COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021269-04**

James D. Sullivan	Employee
St. Joseph's Parish	Employer
Archdiocese of Boston SIG	Self-Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Fabricant)

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee at hearing
Jonathan Harris, Esq., for the employee on appeal
Gregory M. Iudice, Esq., for the self-insurer

COSTIGAN, J. Both parties appeal from an administrative judge's decision denying and dismissing the employee's claim for failing to meet his burden of proving an industrial injury. The employee claims the judge based his denial largely on the erroneous finding that there was no contemporaneous medical evidence documenting a work-related injury. The self-insurer maintains the judge properly denied the claim, but argues, inter alia, that the denial should have been based on the self-insurer's properly raised statute of limitations defense. We agree with the self-insurer that the employee's claim was barred by the four-year statute of limitations set forth in G. L. c. 152, § 41. We therefore affirm the denial of the employee's claim.

James Sullivan had worked as a custodian for the employer since 1992. On December 17, 1999, while descending a ladder, he missed the last three steps, landing on the floor with both feet. His body twisted and he felt something snap in his knees. (Dec. 4.) He testified that he reported this incident to the parish accountant, Andrew Goldy, and told him he was going home. (Dec. 5.)

Over the next four years, the employee had extensive medical treatment to his knees, culminating in bilateral total knee replacement surgery in October 2003.

He continued to work when he was able; when he was not able to work, he used sick or vacation time. (Dec. 5.) The employee never reported the December 17, 1999 incident to his immediate supervisor, the parish priest, despite the fact that he had regular meetings with Reverend Steele three or four times a week. Id. The employee testified he did not know his employer carried workers' compensation insurance, and that Rev. Steele told him, "We don't use that. We have long term disability." (Dec. 6.)

On July 1, 2003, the employee was laid off from his job. (Dec. 6.) A year later, in July 2004, the employee inquired about filing a claim for workers' compensation benefits based on the alleged December 1999 incident. (Dec. 6, 9.) He did not actually file a claim until five months later, on or about December 8, 2004.[1]

Following a § 10A conference, the administrative judge denied the claim, and the employee appealed. On June 20, 2005, the employee underwent an impartial medical examination by Dr. Daniel Bienkowski. The administrative judge addressed the § 11A examiner's opinions:

> [T]he employee had sustained a torn medial meniscus of both the left and right knees, as well as arthritis of the medial joint compartment of both knees; that he was status post bilateral total knee arthroplasties; and that the employee had mild peripheral vascular disease. Dr. Bienkowski was unable to state . . . with certainty that a work injury was a major cause of the employee's disability.

[1] The decision indicates the "employee did not claim an injury until July 2004." (Dec. 9, citing December 5, 2005 Tr. at 46.) The employee testified that in July 2004, he called the Archdiocese's benefit office seeking instructions on filing a claim for long-term disability benefits, but was told he should contact the employer's workers' compensation insurer instead. He contacted the insurer, which denied his claim, and he then contacted an attorney. (December 5, 2005 Tr. 44-46.) A review of the board file reveals that the employer's first report of injury was filed on July 22, 2004, indicating the employee first reported the alleged work injury on July 19, 2004. The employee's formal claim was dated December 8, 2004. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in the board file).

(Dec. 8.) The judge accorded Dr. Bienkowski's opinion prima facie weight, but allowed additional medical evidence for the so-called "gap" period prior to the impartial medical examination. (Dec. 3.)

Among the medical evidence admitted was the December 2, 2004 report of Dr. Robert Pennell, who had evaluated the employee at the request of his attorney. The judge found that Dr. Pennell reported a history of injury "remarkably consistent" with the employee's testimony at hearing, (Dec. 7), and, moreover, that his report was the first medical evidence to reflect the employee had been injured at work on December 17, 1999. (Dec. 6, 7, 8.) The judge specifically found that Dr. Thomas Jevon, the employee's primary care physician, with whom he first treated, did not relate a history of a work incident on December 17, 1999, or refer to a work-related condition, nor did any of the other physicians the employee saw in the five years prior to Dr. Pennell's evaluation. (Dec. 6.)

Based in part on his finding that "[t]he contemporaneous medical records do not document any history of a work-related incident until the 2004 report of Dr. Pennell," (Dec. 9-10), the judge concluded the employee failed to meet his burden of proving he sustained an injury on December 17, 1999. The judge supported this conclusion with several other subsidiary findings. He found the employee did not report his injury to his supervisor, or to anyone else with supervisory authority over him. (Dec. 5, n.1; 9.) The judge also found the employee did not claim an injury until July 2004, more than four and one-half years after the alleged incident. (Dec. 8, 9.) Finally, the judge found Dr. Pennell was unable to state with the requisite degree of medical certainty that the claimed injury of December 17, 1999 was "a major cause" of the employee's disability and/need for treatment. For all these reasons, the judge denied and dismissed the employee's claim. (Dec. 10.)

On appeal, the employee argues the judge erred by finding there was no contemporaneous medical evidence documenting the employee's alleged December 17, 1999 work injury. In fact, the employee argues, Dr. Jevon's office

note dated three days after the alleged work incident, describes the employee's injury as work-related. That December 20, 1999 office note reflects:

> S: 51 yo man without any previous hx of knee pain, notes severe pain in his knee last Friday after going up and down a ladder at work. Since then it has been painful to walk, get out of a chair, go up or down stairs. Has never had serious knee problems in the past.
>
> . . . .
>
> ? meniscal injury
> Placed in knee immobilizer, will take Motrin 800 mg po tid x 10 days, warned of side effects. FU in 1 week, if not improved may need ortho referral.

(Ex. 9, "Employee pre-§11A medical reports; 1. Dr. Thomas Jevon, December 20, 1999. . . .")

The employee testified he sought treatment with Dr. Jevon on that date for a fall from a ladder at work three days earlier. (December 5, 2005 Tr. 4-5 [afternoon session].) The employee is correct that this report corroborates he sought treatment for a work-related knee injury on December 20, 1999. Even though Dr. Jevon's description of the incident is not precisely as testified by the employee, the difference is not material. See Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349, 352 (2002)("Many patients are not good historians. Examinations for the purpose of diagnosing and treating a medical problem are often not suited to coaxing a detailed recounting from the patient of all the possible contributors to the reason for seeing the doctor.")

The employee further argues that because this erroneous finding was, in chief, the basis for the judge's ultimate conclusion that the employee had not proved he sustained a compensable personal injury, recommittal is necessary for the judge to reconsider whether the employee met his burden of proof. On this point, we disagree. This is because the very evidence that the employee treated for a work-related injury on December 20, 1999, establishes the statute of limitations under G. L. c. 152, § 41, began running on that date. See Orekoya v. Bank of New England Corp., 14 Mass. Workers' Comp. Rep. 29 (2000). Section 41 requires

that claims be "filed within four years of the date the employee first became aware of the causal relationship between his disability and his employment."[2] In Orekoya, we held:

> *[T]he 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.

Id. at 31-32. (Emphasis added).

The employee argues that case is distinguishable because Orekoya had been unable to work for over four years before he filed a claim. Here, the employee contends he was not disabled until July 2003 (when, coincidentally, he was laid off),[3] and there was no medical opinion on causation until Dr. Pennell examined the employee on December 2, 2004. This argument is wholly unavailing in light of Orekoya's dispositive holding that "the four-year limitations period began to

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[2] General Laws c. 152, § 41, provides, in relevant part:

> No proceeding for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and 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. . . .
>
> The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury.

[3] The employee's statement that he first became disabled in July 2003 does not comport with the judge's findings that he had numerous surgical procedures on his knees prior to this time and used sick or vacation time when he was unable to work. (See Dec. 5.)

run at the time [the employee] discovered the connection between his work injury and his medical disability which was *no later than the . . . date of the medical treatment sought.*" Id. at 33 (emphasis added); see also Ames v. Town of Plymouth, 19 Mass. Workers' Comp. Rep. 150, 159 n.10 (2005); Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep. 151, 154 (2002). Moreover, it is patently inconsistent for the employee to maintain both that there was no medical opinion of the causal connection between his work injury and his disability prior to Dr. Pennell's, and that Dr. Jevon's office note constitutes a contemporaneous medical record of his work-related knee injury. He cannot have it both ways.

Inasmuch as the employee first treated for his knee injury on December 20, 1999, the causal connection between the work injury and the employee's knee condition was apparent at least as of that date, and the four-year statute of limitations began to run. The employee's claim was not filed until December 2004, almost five years later. It is thus barred.

Alternatively, the employee argues that even if the statute of limitations began to run in December 1999, it should have been tolled until July 2004, when the employee learned his employer had workers' compensation coverage, because previously the employer had intentionally misrepresented to the employee that it did not have coverage. The judge did not find that the employer misled the employee, either intentionally or otherwise, regarding whether it carried workers' compensation insurance.[4] However, since the enactment of the 1985 legislative amendments extending the limitations period from one year to four years, such

[4] Even if the employer had not carried workers' compensation insurance, the employee would have been entitled to file a claim against the Workers' Compensation Trust Fund, pursuant to G. L. c. 152, § 65. That claim would likewise have been subject to the four-year statute of limitations under § 41. Of course, had the employee filed a claim against the Trust Fund within four years of his treatment with Dr. Jevon, such filing would have tolled the running of the statute of limitations.

equitable considerations have been irrelevant. As the court in Baker's Case, 55 Mass. App. Ct. 628 (2002), explained:

> In "exchange" for an extension in the limitations term for a worker to file a claim from one year to four years, the Legislature reduced the continuing liability of insurers by repealing the part of G. L. c. 152, § 49, that had provided an indefinite limitations extension based upon a demonstration of mistake, reasonable cause, or absence of prejudice to the insurer. [5]

Id. at 633. The current version of § 41 thus establishes "a tolling provision conditioned *only* upon either the payment of compensation or the filing of a claim." Green's Case, 46 Mass. App. Ct. 910, 911 (1999)(Emphasis added). The employee neither received compensation nor, as found by the judge, filed a claim within four years. (Dec. 9.)

Accordingly, we affirm the judge's decision on the ground that the employee's claim was barred by the four-year statute of limitations in § 41.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **December 6, 2007**

[5] The prior version of § 49 provided that "failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay." These exculpatory provisions of § 49 were eliminated by St.1986, c. 662, § 37, which is applicable here. See Green's Case, supra at 911.