COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021812-97**

Mark Fenton	Employee
King Philip Regional School District	Employer
Mass. Education and Government SIG	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Levine)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
John J. Canniff, Esq., for the insurer

HORAN, J. The employee appeals from a decision dismissing his claim for §§ 13, 30 and 34 benefits as time-barred. G. L. c. 152, § 41.[1] For the reasons that follow, we affirm the decision.

Since 1986, the employee worked as a custodian for the employer. (Dec. 4.) In 1995, he suffered a heart attack while on vacation. (Dec. 5, n.2; Tr. 14, 26-27.) He testified that at that time he felt "like an elephant was standing on [his] chest." (Tr. 28; Dec. 5, n.2.) The employee returned to work following a course of medical treatment, including surgery. (Tr. 14-15.)

On June 17, 1997, the employee suffered a heart attack at work while "removing large amounts of trash from the classrooms." (Dec. 4.) A co-worker called 911, and the employee was taken by ambulance to a local hospital before being "life-flighted" to Boston Medical Center. (Dec. 5.) On July 1, 1997, the

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[1] General Laws c. 152, § 41, provides, in pertinent part:

> No proceedings for compensation payable under this chapter shall be maintained . . . unless [the] claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment.

insurer sent a notification of denial to the employee referencing the June 17, 1997 injury date. (Dec. 5.) The attachment to that notification states, "[s]hould you decide to file a claim for benefits, you must do so within the time limits provided under MGL, Chapter 152." (Ex. 5.) The employee acknowledged receiving the insurer's denial of payment notification.[2] (Tr. 37-39.)

On June 25, 2008, nearly eleven years after his June 17, 1997 injury date, the employee filed a claim seeking weekly incapacity and medical benefits.[3] (Dec. 5-6.) At the hearing the insurer moved to dismiss the employee's claim as time-barred.[4] (Dec. 3.) The judge bifurcated the hearing "to allow the employee to present evidence solely on the question of the insurer's § 41 claim for dismissal for failure to file a claim timely." (Dec. 4.) Thus, the threshold issue *sub judice* was: when did the employee first become "aware of the causal relationship between his disability and his employment." G. L. c. 152, § 41.

The only two witnesses at the hearing were the employee and his wife. The employee testified he told his wife, and his doctors, that he had experienced a heart attack at work. (Tr. 20, 37, 46.) He knew he was having a second heart attack because his symptoms were the same as the first. (Tr. 31-33, 51.) When asked by the judge if he knew what caused his second heart attack, the employee replied, "I believe it was the work." (Tr. 52.)

At the request of his attorney, on June 16, 2008, the employee was examined by Dr. Harvey Clermont. Dr. Clermont's report of that day contained

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[2] The insurer's notification of denial did not state the nature of the employee's injury. There is no evidence on the record that the employer sent, or that the employee received, a copy of the employer's first report of injury. See G. L. c. 152, § 6.

[3] The parties stipulated that "no compensation has been paid to the employee for this claim." (Dec. 3.)

[4] The insurer also defended the claim on the grounds of liability, disability and extent thereof, causal relationship, and § 1(7A); it also denied the employee's entitlement to medical and § 36 benefits. (Dec. 2; Tr. 4.)

his opinion that the employee's incapacity was "the proximate result of the personal injury (acute myocardial infarction) . . . sustained in the performance of his duties as a custodian on 6-17-97."[5] When the employee was asked whether any doctor, prior to June 2008, had informed him that there was a "medical cause and effect" between his work and his heart attack of June 1997, the employee replied, "Doctor Brockington said they were probably causally [sic], the work and the heart attack." (Tr. 53.) When asked when that conversation took place, the employee replied, "in the time between '97 and now." Id. Dr. Brockington was the employee's treating cardiologist. (Tr. 54.) The employee's wife testified that the only conversation *she* was aware of respecting the causal connection between her husband's work and his second heart attack was a conversation she had with Dr. Brockington that took place one week before the hearing.[6] (Tr. 66-67.)

At the conclusion of the bifurcated hearing, the judge addressed the statute of limitations issue as follows:

> The employee didn't recall on what date Dr. Brockington spoke to him about the [causal] connection, but he knew it was sometime between 1997 and the present. (Tr. 53, 52.) It is reasonable to conclude that a treating cardiologist would talk to his patient well within a four year time frame as to what factors he believed caused his patient's heart attack and appropriate remedial steps to ensure his patient's well-being. The totality of the employee's honest testimony and all of the factors discussed herein convince me that the employee was aware of the causal relationship between his disability and his employment prior to the expiration of the four year statute of limitations.

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[5] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). Dr. Clermont's report was not in evidence at the hearing; it was submitted to the judge at the conference.

[6] When the employee's wife first became aware of the connection between her husband's disability and his employment is irrelevant to the § 41 issue. Accordingly, we reject the employee's argument that the judge erred by failing "to make any credibility findings as to Ms. Fenton's testimony." (Employee br. 17.)

(Dec. 7-8.) In dismissing his claim as time-barred, the judge also expressly relied on the employee's medical treatment following his heart attack at work. Relying on Sullivan v. St. Joseph's Parish, 21 Mass. Workers' Comp. Rep. 263 (2007), the judge found that, "[b]y proving the date of medical treatment to establish an industrial accident, the employee has also established the date the four-year period of limitations began to run." (Dec. 8.) She then concluded that "the employee was aware of the causal connection between his disability and his employment within four years from the date of his June 1997, heart attack." (Dec. 9.)

On appeal, the employee argues the judge erred by assuming that the employee's cardiologist "would talk to [the employee] well within a four-year time frame as to what factors [the doctor] believed caused his patient's heart attack. . . ." (Dec. 8.) We agree. While the employee's testimony supports the conclusion that he informed Dr. Brockington that he suffered his June 17, 1997 heart attack at work, that evidence alone does not permit the judge to infer that Dr. Brockington made the employee aware, within four years of his injury date, of the causal relationship between his disability and his work. See n.10, infra.

The employee also posits the judge erred in concluding that his medical treatment following his heart attack at work commenced the four year statute of limitations on his claim. He cites to the Appeals Court's decision in Sullivan's Case, 76 Mass. App. Ct. 26 (2009), which affirmed our decision in Sullivan v. St. Joseph's Parish, supra. Based on the facts of this case, we agree the judge's reliance upon our decision in Sullivan was flawed. The employee in Sullivan experienced a traumatic[7] injury to his knees at work, (torn menisci when he fell from a ladder), which history the contemporaneous record of medical treatment recounted in general terms. Sullivan v. St. Joseph's Parish, supra at 265-267. In such a case, the employee's immediate medical treatment clearly linked his

[7] We use this term to describe an injury which results from an external and obvious physical cause.

traumatic injury and his disability to his employment. Here, the fact that the injury, a heart attack, occurred *at* work does not establish, *ipso facto*, that the employee was then "aware of the causal relationship between his disability and his employment."[8] G. L. c. 152, § 41. No intrinsic awareness of the causal relationship between one's employment, and a disability occasioned by an event at work, results from contemporaneous medical treatment in such a situation. See Sullivan, supra at 32 n.12 (no per se rule regarding impact of medical treatment after work injury relative to commencement of statute of limitations under § 41).[9]

While we agree with the arguments advanced by the employee on appeal, we nevertheless affirm the decision as the judge's errors are harmless. The decision in this case ultimately turns on who has the burden of proof:

> If a[n] [insurer] pleads the statue of limitations and demonstrates that the action was commenced more than [four] years after the date of the [employee's] injury, the [employee] has the burden of proving that the facts take the case outside of the statute of limitations.

Williams v. Ely, 423 Mass. 467, 474 (1996); Franklin v. Albert, 381 Mass. 611, 619 (1980).[10] Because the employee filed his claim nearly eleven years after his injury, his claim was, in the end, properly dismissed. This is because he failed to offer evidence that he "first became aware of the causal relationship between his disability and his employment" *within* four years of the filing of his June 25, 2008 claim for benefits. The judge found, "[t]he employee argues unconvincingly . . . that he was not aware of the causal relationship between his disability and his work until June 16, 2008, when he met with [Dr.] Clermont who informed him of the causal connection between his heart attack and his duties at work on June 17,

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[8] This is especially so in light of the circumstances surrounding the employee's prior heart attack, which he suffered while on vacation. (Dec. 5, n.2; Tr. 28.)

[9] We acknowledge the judge below did not have the benefit of the Appeals Court's decision in Sullivan's Case at the time she filed her decision in this case.

[10] Neither party addressed this issue in their briefs to this board.

1997." (Dec. 6, footnote omitted.) The judge's rejection of the employee's argument left her without a basis to conclude that his claim was timely filed.[11] Accordingly, the decision is affirmed.

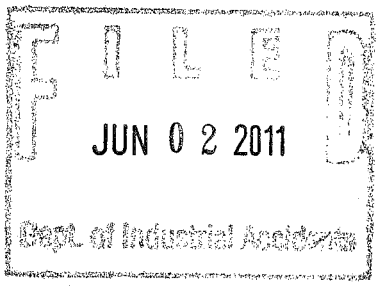
So ordered.

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed:



[11] We regard the employee's testimony that Dr. Brockington informed him, "in the time between '97 and now," of the connection between his disability and his employment as providing an insufficient evidentiary basis for this purpose. (Tr. 53.) Cf. Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 213 (2001)(employee failed to prevail on § 51 claim because, inter alia, there was no evidence as to when he would have acquired a heavy equipment license).