COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 046140-05**

Philip E. Kelly	Employee
Boston University	Employer
Boston University	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Jacques.

APPEARANCES
William J. Branca, Esq., for the employee
Diane J. Bonafede, Esq., for the self-insurer

HORAN, J. Once again, the self-insurer appeals from a decision ordering it to pay for the employee's spinal surgery, owing to his cervical stenosis and myelopathy, which conditions the judge found to be causally related to his October 24, 2005 work injury. See Kelly v. Boston Univ., 25 Mass. Workers' Comp. Rep. 143 (2011). We affirm.

In Kelly, supra, we agreed with the self-insurer that the judge erred by adopting the medical opinions of both Dr. Olarewaju Oladipo and Dr. Tony Tannoury, because their opinions were inconsistent in several material respects. Id. at 146. Being unable to find, as a matter of law, that the error was harmless, we recommitted the case to the judge for further findings; we also expressly rejected the self-insurer's remaining arguments. Id. at 146-148.

In her decision following our order of recommittal, the judge adopted Dr. Tannoury's opinion that there was a direct causal relationship between the employee's injury at work and his cervical stenosis, myelopathy, and the proposed surgery. (Dec. 8-9.) The judge rejected Dr. Oladipo's opinion "that the employee's cervical stenosis was a pre-existing condition," and Dr. Richard C. Anderson's opinion that the employee's cervical stenosis was pre-existing and that

he did not have "signs of myelopathy." (Dec. 10.) Because she found a direct causal link between the employee's industrial conditions and his need for surgery, the judge rejected the self-insurer's § 1(7A) defense.[1] (Dec. 11.)

The self-insurer raises two issues on appeal. First, it maintains the judge "failed to consider [Dr. Oladipo's] opinion" respecting the "diagnosis of myelopathy and whether surgery is reasonable and necessary." (Self-ins. br. 3.) We disagree. Not only did the judge discuss Dr. Oladipo's opinions in her decision, she expressly rejected them. (Dec. 9-10.)

The self-insurer also argues the judge "did not address § 1(7A) in adopting her opinions on causation." (Self-ins. br. 3.) We disagree. While the self-insurer identified medical opinions in evidence which supported its contention that the employee's "resultant condition" was a product of the combination of his "compensable injury" and "a pre-existing condition," the judge was not required to adopt them.

> If the insurer does meet its burden of production under the statute, then the employee has a burden of proof (rather than a mere burden of production) as to the inapplicability of the statute. The employee must prove that either (1) the prior injury was compensable, or (2) *the claimed injury is not a combination injury with a prior noncompensable one*. See Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 220-221 (2006).

MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009)(emphasis added). See also, Dellarusso v. Massachusetts Gen. Hosp., 25 Mass. Workers' Comp. Rep. ___ (December 7, 2011). Simply put, by adopting the opinion of Dr. Tannoury,[2] and

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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 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.

[2] Dr. Tannoury's opinion cannot be read to support either the "pre-existing condition" or the "combination" elements of § 1(7A). As we noted in Kelly, supra, Dr. Tannoury was

rejecting the above referenced opinions of Drs. Oladipo and Anderson, the judge properly did not require the employee to prove his claim under the "a major" causation standard.[3] There was no error.

Accordingly, we affirm the decision. Pursuant to G. L. c. 152, § 13A(6), we order the self-insurer to pay employee's counsel an attorney's fee in the amount of $1,517.62.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **February 9, 2012**

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not deposed. Therefore, we have no way of knowing whether he would have changed his opinion and agreed with the other doctors that the employee, 1) had a pre-existing condition, and that, 2) it "combined" with his industrial injury to cause his "resultant condition." G. L. c. 152, § 1(7A). Thus, this is not a case where *all* of the medical evidence compels the conclusion that the "a major" causation standard applies as a matter of law. We also reject the self-insurer's contentions that 1) there was "no dispute" between the parties about whether the employee suffered from a pre-existing condition, and that 2) he "conceded" this at Dr. Oladipo's deposition. (Self-ins. br. 3-4.)

[3] Judges are free to choose between conflicting medical opinions when addressing the elements of § 1(7A). Dellarusso, supra; see Lovely v. Spinelli's Function Facility, 22 Mass. Workers' Comp. Rep. 9, 11-12 (2008)(proper for judge to adopt medical opinion that employee's kyphosis was not a pre-existing condition that resulted from an injury or disease). The self-insurer's argument, taken to its logical conclusion, would prevent the judge from addressing whether, as a matter of fact, an employee has a pre-existing medical condition in any case where there is a medical opinion attesting to one. This runs counter to the established principle that judges are free to adopt such portions of the medical expert testimony they deem persuasive. See, e.g., Clarici's Case, 340 Mass. 495, 497 (1960); see also Hilane v. Adecco Employment Srvs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003)("An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive").