COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 004688-06

Michael Beliveau	**Employee**
Top Flite Golf Company	**Employer**
A.I.M. Mutual Insurance Company	**Insurer**

REVIEWING BOARD DECISION

(Judge Fabricant, Costigan and Horan)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Charles R. Casartello, Jr., Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision awarding benefits for a low back injury sustained on January 20, 2006. The insurer's argument that the causative event, lifting a twenty pound plate of golf balls, is not a "personal injury," but "wear and tear" as defined in Zerofski's Case, 385 Mass. 580 (1982), is patently incorrect, and we summarily affirm the decision as to that issue. We also summarily affirm the decision as to the insurer's contention that the judge erroneously failed to assign an earning capacity.

Turning to the insurer's arguments that the judge failed to apply the heightened "a major" causation standard of § 1(7A), and that additional medical evidence was required due to a self-contradictory impartial medical opinion, we find no error and affirm the decision.

The employee has been out of work since his 2006 work injury. The insurer resisted the employee's claim for § 34 total incapacity benefits, and the parties cross-appealed the judge's conference order of § 35 partial incapacity benefits to an evidentiary hearing. (Dec. 2.) The employee underwent an impartial medical examination. The impartial physician opined that the employee's morbid obesity was the single most important factor in his disability, but indicated that his work

injury was also a factor. (Dec. 3.) The judge adopted the impartial physician's opinion and awarded the employee the § 34 benefits claimed. (Dec. 4-5.)

The insurer argues that the judge erred by failing to apply § 1(7A)'s "a major" causation analysis to the employee's claim.[1] The insurer's theory is that the employee suffered a "combination" injury, namely, the pre-existing, non-compensable condition resulting from the *disease* of morbid obesity aggravated by the work injury. We disagree.

Whether a pre-existing condition results from an injury or disease is a medical issue requiring expert opinion evidence. Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 93 (1997). Here, the impartial physician was clear in his opinion that the employee's morbid obesity is not a disease. (Dep. 22-24.) [2] Against this uncontroverted evidence, the insurer argues that the reviewing board adopted a definition of disease in Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187 (2003), which would include this employee's morbid obesity as a matter of law. The insurer's argument impermissibly expands the scope of the Blais decision. In Blais, the board held that an impartial medical opinion declaring an employee's degenerative disc disease to be as normal as the "graying of the hair," given his age, defeated the first prong of the § 1(7A) inquiry, i.e., the existence of a pre-existing condition resulting from an

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[1] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause of prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[2] We note the insurer's passing reference to the question of whether the impartial orthopedic physician was qualified to render an opinion on obesity. (Ins. br., 9, n.4.) Because the record does not indicate that the insurer placed this issue before the administrative judge, we consider it waived.

injury or disease. Id. at 192. Likewise, the impartial medical opinion in this case -- the claimant's morbid obesity is not a disease -- supports the judge's treatment of the employee's claim under simple "as is" causation, not § 1(7A) "a major" causation.[3]

The insurer's argument that the impartial opinion is "inherently contradictory," along the lines of Brooks v. Labor Mgmt. Srvcs., 11 Mass. Workers' Comp. Rep. 575 (1997), is unavailing.[4] We do not consider that the opinion of the impartial physician is self-contradictory. The doctor's testimony establishes the work incident as a cause of the employee's incapacity. (Dep. 28, 30, 39-40.) That opinion is never juxtaposed with an opinion that the work incident did not play *any* role in the employee's incapacity, the type of opinion that would be necessary to trigger a Brooks-type contradiction. Under the simple causation standard applicable here, the employee sustained his burden of proof.

Accordingly, the decision is affirmed. The insurer must pay the employee's counsel a fee under the provisions of § 13A(6) in the amount of $1,495.34.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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[3] While Errichetto, supra, allowed that an administrative judge could find morbid obesity to be a disease, we stated explicitly that such a finding needed to be "based on medical evidence." Id.

[4] The insurer's expression of this argument as self-proving does not help its cause: "The testimony of Dr. Glass need not be recited since it is patently apparent to all." (Ins. br. 12.)

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Mark D. Horan
Administrative Law Judge

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