COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 029472-03

Michael Bakanosky	Employee
Marco Construction	Employer
New Hampshire Insurance Co.	Insurer
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Andrea Botticelli Keyo, Esq., for the insurer at hearing
Michael K. Crowe, Esq., for the insurer on appeal
Karen S. Fabiszewski, Esq., for the Workers' Compensation Trust Fund

HORAN, J. The insurer appeals from a decision in which an administrative judge denied its petition for § 37 reimbursement (the "Second Injury Fund"), on the basis that it had not proved the employer had personal knowledge of the employee's pre-existing impairment -- a statutory requirement. [1] We affirm.

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[1] General Laws c. 152, § 37, 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 compensation provided by this chapter. . . .
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> There shall be no reimbursement under this section *unless the employer had personal knowledge of the existence of such pre-existing physical impairment within thirty days of the date of employment or retention of the employee* by such

The employee injured his neck, head and lower back in a motor vehicle accident on November 19, 1991. An MRI of the lumbar spine demonstrated a right sided focal herniation at L4-5, a central bulge at L5-S1 with a slight rightward lateralization, and posterior displacement of the S1 nerve root. (Dec. 3-4.) Six years later, the employee developed back pain within a week of suffering a work-related ankle fracture. The employee received back treatment from 1997 to 2000. In June of 2000, his doctor noted some improvement. (Dec. 4-5.)

In July 2000, the employee applied for a job driving a truck for the employer. During his job interview, the employee answered the employer's inquiry into whether he had suffered any prior injuries. The employee revealed he had an accident a few years earlier, but stated he could perform the duties of a truck driver. The employer offered, and the employee accepted, the job without restrictions or accommodations. The employee began working for the employer on July 12, 2000. (Dec. 7.) He suffered an injury to his lower back on August 17, 2000, for which the insurer paid compensation benefits. (Dec. 3.)

The insurer thereafter filed the present claim for Second Injury Fund reimbursement under § 37. Pertinent to the issue on appeal are the following findings of the administrative judge:

> Although the employee had a pre-existing physical impairment, the insurer has not satisfied its burden of proof that "the employer had personal knowledge of the existence of such pre-existing physical impairment . . . from a . . . statement from the employee." [Footnote omitted.] The requisite evidence of such knowledge is lacking. [The employer] interviewed the employee prior to his hiring. The

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> employer from either a physical examination, employment application questionnaire, or statement from the employee. Proof of the pre-existence of such impairment shall be established only by the production of medical records existing prior to the date of employment or retention in employment of the employee. Nothing in this paragraph shall be construed to allow employers to compel an employee or job applicant to disclose any information regarding physical impairments in violation of any applicable law.

(Emphasis added).

> employee did disclose that he had suffered a back injury in an accident some years in the past; and that he had some back pain; but that he was now fine. The pain to which the employee referred . . . appears to have been associated with an accident that took place years earlier. Having a back injury in the past, accompanied with pain, absent any other relevant information that came to the employer's attention, is not sufficient to persuade me that the insurer satisfied its burden of proof that the employer had knowledge of the existence of a pre-existing physical impairment. . . .
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> Knowledge of a prior injury with pain is not the equivalent of knowledge of a physical impairment. . . .Therefore, the mere fact that an employer knows that a potential employee suffered an injury in the past causing pain is not necessarily equivalent to knowledge of the employee's pre-existing impairment; i.e., knowledge of the pre-existing anatomic or physiological loss of function. [Footnote omitted.] I find, therefore, that the insurer did not meet its burden of proving that the employer had the requisite knowledge regarding the employee's pre-existing physical impairment.

(Dec. 9-10.) Accordingly, the judge denied the insurer's petition for § 37 reimbursement. (Dec. 10.)

The insurer on appeal challenges the judge's findings and conclusion, arguing that knowledge of "injury" is the same as knowledge of "a physical impairment." We disagree. The basic premise, that an injury is not the same as an impairment, and that knowledge of an injury therefore does not suffice as knowledge of an impairment, is self-evident. An injury does not necessarily cause an impairment; not all impairments are caused by injuries. In fact, § 37 contemplates impairments caused by a "previous accident, disease or congenital condition." See Oakes v. Dettinger Lumber Co., Inc., 17 Mass. Workers' Comp. Rep. 82, 85 (2003). The Legislature is deemed to have chosen its words carefully, and § 37 simply does not say "personal knowledge" of an "injury," or of a "disease or congenital condition," for that matter. The "personal knowledge" element of § 37, is not satisfied, *ipso facto*, by knowledge of a prior injury.

Here, the record is void of any evidence that the employer had knowledge of the employee's alleged physical impairment in the time prescribed by § 37. The employer here knew nothing more than that the employee had a prior injury, and that the employee maintained he had recovered from it. The statute contains no exception to the employer

"personal knowledge" requirement in instances where employees are less than completely candid about their prior medical history. The statute does allow employers to discover impairments by conducting medical examinations. There is no evidence the employer availed itself of that right. [2]

The insurer points out that 42 U.S.C. § 12101 (1990) (The Americans with Disabilities Act, hereinafter the "A.D.A."), puts the scope of § 37 coverage into question. [3] "If § 37 is to remain viable with employers being constrained by privacy issues, an injury . . . [that] was known to the employer, should be enough to satisfy the [personal knowledge] requirement set forth in § 37." (Ins. br., 9.) The insurer argues that because an employer cannot inquire [4] about the existence of a prior impairment under the constraints of the A.D.A., the personal knowledge requirement of § 37 necessarily and significantly constrains the scope of the statute's coverage; the prior 1986 version of § 37 explicitly did *not* require the employer's personal knowledge of the employee's prior impairment.

The insurer's conclusion -- that such a limitation could not be correct because it would "effectively negate the intended utility of" the Second Injury Fund (Ins. br., 8) -- does not follow. Such a construction neither invalidates § 37, nor produces an irrational result. The legislature simply scaled back the statute's applicability in light of the then newly enacted A.D.A, a result that we must conclude it intended. "The Legislature is presumed to have been aware of . . . the Federal statute." Batchelder v. Allied Stores Corp., 393 Mass. 819, 821-822 (1985). "We presume that in amending [§ 37 in 1991] the Legislature was aware of . . . the provisions of the [A.D.A., enacted in 1990] . . . ." Commonwealth v. Agosto, 428 Mass. 31, 37 (1998). See Taylor's Case, 44 Mass. App. Ct. 495, 500-501 (1998)(Legislature is presumed to intend collateral consequences of its 1991 amendments to c. 152).

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[2] We note such an examination would have to be conducted in accordance with state and federal antidiscrimination law. See 804 Code Mass. Regs. §§ 3.00-3.02 and 29 Code Fed. Regs. §§ 1630.13-14.

[3] These concerns are reflected in the provision of § 37 that states: "Nothing in this paragraph shall be construed to allow employers to compel an employee or job applicant to disclose any information regarding physical impairments in violation of any applicable law."

[4] In fact, an employer may so inquire, so long as it complies with the antidiscrimination laws. See regulations noted in footnote 2, supra.

We conclude the underlying policy [5] served by § 37 -- that employers should be encouraged to hire the handicapped, by the assurance of partial credit for any reinjury by way of § 37 reimbursement to their insurers, and the corresponding effect on its experience modification -- is reflected in the 1991 amendment. How can the statutory purpose be served without the employer's personal knowledge of the employee's impairment? In light of the language chosen by the legislature, it cannot. [6] Accordingly, the decision is affirmed.

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: March 23, 2006

[5] See Locke, Workmen's Compensation, § 309, pp. 367-368 (2 nd ed. 1981).

[6] We recognize that the Second Injury Fund could be viewed as largely anachronistic, in light of the A.D.A.'s overall policy "to ensure that an applicant's hidden disability remains hidden." Harris v. Harris & Hart, 206 F.3d 838, 842 (9th Cir. 2000). Following enactment of state antidiscrimination statutes and the A.D.A., many states have, in fact, eliminated their second injury funds. See A. Larson, Workers' Compensation Law, § 91.03[8].