COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004461-03**

Theresa Morales	Employee
Lutheran Home of Brockton	Employer
CNA Insurance Company	Insurer
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Horan)

APPEARANCES
W. Frederick Uehlein, Esq., and Dorothy M. Linsner, Esq.,
for the insurer at hearing
Dorothy M. Linsner, Esq., and Jerry Benezra, Esq., for the insurer on appeal
Donna Sullivan Andronico, Esq, and Frank L. Louro, Esq.,
for the Trust Fund at hearing
Pedro Benitez-Perales, Esq., for the Trust Fund on appeal

FABRICANT, J. The administrative judge awarded the insurer second injury fund reimbursement against the Workers' Compensation Trust Fund ("Trust Fund") pursuant to G. L. c. 152, § 37,[1] but did not award § 50 interest. In so doing the judge was following our decision in Carmilia v. General Electric, 15 Mass. Workers' Comp. Rep. 261 (2001), in which we concluded that sovereign immunity barred interest awards

[1] General Laws c. 152, § 37, 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.
>
> 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-

against the Trust Fund. The insurer challenges the Carmilia ruling in this appeal. We are persuaded by the argument the insurer now advances, and conclude that Carmilia was wrongly decided. We reverse the decision insofar as it failed to award § 50 interest.

We need not recount the facts underlying the judge's award of § 37 reimbursement. The judge found that the insurer had satisfied the elements of the statute, and awarded the insurer $42,399.18 on its petition. (Dec. 9.) Citing the Carmilia decision, the judge noted that the insurer's claim for § 50 interest was barred. (Dec. 9.)

Carmilia's analysis of sovereign immunity as a bar to claims of interest against the Trust Fund, an instrumentality of the Commonwealth performing a governmental function, is detailed, discursive and largely correct. However, in consideration of the insurer's argument in this appeal, we conclude that Carmilia's exception to sovereign immunity based on a bargained-for exchange with the Commonwealth does not hold up to further scrutiny. Id. at 273-275

We first note that G. L. c. 152, § 50, as amended in 1991, applies to all claims made after its enactment, and specifically states:

> 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 payments be made, interest at the rate of ten percent per annum . . . shall be required by such order or decision
>
> .

(Emphasis added.) Thus, § 50 interest is due on a decision ordering the Trust Fund to pay § 37 reimbursement (a "payment [] of any kind" claimed by an "other party"), unless it is barred by sovereign immunity.[2]

Carmilia addressed the theory of the statutory bargain between the Trust Fund and the insurer in the context of the "doctrine of improper detention," which, in turn, is based on "the statutory scheme which regulates the relationship of the contracting parties."

> four A, thirty-six A and , where benefits are due under any of such sections, section thirty. . . .

[2] There is no specific exclusionary language in the statute that establishes the Workers' Compensation Special Fund that would otherwise bar the payment of § 50 interest on a §37 reimbursement. G. L. c. 152, § 65(2).

Perkins School for the Blind v. Rate Setting Comm'n, 383 Mass. 825, 831-832 (1981). A direct contractual relationship not being required, "interest will be due on 'money . . . owed by the [Commonwealth] to [a claimant] on an actual or implied contract, or a statutory liability, which gave rise to a contractual relationship when [the claimant] rendered services with the [Commonwealth's] knowledge or approval, or in circumstances which bound it to pay for them.'" Carmilia, supra at 273, quoting Massachusetts Gen. Hosp. v. Commissioner of Pub. Welfare, 359 Mass. 206, 209 (1971). In Carmilia, we determined that this exception to sovereign immunity was applicable only in cases that involved a liquidated debt, and therefore in the nature of a collection action. Id. at 274. "Simply stated, there can be no improper detention of money until payment is due." Perkins School for the Blind, supra at 832. As such, Carmilia stated that until the actual reimbursement amount was established in the hearing decision, no money was owed, and thus no improper detention of the money could be alleged. As a result, we reasoned that § 50 interest for the time that elapsed between the filing of the petition and the decision was not warranted. Carmilia, supra at 275. While it is true that many of the cases do fit the liquidated debt model, (see, e.g., Sargeant v. Commissioner of Pub. Welfare, 383 Mass. 808 (1981)), we now agree with the insurer that our analogies in Carmilia were flawed.

The insurer correctly asserts that the statutory liability under § 37 fits within the implied contract exception to sovereign immunity, citing for support the recent case of Bates v. Director of Office of Campaign and Political Finance, 436 Mass. 144 (2002), which was decided after Carmilia. The insurer points to the political candidate in Bates, who agreed to significant restrictions to the conduct of his campaign in exchange for public funding by participating in the so-called "Clean Elections" statutory scheme.

> Sovereign immunity has posed no barrier to recovery where, as here, the Commonwealth has been held liable to pay money to a plaintiff by virtue of the State's breach of its own expressly acknowledged statutory obligations and the plaintiff's action in conformity with the statutory scheme to his detriment.

Bates, supra at 172.

"By analogy, in the present case, the employer (on its own behalf and that of its insurer) participates in the statutory program when it hires a previously injured employee and agrees to assume an increased exposure if there is an industrial accident involving the previously injured employee in exchange for the § 37 claim for reimbursement if the specified conditions are met." (Ins. br, 22-23.) We think this analogy is apt; the statutory liability created by § 37 falls within the same analytical framework as that created by the Clean Elections law.

The imposition of § 50 interest serves the policy of encouraging early resolution and settlement. It only makes sense that there should be financial motivation for the Trust Fund to promptly pay meritorious § 37 petitions, rather than relying on the prerequisite of a hearing decision. The benefit to employers from the § 37 reimbursement – the appropriate downward adjustment to experience modification – can be entirely lost when petitions languish in the system for years.

Because the bargain between employers/insurers and the Commonwealth/Trust Fund established by § 37 is a *quid pro quo* "of a contractual nature," Falmouth Hosp. v. Commissioner of Public Welfare, 23 Mass. App. Ct. 545, 547 (1987), sovereign immunity does not apply to bar the imposition of § 50 interest on the award of second injury fund reimbursement. We therefore overrule Carmilia, reverse in part the decision on appeal, and order that the interest sought by the insurer be paid in accordance with the provisions of § 50.

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

Filed: ***June 20, 2006***

HORAN, J., (concurring). I agree Carmilia was wrongly decided, and agree with the result reached by the majority. However, I take a different route to arrive at the same destination.

The Trust Fund was created by the legislature "to pay or reimburse" parties to our workers' compensation system in a variety of specified circumstances. See G. L. c. 152, § 65 (2)(a-g). Accordingly, the Trust Fund does not maintain that principles of sovereign immunity operate to bar actions by insurers for recovery under G. L. c. 152, § 37. Instead, it maintains that doctrine operates to free it from the obligation to pay § 50 interest on § 37 reimbursement awards.

It is axiomatic that once the Commonwealth chooses to forgo its sovereign immunity, it "may dictate the terms" regarding the extent of any waiver. Falmouth Hosp., supra at 547, citing C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 392 (1985). Thus, we should first examine the statutory language bearing on the issue of whether interest is due when an insurer prevails in a § 37 reimbursement action. As the majority notes, § 50 provides for interest when "*payments of any kind* are not made within sixty days of being claimed by an employee . . . *or other party* . . . ." (Emphasis added.) Payments under § 37 certainly qualify as "payments of any kind," and the insurer here qualifies as an "other party" under the statute's plain meaning. Therefore, the insurer is entitled to interest under § 50 unless the Trust Fund itself is, under another provision of G. L. c. 152, otherwise specifically exempt from paying it.

The answer to this final inquiry is found in G. L. c. 152, § 65(2). That section lists seven different scenarios under which the Trust Fund is obligated to make payments or reimbursements of compensation. Notably, in only one of the seven scenarios is the Trust Fund freed of the obligation to pay interest. In § 65(2)(e), the Trust Fund is required to pay benefits to employees of uninsured Massachusetts employers "provided, however, . . . (ii) no interest pursuant to section fifty shall be payable out of the trust fund." No such limitation exists with respect to the Trust Fund's obligation to pay, under § 65(2)(c), for "reimbursement of certain apportioned benefits pursuant to section thirty-seven." I am aware that "waivers of sovereign immunity must be expressed by the terms

of the statute or appear by necessary implication from them." Onofrio v. Department of Mental Health, 411 Mass. 657, 659 (1992). I believe the statutory language in question passes the Onofrio test. See Todino v. Town of Wellfleet, 66 Mass. App. Ct. 143 (2006)(G. L. c. 41, §111F statutory scheme necessarily implied award of interest despite sovereign immunity claim). Why would the legislature feel the need to specifically exempt uninsured employer claims from the provisions of § 50 (by so stating in subsection (2)(e) of § 65), if it had not intended the plain meaning of § 50 to apply to all other claims against the Trust Fund? Accordingly, I believe this case is distinguishable from Russo's Case, 46 Mass. App. Ct. 923 (1999)(denying application of § 50 against the Commonwealth as a party in general).

_____
Mark D. Horan
Administrative Law Judge

Filed: ***June 20, 2006***