COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052354-94**

Sunday D. Orekoya	Employee
Bank of New England Corporation	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
Norris E. Coleman, Esq., for the employee at hearing
Sunday D. Orekoya, pro se, on appeal
Robert N. Wilson, Esq., for the insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge denied his claim for workers' compensation benefits on the basis that the claim was not made within the four year limitations period dictated by G.L. c. 152, § 41.[1] In a decision filed September 25, 1996, an administrative judge concluded that the claim was time barred by § 41. After the reviewing board summarily affirmed that decision, a single justice of the Appeals Court remanded the case for further findings on that issue. Because the judge in this remand decision has now applied § 41 correctly, we affirm the decision.

The pertinent facts are as follows. In 1989, the employee, a Nigerian immigrant, worked as a commercial real estate loan assistant for the employer. (Dec. 4.) On July 24, 1989, the employer asked the employee to produce his "Green Card" as proof of his

[1] Section 41 provides, in pertinent part:

> No proceedings for compensation payable under this chapter shall be maintained . . . unless any 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.

right to work in the United States as an alien. The employee was suspended until July 26, 1989, when he was able to produce that documentation. (Dec. 5.) The employee viewed the request as harassment, and for several days stayed out of work due to the stress he experienced. (Dec. 5; Insurer Ex. 2A.) The employee went to the mental health department of the Harvard Community Health Plan on July 27, 1989, where he began treating with a social worker for his work-related stress and anxiety. The employee returned to work, but continued treatment of supportive psychotherapy techniques, relaxation response, and direct counseling. (Dec. 5.) On March 9, 1990, the employee was arrested at his place of employment on charges unrelated to his employment. The employee was suspended indefinitely from his job without pay, and his job was eliminated in April 1991 as part of a company-wide restructuring. The criminal charges against the employee were dismissed on June 25, 1991. (Dec. 4-5.)

The employee filed his first claim with the Department of Industrial Accidents on November 1, 1994. (Dec. 9.) At hearing the employee claimed entitlement to incapacity benefits based upon the actions of the employer from March 9, 1990 until September 1, 1993 and from June 1, 1994 until April 1, 1995, when he began a job search which resulted in his finding employment. (Dec. 5-6.)

The judge made the following statements and findings:

> I find that Mr. Orekoya was involved in a series of events at his place of employment between July 24, 1989 and March 9, 1990 which prompted him to seek medical treatment and which, he claims, disabled (or more precisely "incapacitated") him from working as of March 9, 1990. . . . I find that Mr. Orekoya's first medical/psychological treatment related to this claim occurred on July 27, 1989, three days after he was asked to produce his "Green Card" at work. In his encounter notes, James Ritchie of H.C.H.P.'s mental health department reported: "Patient comes in . . . stating recent stress having to do with his work situation. Apparently, this had to do with a mix up around his status at work. . . . The plan is to have this patient go through some appropriate channels regarding this injury at work . . . ." (Employee Exhibit #2, emphasis added.) I find this medical record submitted by the employee clearly and unequivocally establishes that Mr. Orekoya was aware of the relationship between his alleged disability and his employment as of July 27, 1989. In the employee's Complaint to the Superior Court in his action against Fleet Bank of Massachusetts under Paragraph 15, Mr. Orekoya stated: "On or about July 26, 1989 plaintiff returned to work but took an

> immediate vacation for medical reasons, i.e. emotional distress." (Insurer exhibit #2A, page 3.)[2] This statement further confirms that Mr. Orekoya was aware of the causal connection between his employment and his alleged injury in July 1989. I do not credit his testimony at Hearing that he first became aware of this "being a potential workers' compensation claim" during June 1991. . . . [E]ven if Mr. Orekoya used the March 9, 1990 date of his arrest (on which his alleged disability incapacitated him from earning his usual wages) as the start of the four-year calculation, his claim was still filed over eight months beyond the statutory deadline.

(Dec. 6-9.) The judge therefore denied and dismissed the employee's claim. (Dec.12.)

On appeal, the employee contends that § 41 cannot run from the time of the July 1989 events, because he merely sought psychological treatment and went on a paid vacation, which does not rise to "disability" under that statute. In fact, § 41 does require that the employee's claim be filed within four years of the "date the employee first became aware of the causal relationship between his disability and his employment." (Emphasis added.) However, we disagree with the employee's interpretation.

We consider that the work-related "disability," of which the employee must first become aware for the statute of limitations to begin to run, includes medical treatment, without regard to actual incapacity for work. Section 41 applies to all "proceedings for compensation." It is settled that medical benefits are "compensation" under the Act. Boardman's Case, 365 Mass. 185, 192-193 (1974). Therefore, the discovery rule set out in the language of § 41 must apply equally to claims for § 30 medical benefits alone, as to claims for weekly indemnity benefits. To interpret the statute otherwise narrows its scope impermissibly, and leaves § 30 claims without any statute of limitations. See Jinwala v. Bizarro, 24 Mass. App. Ct. 1, 3 (1987) (statutory language must be considered in connection with the cause of its enactment, the mischief or imperfection to be remedied, the main object to be accomplished, and the avoidance of an unreasonable result). In the present case, this means that we look to the employee's medical treatment in 1989 as the trigger for the § 41 inquiry: When did the employee "first [become] aware

[2] The preceding paragraphs of the complaint described the events at work relating to the employer's accusation that the employee was an illegal alien. (Insurer Ex. 2A).

of the causal relationship between his disability [medical impairment] and his employment[?]"

The judge made specific findings based on competent evidence that satisfactorily answered this § 41 inquiry. The judge found that the employee received medical treatment contemporaneous with the stressful events of July 1989, which records indicate a clear causal connection between his medically disabling emotional condition and the employee's workplace. (Dec.7.) Those notes of the Harvard Community Health Plan mental health department stated: "Patient comes in . . . stating recent stress having to do with his work situation. Apparently this had to do with a mix up around his status at work. . . . The plan is to have this patient go through some appropriate channels regarding this injury at work. . . ." (Employee Ex. 2.) The four-year statute of limitations therefore began to run as of the July 27, 1989 date of medical treatment at the latest.

> We have long made a distinction between "disability" and "incapacity."
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> > The terms "incapacity" and "disability" are words of art in the Massachusetts workers' compensation system. The Committee on Occupational Health of the Academy of Orthopaedic Surgeons has defined disability as "the limitations in work activities or the activities of daily living resulting from impairment" and impairment as "anatomic or physiologic loss of function." *A Physician's Primer on Workers' Compensation*, Appendix 1, Glossary of Workers' Compensation Terms, at 61-62 (1992).

Medley v. E.F. Hauserman Co., 7 Mass. Workers' Comp. Rep. 97, 99 (1993). See also Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 171 (1995); Joppas v. Rand-Whitney, 9 Mass. Workers' Comp. Rep. 396, 398 (1995). The courts have endorsed our interpretations of "disability" and "incapacity." In Scheffler's Case, 419 Mass. 251 (1994), *aff'g* Scheffler v. Sentry Insurance, 7 Mass. Workers' Comp. Rep. 219 (1993), the Supreme Judicial Court reasoned:

> "Compensation is not awarded for personal injury as such but for 'incapacity for work.' This concept combines two elements: physical [or emotional] injury or harm to the body, a medical element, and loss of earning capacity traceable to the physical [or emotional] injury, an economic element. Some benefits may be due for a physical [or emotional] injury which does not interfere with the employee's

> ability to earn full wages. He would be entitled to medical and hospital care and, if left with a permanent physical handicap, to specific compensation under § 36."

Scheffler, supra at 256, quoting L. Locke, Workmen's Compensation, § 321, at 375 (2nd ed. 1981) (emphasis added). "Once the extent of the medical disability has been determined, an administrative judge may make an independent determination of the employee's earning capacity." Sylva's Case, 46 Mass. App. Ct. 679, 680-681 (1999), citing Scheffler, supra (emphasis added). We simply cannot imagine that the Legislature intended that claims for treatment for work related medical disability not be covered by § 41. Since § 41 "disability" must include such claims, the employee is charged with awareness of the causal relationship between his impairment -- his medical disability for which he sought treatment -- and his work in July 1989. The four-year limitations period began to run at the time he discovered the connection between his work injury and his medical disability which was no later than the July 27, 1989 date of the medical treatment sought. The judge's findings reflect this, and are therefore not arbitrary, capricious or contrary to law. § 11C.

Alternatively, even if "disability" in § 41 were taken to mean "incapacity to work," the judge's findings were sufficient to establish incapacity to work as of the 1989 event. The employee asserted in his Superior Court complaint that, after specific emotionally stressful incidents at work, he "took an immediate vacation for medical reasons, i.e., emotional distress." (Dec. 7; Insurer Ex. 2A.) "Pleadings in one case are admissible as statements by a party in other cases . . . ." Liacos, Mass. Evidence § 8.8.3 (6th ed. 1994). The judge was within his authority and discretion to find that the employee's representations in this prior complaint were more credible than the employee's testimony at hearing disavowing any relation between his taking time off in 1989 and the stress at work. (Tr. 34.) See Pinshaw v. M.D.C., 33 Mass. App. Ct. 733, 737 (1992); DiMare v. Capaldi, 336 Mass. 497, 504 (1957).

We summarily affirm the decision as to the employee's other arguments.[3]

[3] 452 Code Mass. Regs. §§ 1.20 (Joinder) and 1.23 (Amendments to Claims and Complaints) only come into play once a claim has been timely filed.

Accordingly, the decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: February 10, 2000
MC/jdm