

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 035624-01

Luis Rosado
L.E. Mason
AIG
Workers' Compensation Trust Fund

Employee
Employer
Insurer
Respondent

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES

Kenneth J. Paradis, Esq., for the insurer at hearing and on brief
Andrea Botticelli Keyo, Esq., for the insurer at oral argument
Pedro Benitez-Perales, Esq., for the Trust Fund

HORAN, J. The Workers' Compensation Trust Fund (Trust Fund) appeals from a decision awarding the insurer a § 37 Second Injury Fund reimbursement. We affirm the decision.

The employee suffered from pre-existing morbid obesity, and weighed approximately 330 pounds at the time of his industrial accident. He worked for L.E. Mason for approximately ten months prior to injuring his back on September 18, 1997. On that date he fell from a platform, rupturing his L4-5 disc. He had two unsuccessful back operations. As of November 1999, the employee had reached a medical end result, and was totally and permanently incapacitated from work. The employee's morbid obesity was a factor in his ongoing disability. (Dec. 3-4.)

The insurer petitioned the Trust Fund for § 37 reimbursement. That section provides, in pertinent part:

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 a

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 the compensation provided by this chapter. . . .

Insurers making payments under this section shall be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed seventy-five percent of all compensation due under [various] sections. . . .

G. L. c. 152, § 37, as amended by St. 1991, c. 398, § 71.

The judge found the insurer's petition met the statutory elements for a reimbursable § 37 claim. In so ruling, he specifically concluded that morbid obesity was a serious chronic disease manifested by a dysfunctional metabolism,¹ and that morbid obesity constituted a physical impairment. (Dec. 7-8.)

On appeal, the Trust Fund argues the employee's morbid obesity is not a disease,² and not an impairment.³ Based on the medical evidence of record, we

¹ The judge rejected the Trust Fund's argument that the employee's morbid obesity was a voluntary condition. (Dec. 8.)

² We have previously cited – without specifically adopting – the First Circuit's discussion of morbid obesity as a physical impairment in the context of assessing morbid obesity as a pre-existing condition under § 1(7A):

[T]he jury could plausibly have found that plaintiff had a physical impairment; after all she suffered from morbid obesity, and she presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effect within the musculoskeletal, respiratory, and cardiovascular systems.

Cook v. State of Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23 (1993)(cited in Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 92 [1997]).

³ The Trust Fund does not dispute that the employee, at the time of hire, suffered from morbid obesity. It also concedes the "employer's knowledge of the alleged pre-existing impairment." (Trust Fund br. 2, fn.1.) There is also no issue before us concerning whether, under § 37, an employer is required to know, at the time of hire, that an

disagree. On page seven of his decision, the judge discussed the medical opinion of Dr. Stephen Schmitz, introduced into evidence by the insurer,⁴ which established both elements:

In my opinion, the prior impairment (morbid obesity) coupled with the second injury (herniated disc) caused a substantially greater disability than would have resulted from the second injury alone. *Morbid obesity is a disease*, generally defined as 100% above ideal body weight (IBW) or 100 pounds above IBW. At 5'5",⁵ Mr. Rosado's approximate IBW is 150 pounds. Clearly he is morbidly obese. *Morbid obesity constitutes a significant impairment for the affected individual*. These impairments may be manifest in multiple organ systems, and has impact on both the personal and professional life of the morbidly obese individual

(Schmitz report 2; emphasis added.) Dr. Schmitz's opinion that morbid obesity is both a disease, and an impairment, carries the insurer's burden of proving the elements of its § 37 petition.⁶

As these are the only elements the Trust Fund argues are unsupported, we discern no error. The decision is affirmed.

So ordered.

employee's morbid obesity constituted a physical impairment which would "likely be a hindrance or obstacle to his employment. . . ."

⁴ Although free to do so, the Trust Fund did not submit medical opinion evidence to counter Dr. Schmitz's opinions.

⁵ The parties stipulated at oral argument that the employee's actual height is 5'8". The Trust Fund does not argue that Dr. Schmitz's diagnosis of morbid obesity is rendered invalid by the incorrect height ascribed to the employee.

⁶ Firemen's Fund Insurance Co. v. Commonwealth, 18 Mass. App. Ct. 129 (1984), is distinguishable. The medical expert in Firemen's Fund did not diagnose *morbid* obesity, stated that the employee's obesity was "entirely due to diet," and noted vast fluctuations (100 pounds) in that employee's weight over the course of four years. Id. at 130-131. None of these factors exists in the present case, and the judge so noted. (Dec. 7-8.) Moreover, the Appeals Court *affirmed* the administrative judge's decision (affirmed by the reviewing board) in Firemen's Fund, so the case fell within the general approach of deferring to the expertise of the agency. See McCarty's Case, 445 Mass. 261, 366-367 (2006).

Luis Rosado
Board No. 035624-01

Mark D. Horan
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

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