COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOs.:** 041559-03 040956-03
Earl H. Lesoine	Employee
Corcoran Management Co., Inc.	Employer
Wausau Business Insurance Co.	Insurer
Commerce and Industry Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Michael M. Kaplan, Esq., for the employee
Michael J. Sherry, Esq., for Wausau
Joseph M. Spinelli, Esq., for Commerce and Industry

HORAN, J. The second insurer in this successive insurer case appeals from a decision awarding the employee ongoing § 34 total incapacity benefits against it for a work aggravation of his previously injured and degenerating lumbar spine. The only argument on appeal challenges the judge's conclusion that the employee proved his claim under the heightened standard of causation applicable to "combination" injuries. G. L. c. 152, § 1(7A).[1] We affirm the decision.

The employee injured his back at work while carrying a heavy air conditioner up some stairs on or about October 22, 2003. The employee continued to work, with some limitation, until December 6, 2003, when he claimed to injure his back at work while shoveling snow. After that

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

incident the employee's back pain increased, and he was unable to continue working as an apartment building maintenance man as of December 14, 2003. (Dec. 2, 4-5.)

The employee filed claims for workers' compensation benefits against the insurers based on the aforementioned dates of injury.[2] The employee underwent a § 11A impartial medical examination by Dr. Nabil Basta. Dr. Basta opined the employee suffered from significant pre-existing degenerative disc disease, and that the October and December 2003 industrial injuries both aggravated that condition. Dr. Basta considered the employee's pre-existing condition was significant, and contributed at least 60 percent to the employee's resultant disability, with approximately 40 percent being due to the combined effects of the two industrial injuries. As to that 40 percent work contribution, Dr. Basta was unwilling, in the course of testifying at his deposition, to characterize that amount as "a major" cause of the employee's disability and need for treatment. (Dec. 6-7.)

The judge's findings pertinent to this appeal are as follows:

> It is clear that the employee had pre-existing back disease, as documented by the Impartial, which disease has combined with the employee's industrial injuries, and contributed to his ongoing disability and need for treatment. The Impartial has opined that the industrial injuries are approximately 40% of the cause of this, with the underlying condition being responsible for about 60%. While he could not ascribe the words "a major" to his causation explanation, the condition as he described it certainly meets the requirements of § 1(7A), as case law has shown that it is not necessary to use the exact language of "a major."
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> As a result, I find that the employee has met his burden in establishing that the injury of December 6, 2003 was a major cause of the Employee's ongoing need for disability and treatment [sic].

(Dec. 8.)

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[2] Wausau Business Insurance Company ("Wausau") insured the employer in October, 2003; Commerce and Industry Insurance Company ("Commerce") insured the employer in December, 2003.

The judge concluded the December 6, 2003 incident was a sufficiently significant contributor to the employee's incapacity, and assigned liability to Commerce based on the successor insurer rule. (Dec. 10.) See Rock's Case, 323 Mass. 423 (1948); Evans's Case, 299 Mass. 435 (1938). The judge ordered Commerce to pay the employee ongoing § 34 benefits from December 14, 2003, to date and continuing. (Dec. 9, 11.)

Commerce urges us to reverse the decision, arguing that the opinion of Dr. Basta, the sole medical opinion in the case,[3] does not carry the employee's burden of proving causation under § 1(7A). We disagree.

It is clear the employee's non-industrial medical conditions prior to October 22, 2003, included spinal stenosis, bilateral facet changes in the lumbar spine, osteophyte formation, and a lumbar disc injury. (Stat. Ex. A; Dep. 10, 12.) The record is also clear that, at least to some extent, each of the employee's claimed industrial accidents aggravated his prior non-industrial medical condition. (Dep. 12-13.) The Appeals Court has held that a physician's opinion of a simple "aggravation" of a prior non-industrial condition is insufficient to carry the employee's burden of proof under the "a major" causation standard of § 1(7A). Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006). Thus, under § 1(7A), the employee's " *resultant condition* shall be compensable only to the extent such compensable injury or disease remains *a major*" cause of the employee's "disability or need for treatment." G. L. c. 152, § 1(7A)(emphasis added).

Here, two work-related events are claimed to result in an injury which combines with prior non-compensable, pre-existing conditions to cause the employee's disability and need for treatment, thus invoking the application of § 1(7A). Nearly seventy years ago, in Smith's Case, 307 Mass. 516 (1940), the Supreme Judicial Court held that an "injury need not be a single definitive act but may extend over a continuous period of time." Id. at 517. Years later, the Appeals Court dealt with the concept of a developing injury *and* the successive insurer rule in Trombetta's Case, 1 Mass. App. Ct. 102 (1972). In affirming an award of benefits against the second of two insurers, the court held:

That the [injury] did not result from any particular disabling incident does not preclude a finding of injury. An injury may develop gradually from the cumulative effect of stresses and aggravations.

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[3] The judge specifically found the report of Dr. Basta to be adequate. (Dec. 3.) Neither party challenges this finding on appeal.

Id.at 105, citing Franklin's Case, 333 Mass. 236 (1955); Brzozowski's Case, 328 Mass. 113 (1951); Pell v. New Bedford Gas & Edison Light Co., 325 Mass. 239 (1950); Mills's Case, 258 Mass. 475 (1926). Here, the judge superimposed the successor insurer rule upon the common law definition of injury in considering the issue of § 1(7A) "a major" causation. In so doing, she did not err.[4]

We can safely assume the legislature was aware of the time-honored concept of "injury" in our workers' compensation act when it inserted the "a major" causation standard into § 1(7A) in 1991.[5] See Commonwealth v. Cousin, 449 Mass. 809, 818 (2007). We can also assume the legislature has long been aware of the successive insurer rule, which dates back to 1938. Evans's Case, supra. It has never been altered or abolished. Sliski's Case, 424 Mass. 126, 131 (1997)(declining the invitation to deviate from the "long and well-established" successive insurer rule). Accordingly, it was proper for the judge to conduct her § 1(7A) analysis by viewing the employee's injury as the "resultant condition" emanating from the effects of his two industrial accidents combined and superimposed on his prior non-industrial medical conditions.[6]

The more difficult question presented on appeal is whether the judge, in finding that the combined effects of the two work-related aggravations constituted "a major" cause of the employee's disability, misconstrued the opinion of the only medical expert, Dr. Nabil Basta. Dr. Basta testified he utilized both industrial accidents to conclude that the employee's work was

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[4] Compare Couch v. Gill-Montague Reg. Sch. Dist., 20 Mass. Workers' Comp. Rep. 237, 242-243 (2006)(first insurer found liable for ongoing incapacity in successive insurer case, failure to address its § 1(7A) defense required recommittal; second insurer did not raise § 1(7A)).

[5] St. 1991, c. 398, § 14.

[6] The alternative approach of requiring the judge to conduct a sequential and independent "injury date by injury date" § 1(7A) analysis may consequently, and unfairly, punish an employee who suffers multiple work-related accidents prior to his eventual disability or incapacity. In such a case, the compensability of the employee's "disability or need for treatment" would hinge upon whether any *one* of his injuries satisfies the § 1(7A) standard. If each event were singularly insufficient to qualify as a major cause of his disability, the employee would lose ─ even though the combined effects of his several industrial accidents would otherwise prove compensable under the "a major" causation standard. We do not believe the legislature would intend to punish a worker who makes a good faith attempt to remain in the workforce under such circumstances.

forty percent causative of his disability. (Dep. 33-34.) When asked to break down the forty percent between each work-related event, he replied: "[C]an't do it." (Dep. 35.) He then opined that as between the two, "the October incident was more of an aggravating factor than the December 6th." (Dep. 36.) After employee's counsel advised Dr. Basta that major "doesn't have to be more than fifty percent," the doctor was asked if "the injury itself is a major, but not necessarily a predominant cause," the doctor replied: "I can not say it." (Dep. 27, 30.) The judge interpreted this answer to mean that the doctor "could not ascribe the words "a major" to his causation explanation. . . ." (Dec. 8.) Nevertheless, the judge found "the condition as he [Dr. Basta] described it certainly meets the requirements of § 1(7A), as case law has shown that it is not necessary to use the exact language of "a major." Id.

The judge is correct that we have affirmed findings of "major" causation in cases where physicians have used reasonably synonymous language, such as "important,"[7] "moderately significant"[8] or "caused in equal parts by the pre-existing degenerative condition and the work injury,"[9] to describe the degree to which the work injury is, or remains, causative of the employee's disability. However, at the time the judge issued her decision, no reported case had dealt with medical testimony analogous to Dr. Basta's. That changed a year later with our decision in Healey v. Tewksbury Hosp., 21 Mass. Workers' Comp. Rep. 87 (2007).

In Healey, a majority of the board reversed an award of benefits, citing a failure of proof of "a major" causation. Id. at 89. The impartial physician's opinion, adopted by the judge in Healey, supported the view that the industrial injury was a "significant factor, but not a major factor" in the employee's disability. Id. at 88. However, the doctor in Healey also *specifically* opined the industrial injury was *not* a major cause of the employee's disability. Id. at 88-89. The judge found for the employee, reasoning that use of the term "significant factor" was substantially equivalent to "a major" cause. Id. at 88. The board held the doctor's specific exclusion of "a major" could not be ignored by the judge, and vacated the benefit award. Id. at 89.

This case differs from Healey in two crucial respects. While Dr. Basta declined to state that the employee's industrial accidents are "a major" cause of his disability, he conceded that, when

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[7] Cross v. Beverly Rehab., 17 Mass. Workers' Comp. Rep. 241, 243 (2003).

[8] Siano v. Specialty Bolt and Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002).

[9] Durfee v. Baldwin Crane & Equip., 20 Mass. Workers' Comp. Rep. 163, 165 (2006).

combined, they constitute forty percent of the cause. (Dep. 33-34.) Moreover, Dr. Basta's deposition testimony reveals that in refusing to state the employee's industrial accidents are a major cause of his disability, while simultaneously opining that the accidents are forty percent responsible for it, he comprehended a higher standard of proof than what § 1(7A) requires.[10] (Dep. 23-30, 33-37.) In response to a question concerning the distinction between major and predominant, the doctor replied: "major doesn't have to be predominant . . . which is *more* than 51 percent." (Dep. 25; emphasis added.) The Appeals Court rejected this definition of predominant, as appearing in the third sentence of § 1(7A), in May's Case, 67 Mass. App. Ct. 209 (2006). Essentially, the May court held that the *predominant* cause could be an event *less than* 50 percent causative, so long as it is *the* major, important, or primary cause. Id. at 212-213. Logically, therefore, " *a* major" cause can be something less than the most important cause or, stated differently, well under fifty percent causative of the employee's disability. We have held that while only one cause can be properly labeled "the" major cause in a given case, multiple causes may qualify as "a" major cause of an employee's disability. Siano v. Specialty Bolt and Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002). In light of Dr. Basta's misunderstanding of the legal meaning of "a major," the judge, mindful of the correct standard, could reasonably interpret the totality of Dr. Basta's testimony, especially his forty percent assessment,[11] to conclude the employee carried his § 1(7A) burden of proof.

Accordingly, the decision is affirmed. Employee's counsel is awarded a fee pursuant to G. L. c. 152, § 13A(6), in the amount of $1,458.01.

So ordered.

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[10] There was no argument advanced in Healey that the doctor's opinion was based on an equally flawed understanding of the § 1(7A) standard.

[11] This fact clearly distinguishes the instant case from cases such as Ribeiro v. Sealy Corp., 20 Mass. Workers' Comp. Rep. 213 (2006), cited by Commerce in its brief. The doctor in Ribeiro never testified to anything beyond a mere aggravation of the employee's prior non-industrial condition. See also Castillo, supra , and Kryger v. Victory Distribution, 17 Mass. Workers' Comp. Rep. 78 (2003), *aff'd* Mass. App. Ct., No. 2003 - J - 144, slip. op. (February 23, 2005)(single justice).

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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