COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 000980-00**

Mary Nelson	Employee
Neles Jamesbury, Inc.	Employer
Travelers Casualty & Surety	Petitioner
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson & Maze-Rothstein)

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

MCCARTHY, J. The Workers' Compensation Trust Fund ("Trust Fund") and the insurer cross-appeal from a decision in which an administrative judge concluded that the insurer's petition for § 37 second injury reimbursement, filed almost nine years after the April 8, 1991 date of injury, was not governed by a statute of limitations or the doctrine of laches. The judge therefore awarded the insurer the § 37 reimbursement sought, but denied the insurer's claim for § 50 interest on that award. We summarily affirm the decision as to the insurer's assertion of error in the denial of § 50 interest, based on our recent decision in Carmilia v. General Elec., 14 Mass. Workers' Comp. Rep. 261 (2001). For the reasons that follow, we also affirm the decision as to the Trust Fund's arguments on appeal, that the insurer's § 37 petition should have been time-barred.

The facts relevant to the issue on appeal are simple: The employee was injured on April 8, 1991; the insurer made payments of weekly benefits under §§ 34 and 35, along with § 30 medical benefits, until the case was settled by lump sum agreement on March 27, 1998 for $70,000.00; the insurer filed its petition for § 37 reimbursement on January 31, 2000. (Dec. 4-5.) As the Trust Fund does not argue error in the judge's finding that

the insurer met its burden of satisfying the elements required for a valid § 37 petition, we need not discuss those details. (Dec. 5-6.) We only address the question of whether some of the insurer's petition was time-barred, having been filed almost nine years after the April 8, 1991 date of injury.

The insurer's petition, being based on a date of injury of April 8, 1991, is governed by the 1985 version of § 37. That statute contained no statute of limitations. Recently, in Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep.___ (2002), we rejected the Trust Fund's identical arguments that various statutes of limitations should be "borrowed" in order to supply the 1985 version of § 37 a limitations period ranging from two to six years, depending on which statute might be borrowed. In answer to the Trust Fund's major thrust in Walsh, that the Legislature's enactment of a rolling two year statute of limitations for § 37 petitions as part of the 1991 reform of the Act should be borrowed for use in the 1985 version of § 37, we stated:

> In that [1991] amendment, the Legislature provided a two year rolling statute of limitations . . . to be applied "only to personal injuries occurring on or after the effective date of" the amendment, December 23, 1991. G.L. c. 152, § 2A; St. 1991, c. 398, § 106. To apply this statute of limitations to the 1985 version of § 37 would render the Legislature's explicitly prospective characterization of this provision utterly meaningless. Indeed, if the Legislature had intended the new statute of limitations to have retroactive application, "it would have been natural for the Legislature to express such an intention," as it did for the vast majority of the amendments enacted in 1991. See St. 1991, c. 398, § 107.

Walsh, supra, quoting Town of Nantucket v. Beineck, 379 Mass. 345, 348 (1979). We also rejected the Trust Fund's arguments for borrowing other statutes of limitations in this case, along with its argument that the doctrine of laches should apply to bar the insurer's § 37 petition. See Walsh, supra. We reach the same conclusion in this case.

However, the April 8, 1991 date of injury in the present case raises an issue, which did not come up in regard to the September 4, 1987 date of injury in Walsh. The issue is whether the regulatory statute of limitations in effect on April 8, 1991 should be applicable to this claim. 452 Code Mass. Regs. § 3.07(3), promulgated on August 17,

1990, provided the same rolling two year statute of limitations that the Legislature later adopted for use in the 1991 version of § 37:

> Any petition for reimbursement made pursuant to the provisions of M.G.L. c. 152, § 37 for claims relating to injuries occurring on or after January 1, 1991 must be filed in a manner consistent with the provisions of 452 C.M.R. 3.07(1) and no later than two (2) calendar years from the date on which the benefits payment, for which the reimbursement request is being filed, was made.

When supplanted by the 1991 version of § 37, the regulation necessarily became moot for all dates of injury on and after December 23, 1991. Regulation § 3.07(3) was repealed on January 10, 1997, when the department simply dropped the provision from the 452 Code of Massachusetts Regulations in fulfilling its duty to "reduce regulatory burden and comply with Executive Order 384 by updating adjudicatory rules . . . [by] eliminating sections duplicative of the Workers' Compensation Act . . . ." 452 Code Mass. Regs. § 1.00, Summary of Regulation, effective January 10, 1997.

The insurer argues that regulation § 3.07(3), as it existed on April 8, 1991, does not apply to this claim because, among other reasons, it was repealed in 1997. We agree. "As a general rule, we construe and apply regulations the same way we construe and apply statutes." Figueroa v. Director of Dep't of Labor and Workforce Dev., 54 Mass. App. Ct. 64 (2002). " '[W]here a statutory right of action is given[,] the repeal of the statute without a saving clause destroys the right.' " Pittsley v. David, 298 Mass. 552, 555 (1937), quoting Wrentham v. Fales, 185 Mass. 539, 542 (1904). More recently, the Appeals Court stated, with regard to the repeal of a statute without a saving clause: "[W]e can infer that the Legislature intended to eliminate the . . . provision as to all claims not completed to final judgment." Parello v. McKinney, 46 Mass. App. Ct. 785, 790 (1999). The court cited as secondary authority 1A Singer, Sutherland Statutory Construction § 23.33, at 424 (5th ed. 1993 & 1998 Supp.):

> The effect of the repeal of a statute having neither a saving clause nor a general saving statute to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to

> proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it had never existed.

Parello, supra, quoting Singer, supra. There is nothing in the departmental regulations put into effect on January 10, 1997 that indicates, in any way, an intent to save any part of the repealed regulations. As stated in Figueroa, supra , and the cases cited therein, there is no basis for differentiating between regulations and statutes with regard to rules of construction. Likewise, we see no basis for differentiating between the extinguishing of a cause of action and the extinguishing of a defense to a cause of action, as in the present case.

Accordingly, because the department's repeal of regulation § 3.07(3) renders it non-existent for all dates of injury, the statute of limitations contained therein cannot be applied to this claim.

The decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

WAM/kai
Filed: **May 10, 2002**