COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 24090-99**

Paul Walsh	Employee
Bertolino Beef Co.	Employer
CNA Insurance Co.	Insurer
Workers' Compensation Trust Fund	Respondent

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

APPEARANCES
Mark J. Nevils, Esq., for the insurer at hearing
Jerry Benezra, Esq., for CNA Insurance Co. on appeal
Yvonne Viera-Cardoza, 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 was not barred by a statute of limitations or the doctrine of laches. The judge also denied the insurer's request for § 50 interest on the award. This petition was governed by the 1985 version of § 37, as the date of injury in this case was September 4, 1987. As that version contained no statute of limitations, the judge awarded the insurer the second injury reimbursements requested. We agree with the judge's conclusion that the insurer's petitions were not time-barred, and therefore affirm the decision for the reasons that follow. 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., 15 Mass. Workers' Comp. Rep. 261 (2001).

On January 26, 1999, the insurer filed a petition for reimbursement under § 37 for benefits paid for Mr. Walsh's accepted September 4, 1987 industrial injury. (Dec. 2, 5.) The Trust Fund did not dispute that the petition satisfied all of the elements of § 37. The Trust Fund's only defense to the petition was that it was not timely filed even though the

1985 version of § 37 applicable to this petition contained no statute of limitations. (Dec. 5-6.)

The judge rejected the Trust Fund's argument. The judge reasoned:

> Within its various Sections, the statute contains explicit language limiting the period for which certain benefits shall be paid, limitations on when various notices must be filed by employers and insurers, and also contains limitations on the time within which certain claims for benefits must be filed. Thus, the Legislature included specific limitations where it wanted them to be applied – and conversely, excluded them where it did not want limitations to apply. Only in the most arcane and unlikely circumstances would it be necessary or appropriate to find guidance in analogous statutes than within the Workers' Compensation Act itself.
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> The Trust Fund correctly argues that, when the Legislature amended the Statute in 1991, it added a specific statute of limitations within the text of Section 37: ". . . Any petition for reimbursement under this section shall be filed no later than two years from the date on which the benefits payment for which the reimbursement request is being filed was made." It then argues that this language would bar reimbursement for any benefits that were paid prior to January 26, 1997, the two year look-back period before the insurer filed its petition for reimbursement. However, when it adopted those comprehensive 1991 reforms, the Legislature also identified which revisions were to be deemed "procedural" and which were to be "substantive." In this instance, the Legislature specifically stated that the new limitation period in Section 37 was to be deemed substantive, and therefore, applies only to dates of injury occurring after its effective date. It was not intended to be applicable to "Middle Act" cases with dates of injury between December 10, 1985 and December 22, 1991. There is no dispute that the employee's latest industrial injury (on which this petition is based) occurred on September 4, 1987, and therefore the "Middle Act" version of Section 37 applies to this petition. That version of Section 37 contains no limitation as to when a petition must be filed in order for the insurer to seek reimbursement for benefits paid after the 104th week of disability.
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> It is clear that in 1991 the Legislature wanted to include a statute of limitations for insurers filing petitions seeking reimbursement and it included specific language to that effect where none existed before, and it did so on a prospective basis for dates of injury occurring after December 22, 1991. If the Legislature felt that the Trust Fund would have been prejudiced in some way that required retroactive application of this new limitations period, then it could have enacted a retroactive limitation on petitions, an action it specifically chose not to do here.

(Dec. 7-8.)

The Trust Fund's primary attack on the decision is based on the theory that a court may borrow a statute of limitations, with a view toward the gist of the action, for use in a statute that does not contain a statute of limitations. See, e.g. Hendrickson v. Sears, 365 Mass. 83 (1974); Town of Nantucket v. Beineck, 379 Mass. 345, 347-348 (1979). The Town of Nantucket court reasoned that if the Legislature had intended no time limitation for actions to be brought under the newly enacted conflict of interest statute there at issue, "it would have been natural for the Legislature to express such an intention." Town of Nantucket, supra at 348. The legal proposition cited is accurate. In our view, it also has no bearing on the present case.

The Trust Fund extrapolates from Town of Nantucket that the lack of express legislative intent for the absence of a statute of limitations in the 1985 version of § 37 means that a statute of limitations must be borrowed for use therein. We do not agree. Unlike Town of Nantucket, where no express legislative intent addressed time limitations, here the Legislature did, in fact, express just such intent when it amended § 37 in 1991. In that amendment, the Legislature provided a two year rolling statute of limitations – quoted by the judge above – 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 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. Where there is such a plain and rational meaning to be applied, we are obliged to apply it, rather than set off on an interpretive quest. See O'Brien v. M.B.T.A., 405 Mass. 439, 443-444 (1989), quoting Commonwealth v. Vickey, 381 Mass. 762, 767 (1980)("a basic tenet of statutory construction is to give the words their plain

meaning in light of the aim of the Legislature, and when the statute appears not to provide for an eventuality, there is no justification for judicial legislation").

The Trust Fund makes several other unavailing arguments, asserting first that our decision in Orekoya v. Bank of New England, 14 Mass. Workers' Comp. Rep. 29, 32 (2000), supports the borrowing of a statute of limitations for use in the 1985 version of § 37. To the contrary, in that case we merely held that the statute of limitations on claims for compensation in § 41 was triggered by the receipt of causally related medical treatment, by applying the well-established distinction between medical "disability and "incapacity:" "[A]ny claim for compensation due with respect to such injury [must be] filed within four years from the date the employee first became aware of the causal relationship between his *disability* and his employment." G. L. c. 152, § 41. (Emphasis added). Moreover, the Trust Fund's argument in the alternative that the § 41 four year statute of limitations should be borrowed for use in the 1985 version of § 37 is also meritless, as § 37 enables insurers to file petitions for reimbursement, not "claim[s] for compensation." Likewise, we do not see any merit in the Trust Fund's argument that the catch-all six-year statute of limitations for contracts should apply. See G. L. c. 260, § 2. We have concluded that the rights and obligations under § 37 are not contract-based, a position that we see no reason to abandon now. See Carmilia, supra at 275; Richards v. E.I. DuPont, 16 Mass. Workers' Comp. Rep. ___ (March 5, 2002). The Trust Fund's passing reference to the regulation 452 Code Mass. Regs. § 3.07 (repealed as of January 10, 1997), which provided a statute of limitations for dates of injury on or after January 1, 1991, is also unworthy of serious attention, as the injury date here clearly does not fall within its coverage. Finally, we agree with the judge that the doctrine of laches does not apply to this statutory cause of action, sounding – as it does – in law, not equity. See Klapacs' Case, 355 Mass. 46 (1968).

Accordingly, as we conclude that this petition brought under the 1985 version of § 37 is not subject to a statute of limitations or barred by laches, we affirm the decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed:

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Sara Holmes Wilson
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge