COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021340-03**

Dennis Durfee	Employee
Baldwin Crane & Equipment	Employer
Ace American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Horan)

APPEARANCES
Andrew J. Schultz, Esq., for the employee
Joseph M. Spinale, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision in which an administrative judge denied its complaint for modification of § 34 benefits. The insurer asserts that the judge erred by failing to find the § 11A report inadequate and in misapplying § 1(7A). Finding the judge's acceptance of the § 11A report and application of § 1(7A) appropriate, we affirm the decision.

The employee injured his back while working as a construction site engineer on April 17, 2003. (Dec. 2-3.) The impartial physician diagnosed prior degenerative lumbar spondylosis with disc herniation at L4-5, L5-S1, status post L4-5 surgery, but ultimately concluded that the employee's current partial disability is causally related in equal parts to the work injury and the degenerative condition. (Ex. 1, Dec. 4-5.) The judge also credited the employee's testimony of constant pain and radiculopathy from the time of the accepted injury. (Dec. 4-5.) Based on the employee's testimony and the impartial physician's opinion, the judge denied the insurer's request for a reduction in weekly compensation and awarded ongoing § 34 benefits. (Dec. 7.)

The insurer argues that the impartial physician's report is inadequate due to the absence of a functional capacity evaluation in his record review. However, we do not view the impartial physician's opinion as inadequate in this regard. He opined that the

employee remained at a sedentary/light duty capacity, (Dep. 25-26), and also stated that "in order for the employee's work capacity to be evaluated formally," a functional capacity evaluation would be necessary.[1] (Ex.1.) That an impartial doctor might have something more to say if he had more information is, of course, a truism.

Even without the functional capacity evaluation, the impartial physician did opine that the employee could not return to his prior work. The judge credited the employee's testimony of constant debilitating back pain, with pain and numbness in his legs, and concluded that the employee did not have the capacity for even sedentary/light work that the impartial physician found he could perform. (Dec. 4.) Therefore, regardless of what additional information the functional capacity evaluation might have provided, its absence neither rendered the doctor's disability opinion inadequate, nor the decision arbitrary and capricious. The employee's ability to function in a sedentary job as per the impartial physician's opinion, measured against his limited vocational experience (heavy duty labor), and the judge's assessment of his pain, fully warrants the judge's conclusion that the employee remained totally incapacitated. See Anastasio v. Perini Kiewit Cashman, 19 Mass. Workers' Comp. Rep. 102, 103 n.3 (2005) and cases cited (judge may utilize pain findings to support award of total incapacity benefits when medical evidence supports partial disability). We see no merit in the insurer's allegation of inadequacy of the impartial physician's disability opinion, and therefore no reason to recommit.

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[1] The complete disability assessment appears as follows in the §11A report:

> Based on today's examination and the medical records reviewed, it appears that Mr. Durfee is disabled from his regular work duties as an operating engineer. It is not clear to me if this is necessarily permanent, however. In order for Mr. Durfee's work capacity to be evaluated formally, a functional capacity evaluation needs to be scheduled, and once completed, Mr. Durfee's performance on this testing could then be compared with US Department of Labor Dictionary of Occupational Titles. His true work capacity could then be determined as well as any restrictions and/or accommodations that would need to apply on his return to the workforce.

(Ex. 1.)

The insurer also argues the judge's conclusion that the work injury "remained a major but not necessarily predominant contributing cause" of the employee's present disability, was not supported by the impartial physician's finding that the employee's disability is caused in equal parts by the pre-existing degenerative condition and the work injury. See G. L. c. 152, § 1(7A). We disagree. A medical opinion that establishes the work injury as a 50% contributor to disability – as this impartial physician states– satisfies § 1(7A)'s major cause standard as a matter of law. "There may . . . be multiple 'major' causes. A major cause is an important, a serious, a moderately significant cause." Siano v. Specialty Screw & Bolt Co., 16 Mass. Workers' Comp. Rep. 237, 240 (2002). We think that fifty percent meets all of these descriptions. Cf. Valachovic v. Big Y Foods, 19 Mass. Workers' Comp. Rep. 134, 137 (2005)(addressing confusion between standard of proof – "more likely than not" and § 1(7A) standard of causation, and concluding doctor's opinion of no more than a 50% chance of any causal contribution from work failed to meet burden of proof in "as is" case).

The decision is affirmed. Pursuant to § 13A(6), we order the insurer to pay employee's counsel a fee of $1,357.64.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***May 30, 2006***