COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032235-08**

Clarence S. Rowley, III	Employee
Allston Supply Company, Inc.	Employer
A.I.M. Mutual Insurance Company	Insurer
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Levine.

APPEARANCES
Dorothy M. Linsner, Esq., for the insurer
Pedro Benitez-Perales, Esq., for the respondent

COSTIGAN, J. The Workers' Compensation Trust Fund (Trust Fund) appeals from the administrative judge's decision ordering it to reimburse the insurer, pursuant to G. L. c. 152, § 37,[1] certain § 30 medical benefits. The Trust Fund argues that the award ran afoul of the two-year statute of limitations added to § 37 by St. 1991, c. 398, § 71. We agree, and reverse that aspect of the decision.

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[1] The statute, which governs the so-called "Second Injury Fund," provides, in pertinent part:

> Insurers making payments under this section shall be reimbursed by the state treasurer from the 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 thirty; provided . . . 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 . . . whether paid under an agreement, decision, or lump sum settlement. 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.

We summarize the relevant facts and procedural history. The insurer filed its § 37 petition for reimbursement on or about November 14, 2008. The petition identified the employee as having received § 34 total incapacity benefits from September 5, 2001 to August 30, 2004, and § 35 partial incapacity benefits from August 31, 2004 to November 12, 2006.[2] On November 13, 2006, a different administrative judge approved a § 48 lump sum settlement in the amount of $147,500; after deduction of an attorney's fee and an allocation for § 36 permanent loss of bodily function benefits, the employee's net recovery was $111,936. The agreement specified that the settlement had been reached prior to a hearing on the employee's claim for § 34A permanent and total incapacity benefits, and represented more than seven years of such benefits.

The insurer's petition sought reimbursement of 75% of $159,674.40, representing: 1) the employee's net settlement proceeds of $111,936; and 2) all medical benefits paid subsequent to the first 104 weeks of disability, that is, after September 3, 2003, in the amount of $47,738.40. Following a § 10A conference, the administrative judge, whose decision we review, ordered the Trust Fund to pay the insurer $50,000 and § 50 interest. Only the insurer appealed. On April 29, 2010, the date of the hearing, the insurer and the Trust Fund reached an agreement resolving all issues except the insurer's claim for reimbursement of $44,651.27[3] in medical benefits paid after the first 104 weeks of disability, but more than two years before the filing date of the petition. (Dec. 2.)

At hearing, the Trust Fund argued that § 37's two-year statute of limitations barred the insurer from recovering medical benefits paid more than two years before the filing of its petition, that is, prior to November 14, 2006, but after September 3, 2003, when the first 104 weeks of disability expired. The Trust Fund maintained

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[2] By the terms of § 37, those benefits were not reimbursable.

[3] The parties agreed that if the insurer prevailed, its recovery would be $33,488.45, plus § 50 interest. That amount represented seventy-five percent of the medical benefits at issue. (Dec. 2.)

then, and does so now, that the two-year statute of limitations "reflects the Legislature's intent to limit the time in which an insurer could recover reimbursement for payments of benefits under § 37." (Trust Fund br. 8.)

The judge disagreed. Relying on the opinion of a single justice of the Appeals Court in Cosgrove v. Penacook Place, 02-J-614 (2005), the judge wrote:

> The single justice in Cosgrove affirmed the reviewing board's effective ruling "that the Trust Fund must pay the insurer 75% of all medical benefits paid for treatment incurred after the first one hundred and four weeks from the onset of disability." Cosgrove, supra, p.8. Section 37 of the Act allows insurers reimbursement after the 104 week waiting period. Reimbursement to the insurers for benefits paid under §30 of the Act is contingent upon benefits being due under the other sections enumerated in §37. But §37 places "no additional time limitations upon the reimbursement of §30 benefits." Cosgrove, supra, p.10.
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> The fortuity of when the §37 petition is filed within the two year statute of limitations does not affect the insurer's entitlement to reimbursement of §30 benefits it paid. Furthermore, the language imposing the two year statute of limitations, by its terms, applies only to the other eligible sections of the statute, not to §30. Said language does not evince an intent to limit §30 reimbursement beyond the initial 104 weeks, whether or not it may so limit reimbursement of the other eligible sections. [Footnote omitted.]

(Dec. 3-4.) Although the judge awarded reimbursement of certain "indemnity payments" and § 50 interest, (Dec. 4), the Trust Fund appeals only the ordered reimbursement of medical benefits paid by the insurer more than two years prior to the filing of its § 37 petition. We agree with the Trust Fund's argument.

It was error for the administrative judge to rely exclusively on the holding in Cosgrove to find that § 37's two-year statute of limitations on petitions for reimbursement does not apply to medical benefits. We need not address the question of the precedential value of a single justice opinion because the cases are distinguishable on the facts. Cosgrove simply did not, nor could it, address the statute of limitations issue presented in this case. The § 37 petition at issue in Cosgrove was timely filed on July 29, 1998, some nine months after the expiration of the first 104

weeks of disability.[4] Thus, the Cosgrove petition was filed well within the applicable statute of limitations.[5]

It is only against that factual background that the single justice's holding can be properly construed:

> Turning to the trust fund's appeal, the reviewing board did not err in summarily affirming the administrative judge's ruling that the trust fund must pay the insurer 75% of all medical benefits paid for treatment incurred after the first one hundred and four weeks from the onset of disability.

Cosgrove, supra at 9.[6] Once § 34A benefits were paid in the lump sum settlement, the insurer was allowed to reach back, but no further than the 105th week of disability, to recoup a percentage of the medical benefits paid since that date.

This begs the question at issue here: whether the insurer may recover medical benefit payments incurred after the 104th week of disability, but more than two years before the filing of a § 37 petition seeking their reimbursement. Contrary to the insurer's argument and the judge's determination, no fair reading of § 37 allows the conclusion that all other identified qualifying benefits,[7] but not § 30 medical benefits, are subject to the two-year statute of limitations:

> *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 made was filed.

General Laws c. 152, § 37. (Emphases added.) In construing a statute, "its words

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[4] This was a mere six months after approval of a § 48 lump sum settlement, which ultimately, see Cosgrove v. Penacook Place, 16 Mass. Workers' Comp. Rep. 406 (2002), allocated some of the proceeds to the employee's potential entitlement to § 34A permanent and total incapacity benefits. (3/15/2000 Cosgrove Tr. 1-3.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of contents of board file proper).

[5] By virtue of the employee's August 29, 2001 date of injury, the provisions of § 37, as amended by St. 1991, c. 398, § 71, applied to the insurer's claim for reimbursement. See Oakes's Case, 67 Mass. App. Ct. 81, 85 fn.6 (2006).

[6] The single justice rejected the Trust Fund's argument that only § 30 medical benefits *incurred after* the insurer paid one of the identified qualifying benefits were reimbursable.

[7] Sections thirty-one, thirty-two, thirty-three, thirty-four A and thirty-six A.

must be given their plain and ordinary meaning according to the approved usage of language . . . and . . . the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it." Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998), quoting Johnson's Case, 318 Mass. 741, 746-747 (1945). "Any" means, *inter alia*, "[o]ne or another without restriction or exception." The American Heritage Dictionary, Second College Edition, 1985. There is no statutory language excluding medical benefits from the limitations period, nor is there any statutory language limiting § 37 petitions, and "the benefit payment" sought, to all the identified qualifying benefits except medical benefits. Moreover, contrary to the insurer's curious argument, a § 37 petition may in fact seek reimbursement of medical benefits only.[8] The word "shall" is likewise plain, unambiguous, and mandatory, not precatory, in nature. Taylor's Case, supra.

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[8] The insurer argues that "[t]he reimbursement for medical benefits being sought is simply an add-on claim since no petition for those could be filed." (Ins. br. 3-4.) That argument is patently wrong, as illustrated by the following example:

Assume an employee was injured in 1992 and received the full seven years of §§ 34 and 35 weekly incapacity benefits, which is five years beyond the first 104 weeks of disability. In 1999, she was awarded weekly § 34A permanent and total incapacity benefits, which she collected for four years before redeeming her potential future entitlement by lump sum settlement in 2003. Then, within a month of the lump sum settlement, the insurer filed a § 37 petition. The Trust Fund agreed with the insurer as to how much of the lump sum monies represented potential future § 34A benefits. Because the first two years of past weekly § 34A benefits fell outside the two-year statute of limitations, that is, beyond two years from the filing date of the petition, the insurer was not entitled to recover those benefits, but the Trust Fund reimbursed it 75% of the balance. No reimbursement of medical benefits was claimed. Post-lump sum settlement, the employee continued to treat for her industrial injury and the insurer continued to pay medical benefits. In 2008, five years after the lump sum settlement, the employee underwent surgery related to her injury. The insurer paid for the surgery and follow-up medical care, and then filed a § 37 petition for reimbursement of those medical benefits, as well as all paid after the first 104 weeks of disability.

In this scenario, the insurer's "add on" argument would preclude recovery of *any* medical benefits claimed in the petition, because no concomitant identified qualifying benefit was also being claimed. This is an absurd result.

Moreover, according to the insurer and the administrative judge, there is no statute of limitations for recovery of medical benefits, and therefore the insurer could seek and receive reimbursement for medical benefits tracking all the way back to the first day after expiration of the first 104 weeks of disability, that is, at the beginning of the third year of § 34 benefits

The only rational construction of the statute is that the two-year statute of limitations, applicable to dates of injury from and after December 23, 1991, applies to *all* petitions seeking reimbursement of *all* qualifying benefit payments, including medical benefits. In the pre-1991 version of § 37, there was no express statute of limitations, and our appellate courts ultimately held no statute of limitations could be borrowed from other statutes. See Oakes, supra, and Alves's Case, 451 Mass. 171, 172 (2008).[9] By exempting § 30 medical benefits from the statute of limitations added to § 37 in 1991, the administrative judge ignored a basic tenet of statutory construction:

> We must construe a statute "in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."

Sellers v. John Havlin Tree Serv., 20 Mass. Workers' Comp. Rep. 277, 279 (2006), [*aff'd* Sellers's Case, 452 Mass. 804 (2008)], citing Jinwala v. Bizarro, 24 Mass. App. Ct. 1, 3 (1987), quoting Industrial Fin. Corp. v. State Tax Comm., 367 Mass. 360, 364 (1975).

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paid -- some fourteen years before the filing of the § 37 petition. This result is antithetical to the policy behind the 1991 amendment to § 37 which, *inter alia*, created the two-year statute of limitations, expressly deemed substantive by the legislature and later described by the reviewing board as "rolling." Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep. 151, 153 (2002); Alves's Case, supra. "Rolling" means that, over time, an insurer has the right to file more than one petition for reimbursement, but the benefits available for reimbursement are limited to the two-year look-back period from the date the petition is filed.

[9] Reference to the pre-1991 version of § 37 is instructive:

> The word "compensation" as used in this section for the purpose of reimbursement hereunder shall include all payments to the employee, or to his dependents in case of death, provided for by sections thirty, thirty A, thirty-one, thirty-two, thirty-three, thirty-four, thirty four A, thirty five, thirty-fiveA, thirty six and thirty-six A.
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> . . .
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> No reimbursement shall be made covering the first one hundred and four weekly payments or for medical benefits during that period, whether paid under an agreement, decision, or lump sum settlement.

We think the legislature's intent in enacting the 1991 amendment to § 37 was to limit an insurer's second injury fund recovery to benefits paid within a finite, determinable period no greater than two years prior to the filing of a petition. The 1991 amendment represented a radical restriction of insurers' rights to reimbursement in second injury fund cases, both as to the types of benefits that could be recovered and the time within which recovery must be sought. The legislature acknowledged this retrenchment by designating the amendment substantive in nature, with only prospective application. St. 1991, c. 398, § 106. Nothing in the statute or the policy considerations behind the amendment permits the conclusion, reached by the administrative judge and urged by the insurer, that medical benefits were excepted from the two-year statute of limitations.

Lastly, strong policy considerations support the conclusion that the two-year statute of limitations appearing in the 1991 version of § 37 applies to all petitions for reimbursement, and to all recoverable benefits identified in the statute. Second Injury Fund reimbursements,

> are specifically designed to help employers bear the additional cost associated with hiring workers with prior disabilities. In order for this financial assistance to work, the reimbursements collected by insurance carriers must be timely reported to the designated rating bureau so that the employer can have their experience modification factor revised to reflect the lower claim costs.

Massachusetts Workers' Compensation Advisory Council Fiscal Year 2010 Annual Report, 13 (January 2011). Of course, timely reporting of § 37 reimbursements requires timely petitions for same.

In order to advance that goal, the Workers' Compensation Advisory Council[10] further noted:

> *The Advisory Council is recommending that during the 2011-2012 Legislative Session, legislation is filed and passed to phase out Section 37 Second Injury Fund reimbursements for all new and arising cases eligible for reimbursement with injuries occurring before December 23, 2991, so called "Mid Act" and "Old Act" claims.* Council members believe that such

[10] The Workers' Compensation Advisory Council was established by the Reform Act of 1985 and exists pursuant to G. L. c. 23E, §§ 15-17.

> legislation should become effective 180 days after enactment to allow insurers adequate time to review and submit remaining caseloads. The Advisory Council is further recommending the preservation of the Second Injury Fund in Massachusetts for all claims arising on or after December 23, 1991, so called "New Act" claims. It is important to note that passage of such legislation will not impact the amount of benefits received by injured workers in any way. Instead, *the Commonwealth's employer community will be protected from having to fund stale SIF claims without the possibility for future premium savings.*

(Id. at 14; emphases added.) It is precisely because "New Act" § 37 petitions for reimbursement are subject to the two-year statute of limitations as to all reimbursable benefits, that the Advisory Council endorses the preservation of the current Second Injury Fund.

Because the administrative judge failed to distinguish the facts in Cosgrove, violated basic rules of statutory construction and ignored sound policy considerations, we reverse his decision and vacate so much of his award as required the Trust Fund to reimburse the insurer for medical benefits paid after the first 104 weeks of disability but more than two years prior to the November 14, 2008 filing of its § 37 petition.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed:

FILED
APR 12 2011
Dept. of Industrial Accidents