COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 073718-01 024464-03**

Michael J. Lovely	Employee
Spinelli's Function Facility	Employer
Eastern Casualty Insurance Co.	Insurer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Timothy F. Duffy, Esq., for the employee
Carl F. Schmitt, Esq., for Eastern Casualty
James A. Garretson, Esq., for Travelers at hearing
David G. Braithwaite, Esq., and Ronald L. Sullivan, Esq., for Travelers on appeal

FABRICANT, J. The second insurer (Travelers) in this successive insurer case appeals from a decision in which an administrative judge ordered it to pay the employee ongoing partial incapacity benefits stemming from a 2003 work injury. The employee cross-appeals. We summarily affirm the decision with respect to the employee's appeal. As to Travelers' appeal, we also affirm the decision. We address its argument regarding the "a major" cause provision of G. L. c. 152, § 1(7A), governing "combination" injuries.[1]

The employee sustained two injuries at work, one in 2001 (insured by Eastern Casualty) and the second in 2003 (insured by Travelers). Both injuries were right dorsal strains/sprains aggravating a pre-existing non-work-related condition of spinal kyphosis,

[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 or 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.

a "hunchback" or "humpback" in lay terms. (Dec. 6-7.) Based on the adopted medical evidence of the impartial physician, the judge found:

> After a review of all the medical exhibits,[2] I do not find that the insurer has met the burden of production that the spinal kyphosis is an injury or disease. The impartial physician classifies the condition as one that is either congenital or the result of a developmental process. There is no medical evidence presented as to which the employee's condition was. The condition is clearly not the result of an injury. I do not find that the insurers have met the burden of production that it is the result of a disease. Based on the medical opinions of Dr. Pennell [the impartial physician] I find that there is simple causation between the diagnosis of chronic right dorsal sprain and the work related injuries.

(Dec. 7-8; footnote added.)

Travelers contends that the judge erred by concluding kyphosis is not a condition resulting from disease, and therefore failed to apply the proper standard of "a major" causation under § 1(7A). Travelers points to our broad construction of the § 1(7A) term, "disease." In Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187 (2003), we adopted the following definition of "disease," from Dorland's Medical Dictionary (26th ed. 1985): "Any deviation from or interruption of the normal structure or function of any part, organ or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." Blais, supra at 192 n.4.

Travelers argues that the employee's pre-existing kyphosis is a condition resulting from a disease because it is a deviation from the normal structure of the spine. Travelers, however, ignores the remainder of the Blais decision. Blais establishes that the administrative judge may rely on expert medical evidence to address the elements of § 1(7A) "major" causation in a particularized, case-by-case basis. In that case, the adopted doctor's opinion was that the fifty-two year old employee's pre-existing

[2] The judge allowed additional medical evidence on the basis of medical complexity. All parties submitted additional medical evidence. (Dec. 2, 4.)

degenerative disc disease was not pathologic;[3] it was as normal as "wrinkling of the skin or graying of the hair." Id. at 192 (footnote added). As such, we concluded that the judge did not err in failing to apply § 1(7A) "major" causation to the work injury – an aggravation of bulging lumbar discs – because the pre-existing disc condition was essentially a normal attribute of aging under the doctor's definition. Id.

So too, in the present case, the impartial physician's opinion lends support for the judge's conclusion that the employee's pre-existing kyphosis did not result from a disease: "[I]t was just a typical juvenile round back or hunchback which is not that rare in the population." (Dep. 39.)

> Q: That condition [kyphosis] was referred to as a diagnosis by my brother but it's not really a medical disease or condition, is it? Is it a diagnosis?
>
> A: It's a, well, an increased dorsal kyphosis, I guess it's a diagnosis. It's a variation of a normal finding.
>
> Q: It's a -- you referred to adolescent development or perhaps even congenital causes for that condition, is that accurate.
>
> A: Yes.
>
> Q: So it's not a condition that is caused by a specific injury or accident, is it?
>
> A: No.
>
> Q: And rather, it's something that occurs in the spine as a result of some developmental process, is that right?
>
> A: Yes.

(Dep. 54.)

The doctor's testimony is sufficient to support the administrative judge's finding that this employee's kyphosis, a "variation of a normal finding," was not a condition "resulting from an injury or disease." § 1(7A). The impartial physician having placed

[3] "Pertaining to or caused by disease." American Heritage Dictionary, 2nd College Edition 1985).

kyphosis within the realm of "normal," the judge was well within the permissible scope of his authority as fact-finder to rely on and adopt that opinion. The administrative judge's finding that the employee's dorsal kyphosis is not a "pre-existing condition, which resulted from an injury or disease" is, given the adopted § 11A medical evidence, not arbitrary, capricious or contrary to law. G. L c. 152, § 11C. We affirm the judge's denial of Travelers' proffered § 1(7A) defense.

Accordingly, we affirm the decision. We order that Travelers pay counsel for the employee a fee of $1,458.01 under the provisions of G. L. c. 152, § 13A(6).

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **January 23, 2008**

COSTIGAN, J., dissenting in part and concurring in part. If a work-related dorsal sprain which aggravates an underlying, non-work related condition of spinal kyphosis is not the type of combination injury the legislature had in mind when it added the fourth sentence to § 1(7A),[4] I don't know what is. The majority rejects Travelers' argument that the definition of "disease" adopted by this board in Blais, supra, governs this case, because in Blais, the employee's degenerative disc *disease* was not a disease at all but rather a normal attribute for a person of his age. So, too, says the majority, is the employee's spinal kyphosis, pointing to Dr. Pennell's statement that the kyphosis "was just a typical juvenile round back or hunchback *which is not that rare in the population*." (Dep. 39; emphasis added.) Quite apart from the issue of what is "normal" in any given

[4] St. 1986, c. 662, § 55, effective January 1, 1986. See footnote 1, supra.

person,[5] it seems to me plain error to equate what is "not that rare in the population," to what is "normal." By way of example, certainly cancer is "not that rare" in the adult population, but I doubt anyone would characterize that affliction as "normal."

Dorland's Illustrated Medical Dictionary, (27th ed. 1988), defines "kyphosis" as "*abnormally* increased convexity in the curvature of the thoracic spine as viewed from the side; hunchback." (Emphasis added.) Thus, kyphosis is a "deviation from . . . the normal structure or function" of the spine and falls squarely within the Blais definition of disease. Moreover, a pre-existing condition can both be congenital and result from disease. See Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 (1998).

Dr. Pennell's opinion, adopted by the judge, that the employee's work injuries aggravated his kyphosis, soundly establishes the element of "combination" under § 1(7A) as to both the 2001 and 2003 work incidents.[6] See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490, 492 (2003)("The combination the statute addresses is a *medical* combination . . . most frequently involv[ing] aggravation injuries, such as back strains superimposed on degenerative disc conditions.") However, the judge's

[5] I question whether what is "normal" disc degeneration in a fifty-year old male smoker who has performed heavy manual labor for thirty years, is also normal in a fifty-year old female non-smoker who has performed sedentary, clerical work for ten years. In my view, the exclusion of so-called "normal for one's age" conditions from the purview of § 1(7A) rests on medical opinions which, at best, are based on mathematical or statistical likelihood, long held to be insufficient to carry an employee's burden of proof. King's Case, 352 Mass. 488 (1967); Tartas's Case, 328 Mass. 585 (1952).

[6] Eastern, the first insurer, had also raised § 1(7A). Dr. Pennell opined: "Mr. Lovely has a significantly increased dorsal kyphosis. This might make him subject to some mid and upper back discomfort, as a result of heavy lifting or carrying. . . . Thus, his original right mid back symptoms were probably valid and related to his employment." (Stat. Ex. 1, p. 11.) The doctor also testified that although the employee's symptoms began at one point in time, "they were sort of perpetuated by his continuing to repeat the same activities," and the dorsal strain did not resolve because of successive incidents at work that sustained the complaints. (Dep. 58.)

finding on the issue of liability as between the two insurers[7] plainly did not contemplate that § 1(7A) applied to one, or both, of the employee's claimed work injuries. Therefore, I would recommit this case for the judge to reconsider the medical evidence and answer the following questions. Was the employee's work injury of July 10, 2001 a major cause of his disability and/or need for treatment thereafter and, if so, for what period of time did that injury remain a major cause? Given "that the employee was able to return to his full work after the first injury and then sustained a significant second injury which caused his further disability and need for treatment," (Dec. 8), had the employee returned to his pre-existing medical baseline at the time of his second work injury on May 4, 2003? If he had returned to baseline, was the employee's work injury of May 4, 2003 a major cause of his disability and need for treatment from and after May 30, 2003, the first date of disability claimed and, if so, for what period of time has that injury remained a major cause?

Lastly, because the § 1(7A) analysis the judge should have undertaken is inextricably linked to his handling of the successive insurer issue, I respectfully dissent from the majority's summary affirmation of the decision in that regard. I concur with the majority's summary affirmation of the judge's decision that the employee is able to perform full-time modified work.

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Patricia A. Costigan
Administrative Law Judge

Filed: **January 23, 2008**

[7] The judge found:

> There is a dispute as to which insurer is responsible for the current benefits claimed by the employee. I find the employee was able to return to his full work after the first injury and then sustained a signficant second injury which caused him further disability and need for treatment. Pursuant to the last on the risk doctrine, I find that the second insurer is responsible for the employee's benefits.

(Dec. 8.)