COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017953-00**

Edward Healey	Employee
Tewksbury Hospital	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from an administrative judge's decision awarding the employee permanent and total incapacity benefits for an industrial aggravation injury to his lower back, subject to the relevant provisions of G. L. c. 152, § 1(7A).[1] The self-insurer argues that, as a matter of law, the § 11A medical evidence does not support the award of benefits, given the impartial physician's opinion that the work injury was not a major cause of the employee's present disability. We agree, and reverse the decision.

The employee fell down stairs at work and injured his back on May 17, 2000. His pain was immediate, and it has not resolved. (Dec. 119.) The employee had pre-existing degenerative disc disease, and a pre-existing L4-5 disc herniation due to a non-work-related 1998 incident, triggering the application of § 1(7A) to this § 34A claim. (Dec. 117, 120.)

[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.

The impartial physician opined that the work injury of May 17, 2000 remained a significant contributing cause of the employee's continued chronic back pain as of the date of his § 11A medical examination. (Dec. 120-121.) The impartial physician specified that the work injury "would be a significant factor, but not a major factor" of the employee's present disability.[2] At his deposition, the impartial physician defined his use of "significant" as "just like every other injury." (Dec. 121-122; Dep. 55-56.)

The judge concluded:

> The impartial doctor had great difficulty in offering his causation opinion. He ultimately rejected the word "major" in describing the strength of the causation of the May 17, 2000 work injury to the employee's present disability. However, he was comfortable describing the effects of the May 17, 2000 industrial injury as a "significant" cause of the employee's continuing disability. He concluded his deposition by saying that the May 17, 2000 industrial injury was not a major cause of his current disability but was a significant cause of his continuing disability "just like every other injury." I interpret that statement as rising to the level of "major cause." The doctor put the May 17, 2000 injury on the same plane with the other causative factors, which satisfies the legal requirement for a finding that an incident constitute[s] a major cause of continuing disability.

(Dec. 122-123.) The judge awarded § 34A benefits accordingly. (Dec. 123.)

The decision cannot stand. The judge erred in finding that since the work injury was a "[s]ignificant factor just like every other injury," (Dep. 55), it was therefore also "a major" cause of disability. Although this reasoning has some grounding in the case law, see Siano v. Specialty Bolt & Screw Co., 16 Mass. Workers' Comp. Rep. 237, 240 (2002), it nonetheless fails to account for the doctor's explicit exclusion of "a major" as a qualifier of causal connection. (Dep. 55-56.) In the absence of such specific testimony regarding the relative weight of each of these terms, we have interpreted "significant" as "major." See Siano, supra. However, the Siano formulation cannot govern the instant

[2] We do not construe the deposition testimony of the impartial physician, cited by our dissenting colleague, see footnote 4, infra, as referring to the employee's ongoing incapacity, but rather to "a major" causation at the time of the industrial injury.

case.[3] The impartial physician considered that a "significant factor" was less than "a major cause." That evidence cannot be disregarded. Where the medical evidence rules out "major" causation, the only recourse left to the employee, who bears the burden of proof, see Sponatski's Case, 220 Mass. 526, 527-528 (1915), is a request for additional medical evidence under § 11A(2) to address the issues of causation and present disability. As the employee did not make such a request in this case (Tr. 3-4), the issue was not preserved for appellate review. See Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001). Accordingly, we reverse the decision, and vacate the award of benefits.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **March 28, 2007**

McCARTHY, J., dissenting. This board has recognized the difficulty faced by medical experts attempting to render a causation opinion in accordance with the legal definitions within chapter 152: "For the medical expert, the standard for causal relationship prescribed in Section 1(7A) is often confounding." Siano, supra at 240. As a result, the courts, along with this board, have consistently held that a medical opinion on causation need not be stated in the precise terms used by the statute. May's Case, supra at 213; Robinson's Case, 416 Mass. 454, 460 (1993); Marchione v. McCourt

[3] Likewise, the recent opinion in Robin W. May's Case, 67 Mass. App. Ct. 209 (2006), does not alter our view on this matter. In May, the Appeals Court addressed "the predominant" causal standard of § 1(7A), for purely emotional work injuries. The court held that the standard was satisfied by medical testimony that the work incidents were "the major cause" and "the primary cause" of the resulting emotional disability. Id. at 213. Importantly, the medical testimony in

Construction Co., 17 Mass. Workers' Comp. Rep. 472, 474-475 (2003); Siano, supra at 240; Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 198 n.6 (1996). Rather, terms which are "substantially equivalent" to the statutory terms may satisfy the causation standard. May's Case, supra; Marchione, supra; Siano, supra.

Further, we have held that an administrative judge may look to the totality of the expert's testimony, and the lay testimony, rather than to the precise words the expert used to determine whether the applicable causation standard has been met. See Silverman v. Department of Transitional Assistance, 15 Mass. Workers' Comp. Rep. 176, 177 n.4 (2001)(no error in judge basing finding that "a major cause" standard had been met on the totality of medical opinion rendered by each expert even though medical experts did not use the words "a major"); Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644, 651 n.7 (2003)(medical opinion which, if taken alone, could be seen as speculative, is sufficient to support causation finding, when medical and lay testimony are viewed as a whole); Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995).

In Siano, supra, we reversed a judge's finding that the medical evidence did not satisfy § 1(7A)'s heightened causation standard, and held that a doctor's testimony that the work injury played "a moderately significant" role in the employee's disability, *as a matter of law*, satisfied the "a major cause" standard, even though the doctor opined that the pre-existing condition played the more significant, even predominant, role. Id. at 238-240. We concluded, "There may . . . be multiple 'major' causes. A major cause is an *important, a serious, a moderately significant cause*." Id. at 240. (Emphasis added.)

In later cases confirming our holding in Siano, we recognized the administrative judge's prerogative to interpret the medical evidence, and affirmed judges' findings that the "a major cause" standard was met in varying circumstances where the "magic word" had not been used. See Cross v. Beverly Rehabilitation, 17 Mass. Workers' Comp. Rep. 241, 243 (2003)(upholding a judge's decision finding a medical opinion that the work

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May lacked the dispositive feature in the present case, namely an express medical opinion that the work incidents did not meet the requisite standard of causation.

incident is an "important" cause of present disability satisfied the § 1(7A) standard); Myers v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 22 (2005)(upholding a judge's decision finding that a doctor's opinion that the work event was the "significant" cause for the employee's disability satisfied the "a major cause" standard, even though the doctor opined "the major cause" was an unrelated surgery); Durfee v. Baldwin Crane & Equipment, 20 Mass. Workers' Comp. Rep. 163, 165 (2006)(upholding a judge's conclusion that the "a major cause" standard was satisfied by an impartial opinion that the employee's disability was causally related "in equal parts" to his work injury and his degenerative condition).

Here, I would uphold the judge's decision interpreting Dr. Oladipo's opinion as rising to the level of "a major cause." The judge found that, after having "great difficulty" in offering his causation opinion, the impartial physician ultimately opined that the work injury was a "significant" cause of the employee's continuing disability, "just like every other injury." (Dec. 122-123.) The judge rationally inferred that this statement put the work injury "on the same plane with other causative factors." (Dec. 123.) See Durfee, supra (medical opinion that disability was causally related "in equal parts" to work injury and pre-existing condition satisfied § 1(7A)). The fact that Dr. Oladipo stated, after much waffling, that the work injury was a significant but not a major cause of the employee's present disability does not invalidate the judge's finding.[4] Since

[4] Moreover, elsewhere in his deposition, Dr. Oladipo opined that the work injury was a major cause of the employee's ongoing incapacity:

> Q: Okay. And how many major factors do you think there are of the pain in 2004?
> A: The injury would have been a major contributing factor in this case, based on the findings of the second MRI. The degenerative joint disease would also be a major contributing factor, since you can have more than one major contributing factor. That's correct.
> (Dep. 41.)

Dr. Oladipo's later testimony that the work injury was a significant but not a major factor in the employee's incapacity was based on information that the employee suffered subsequent non-work injuries. (Dep. 46-48.) However, where there are intervening injuries, the employee need not prove the work injury is "a major cause" of his disability with respect to those injuries. He need only prove that the work injury bears some continuing causal relation to his incapacity.

we have held that "major" is substantially equivalent to "significant," the doctor's determination that the two terms have different meanings is itself meaningless. By juxtaposing the two terms, Dr. Oladipo, in fact, indicates that his understanding of "a major" cause is not the same as the legal definition, reached after years of judicial interpretation, of important, serious, moderately significant.[5] Siano, supra at 140.

If a decision is based on the evidence and reasonable inferences drawn therefrom, we will affirm it, unless it is vitiated by an error of law. See Buck's Case, 342 Mass. 766, 769-770 (1961); Josi's Case, 324 Mass. 415, 416 (1949). Dr. Oladipo offered a medical opinion. It was up to the judge to determine whether that opinion meets the legal standard, as defined by the board and the courts. The judge, evaluating the doctor's testimony, taken as a whole, determined that the impartial opinion did satisfy the § 1(7A) standard. There was ample evidence from which the judge could draw this conclusion, and there was no error of law. I would affirm his decision.

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William A. McCarthy
Administrative Law Judge

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After-occurring injuries break the causal chain only if they were not the result of reasonable and normal activity. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160 (2002).

[5] We note that this juxtaposition was introduced by employee's counsel. (Dep. 35.)