the remainder of the decision.

We briefly discuss the Trust Fund's appellate arguments. At the outset, we note that the Trust Fund does not challenge the amount of the reimbursement ordered nor the judge's findings on the required elements of the insurer's § 37 petition:

> The disability suffered by Lippett on December 30, 1990 combined with the disabilities resulting from his previous football injuries to create a physical impairment that was substantially greater than a disability which would have resulted from the December 30, 1990 injury alone.

(Dec. 614.)[1] The Trust Fund does contend that the judge improperly assumed the role of "expert" on the subject of the National Football League (NFL) players' contracts. For example, the judge stated that "[Mr. Lippett] did not receive any cash payments after the season ended because the NFL as a general rule, pays its players on a per game basis." (Dec. 619.) He further stated: "As per NFL custom, he would not have received payment until the first regular season game in September, 1992, but, with the termination of his contract, and his retirement, he would not be paid at that time." (Dec. 620.) We agree that a judge generally should not rely on personal knowledge of specialized matters as the basis for findings and rulings. See Decristoforo v. HER Constr. Co., Inc., 14 Mass. Workers' Comp. Rep. 102, 105-106 (2000).

Nevertheless, in the present case, the error, if any, was harmless. The judge utilized his apparent expertise to analyze an issue that did not need to be resolved; namely, whether Mr. Lippett's claim was entirely barred from inclusion within the scope of c. 152 by virtue of the professional athlete exemption to the § 1(4) definition of "employee."[2] That exemption, § 1(4)(b), covers "persons employed to participate in

---

[1] The version of § 37 applicable to this 1990 injury 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 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.

[2] This issue is also the Trust Fund's second issue on appeal. Our discussion herein disposes of that aspect of the appeal.

organized professional athletics, while so employed, if their contracts of hire provide for the payment of wages, during the period of any disability resulting from such employment." Mr. Lippett was no longer employed by the Patriots when he filed his claim for benefits under c. 152 on June 16, 1993, thus raising the question of his inclusion in the § 1(4)(b) exemption at that time. (Dec. 614.) This precise legal issue is unsettled; there is no case law interpreting the scope of this provision.

But we need not decide the issue because the only relevant inquiry regarding this § 37 reimbursement claim based on payments made by a lump sum agreement is simply, "Was the settlement *reasonable*?" See Cosgrove v. Penacook Place, 15 Mass. Workers' Comp. Rep. 166 (2001). Walsh v. GTE Gov't Sys., 15 Mass. Workers' Comp. Rep. __,__ (December 24, 2001)(lump sum settlement prior to acceptance of liability). Under the circumstances, where an unsettled issue of law would determine the litigation of Mr. Lippett's underlying claim, it is unlikely that the settlement could have been found unreasonable. And the judge here did find that the settlement was reasonable. (Dec. 623.) Contrast Diliberto v. New England Elec. Co., 11 Mass. Workers' Comp. Rep. 123, 133-134 (1997), aff'd sub nom. Aetna v. Commonwealth, 50 Mass. App. Ct. 373, 378-379 (2000)(a settlement for an "injury" resulting from prolonged sitting was held to be unreasonable and therefore not reimbursable under § 37 because the injury fell within the doctrine of Zerofski's Case, 385 Mass. 590 (1982), that injuries from activities common to all or a great many employments are not compensable under c. 152). Thus, as the judge's expertise was applied to decide an issue that did not need resolution, the error is harmless.

As to the Trust Fund's argument that Mr. Lippett's claim was time-barred by various "borrowed" statutes of limitations or the equitable doctrine of laches, the case is governed by our recent decision in Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep. ____ (April 18, 2002). There, we concluded that no statute of limitations applies where none existed for § 37 reimbursement claims based on injuries pre-dating the 1991 amendment to § 37. That amendment inserted a rolling two-year statute of limitations for dates of injuries occurring on or after December 23, 1991. The § 37

petition based on Mr. Lippett's December 30, 1990 injury was not subject to a statute of limitations, and the equitable doctrine of laches also does not apply. See id.

Accordingly, the decision awarding § 37 reimbursement is affirmed. The award of § 50 interest is reversed.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

FEL/kai
Filed: **May 6, 2002**