COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 024064-99**
Kim Oakes	Employee
Dettinger Lumber Co., Inc.	Employer
Travelers Casualty & Surety Insurance Co.	Insurer/Petitioner
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges McCarthy, Levine & Wilson)

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 and the insurer cross-appeal from a decision in which an administrative judge awarded the insurer § 37 reimbursement for seventy-five percent of all compensation paid subsequent to that paid for the first one hundred and four weeks of disability. We summarily affirm the decision as to the insurer's sole contention that the judge erred by denying its claim for § 50 interest on the award. See Carmilia v. General Elec., 15 Mass. Workers' Comp. Rep. 261 (2001). The Trust Fund contends that the decision lacks findings that support its conclusion, and that the applicable 1985 version of § 37 contained an implied statute of limitations that would bar the petition. We summarily affirm the decision as to the absence of a statute of limitations to be applied to the 1985 version of § 37. See Walsh v. Bertolino Beef Co., 16 Mass. Workers' Comp. Rep. 151 (2002). We disagree with the Trust Fund's other arguments and affirm the decision.

On December 8, 1998, the insurer filed a petition for § 37 reimbursement based on Mr. Oakes' September 2, 1989 injury to his left hand.[1] (Dec. 5.) The insurer had paid

[1] The 1985 version of G. L. c. 152, § 37, provides, in pertinent part:

the employee incapacity benefits under §§ 34 and 35 for his injury and on June 22, 1998 the parties settled the claim by lump sum agreement for $100,000. (Dec. 2-3.) The employee had sustained a prior injury to his back in 1980, and also had ulnar nerve damage and loss of strength to his right hand as a result of a childhood injury. (Dec. 4-5; Insurer's Petition Exhibit 20.) The judge concluded that the statutory elements of § 37 were satisfied by the insurer's submission of medical evidence supporting its petition, and awarded the reimbursement sought. (Dec. 14.)

The Trust Fund challenges the judge's findings with respect to the statutory elements of pre-existing physical impairment likely to be a hindrance or obstacle to employment, and substantially greater disability that results from the combination of that prior impairment with the effects of the industrial injury. The errors pointed to by the Trust Fund are harmless. The uncontroverted record evidence satisfies the two critical statutory elements.

The Trust Fund argues that the judge confused "physical impairment" under the statute with the simple existence of a "prior injury." The judge found:

> Whenever an employee who has a known physical impairment which is due to any previous accident, disease or any congenital condition and is, or is likely to be, a hindrance or obstacle to his employment, and who, in the course of and arising out of his employment, receives a personal injury for which compensation is required by this chapter and which results in disability that is substantially greater by reason of the combined effects of such impairment and subsequent personal injury than that disability which would have resulted from the subsequent personal injury alone, the insurer or self-insurer shall pay all compensation provided by this chapter. The insurer or self-insurer shall, however, be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount equal to seventy-five per cent of all compensation paid subsequent to that paid for the first one hundred and four weeks of disability.
>
> . . .
>
> Personal knowledge upon the part of the employer as to the existence of such pre-existing physical impairment shall not be required for reimbursement as provided by this section; provided, however, that proof of the pre-existence of such impairment shall be directly established from medical records existing prior to the date of employment or retention in employment of such an employee, or from information established by the employer not later than thirty days subsequent to the date of employment from either a physical examination, employment application questionnaire or statement from the employee.

> Applying [the] pre-1991 standard, it was not required that [the employer] have personal knowledge of Mr. Oakes' *prior injury* before hiring him or thirty days thereafter [in order for § 37 to apply.]. All that is required [is] that such an injury existed which can be supported by medical evidence existing prior to the date of the subsequent injury. Such medical records existed and have been submitted in this case. Therefore, I find that the employee had prior physical impairments in accordance with § 37. . . . The insurer have [sic] submitted evidence by Dr. Schmitz, who declared that his prior back injury and the lessened use of his right major hand placed restriction on Mr. Oakes performing his duties. . . . Also, the impartial examiner, Dr. Mallory [sic] opined in his report that Mr. Oakes had 35% upper extremity impairment, right carpal tunnel syndrome due to spondylothesis of his back. The employee was seen by a host of other doctors who commented on and noted the impairment of his right hand and back.

(Dec. 8-9; emphasis added.)

We agree with the Trust Fund that the judge ill advisedly used "injury" and "impairment" interchangeably in the above findings. Nonetheless, the medical opinion of Dr. Schmitz, submitted by the insurer with its petition for reimbursement (Insurer's Petition Exhibit 20), establishes that the employee was indeed suffering from back and right hand impairments prior to his being hired. Such impairments included severe degenerative disc disease of the lumbar spine, manifested by spondylolisthesis, which required a decompression laminectomy, nerve damage to his right hand from childhood, and early carpal tunnel syndrome. Id. We do not agree with the Trust Fund that the judge's reference to "injury," rather than "impairment," warrants reversal or even recommital. We see the error as inconsequential.

The Trust Fund further argues that the judge failed to make findings as to whether the employee suffered from prior physical impairments. The Trust Fund contends that the judge only found that the employer had the requisite presumptive knowledge of the impairments. However, the judge's finding, "that the employee had prior physical impairments in accordance with § 37," (Dec. 8), based on the existence of medical records establishing the employee's underlying medical condition prior to being hired, is clear. Moreover, the judge also found that "the employee's *prior impairment* was or was

likely to be an obstacle or hindrance to his employment." (Dec. 9; emphasis added.) We therefore reject this argument.

Finally, the Trust Fund attacks, as unsupported by the evidence, the judge's finding that the combination of the prior impairments with the effects of the industrial injury resulted in "substantially greater disability" than there would have been had there been no such combination. The Trust Fund points to the judge's reference – in the course of finding that statutory element – to medical opinions that it contends are not supportive of the conclusion. Although the Trust Fund is partially correct, the argument elevates form over substance. First, of the two medical reports cited by the judge – those of Drs. Malloy and De Marco – only Dr. De Marco's report lacks an opinion that could support the judge's "substantially greater disability" finding. Dr. Malloy, on the other hand, opined that the 47% A.M.A. whole person impairment that was due to the September 2, 1989 industrial injury increased to 62%, when the pre-existing back and right hand impairments were combined with it. (Insurer's Petition Exhibit 17.) Moreover, Dr. Schmitz's opinion lays the issue to rest in that it explicitly supports the judge's finding: The prior impairments "coupled with the industrial accident . . . to cause a substantially greater disability than would have resulted from the second injury alone." (Insurer's Petition Exhibit 20.) We see no reason to reverse or recommit the case where no countervailing medical evidence in the record would support any other result.

While some of the judge's findings could have been clearer, we will not reverse a decision (the disposition sought by the Trust Fund), or recommit a case, where the asserted error is harmless. Such is the case here.

We affirm the decision.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: **March 3, 2003**

_____
Frederick E. Levine
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge