COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024007-98**

Rodolfo Marchione	Employee
McCourt Construction Co.	Employer
New Hampshire Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Maze-Rothstein)

APPEARANCES
M. Blair Bigelow, Esq., for the employee
Eugene M. Mullen, Jr., Esq., for the insurer

WILSON, J. The insurer appeals from the decision of an administrative judge in which the employee was awarded weekly benefits for temporary, total incapacity under G. L. c. 152, § 34, until exhaustion and ongoing § 34A benefits for permanent and total disability. Finding no error, we affirm the administrative judge's decision.

Rodolfo Marchione, age sixty-four at the time of the hearing, was born in Italy and attended school there until the age of twelve. In 1966, he immigrated to the United States. The employee does not speak English well and reads only a little English. His entire work experience has been as a heavy laborer. (Dec. 3.)

In April 1998, Mr. Marchione was hired by McCourt Construction as a "pick and shovel" laborer. On July 9, 1998, while in the scope of his employment, the employee fell off the bed of a pickup truck and injured his head and back. As a result, the employee continues to experience occasional head and back pain. He is able to drive ten to twenty minutes and performs daily physical therapy exercises that include walking. (Dec. 3.)

The insurer accepted liability and, beginning on July 9, 1998, paid § 34 weekly benefits for temporary and total incapacity. Subsequently, on June 27, 2000, the insurer filed a complaint to modify or discontinue benefits. That

complaint was denied at conference and the insurer appealed to a hearing de novo. The employee was permitted to join a claim for permanent and total incapacity benefits under § 34A. (Dec. 2.)

On August 8, 2000, Dr. John F. McConville examined the employee pursuant to § 11A. The parties deposed the impartial examiner, whose medical report and deposition testimony were admitted into evidence. (Dec. 1, 3.) Dr. McConville diagnosed cerebral concussion, status post mild right frontal subdural hematoma, degenerative arthritis of the dorsal and lumbar spine and healed fracture mild compression L4 vertebrate with moderate intermittent right lumbar radiculopathy. The doctor opined that the closed head injury, subdural hematoma and fracture of the L4 vertebrate were causally related to the work incident. He further opined that the fracture caused the underlying degenerative changes throughout the employee's skeletal axis to be much more symptomatic, a condition that is permanent in nature. He imposed the following physical restrictions upon the employee: no lifting greater than twenty pounds on an occasional basis, no climbing, stooping, bending or twisting his central skeletal axis. (Dec. 5; Rep. of § 11A Examiner, 3-4.)

Jonathan J. Fandel, a case manager for Concentra Managed Care, Inc., testified as a vocational expert on behalf of the insurer. He opined that a person with the employee's medical restrictions and vocational profile could obtain gainful employment as a bench assembler or as a parking lot cashier. (Dec. 5.)

A videotape taken by the insurer's investigator was admitted into evidence. (Dec. 1.) The tape shows the employee using two different brooms to sweep leaves in his driveway and in front of his house, as well as driving his truck. (Dec. 3.)

The judge adopted the impartial examiner's medical opinions, which did not change upon viewing the videotape of the employee's activities. (Dec. 4, 5.) After assessing the employee's physical restrictions, his limited education and

work experience and his difficulty with the English language, the judge was not persuaded that the employee was capable of the employment opportunities suggested by the insurer's vocational expert, and concluded that the insurer is liable for the employee's permanent and total incapacity under § 34A upon exhaustion of § 34 benefits.

The insurer contends that the judge erred in awarding weekly benefits for permanent and total incapacity, as the medical evidence supports the conclusion that the employee has a sedentary work capacity.

After review of the insurer's arguments and the record before us, we are satisfied that the judge's analysis of the employee's capacity for work is adequately supported by her findings on the physical disability and the vocational factors. See Scheffler's Case, 419 Mass. 251, 256 (1994.) We summarily affirm the decision as to the finding of total and permanent incapacity under § 34A.

A second issue raised by the insurer bears comment. In a two-pronged argument, the insurer asserts that the judge failed to take into consideration the employee's substantial, pre-existing, degenerative changes in his lower back and that the employee did not meet his burden of proving that the July 1998 incident remained "a major" cause of his current disability or need for treatment.[1] (Insurer's brief 4, 7.) Again, we disagree. The judge clearly considered the employee's pre-existing, degenerative condition. In addition to reference elsewhere in her decision, the judge stated: "In this case the impartial medical examiner has opined that the fracture of the L4 vertebrate 'appears to have

[1] General Laws c. 152, § 1(7A), reads in pertinent part as follows:

> 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.

markedly accentuated and caused to be much more symptomatic the underlying degenerative changes throughout his entire skeletal axis. This aggravation was not temporary, but was permanent and the employee has not returned to his baseline pre-injury condition.' Accordingly, the industrial injury remains a major cause of the employee's disability." (Dec. 7; quoting Rep. of § 11A Examiner, 4.)

We have held that it is possible to meet the "a major" standard for causal relationship for the purposes of § 1(7A), without a medical expert's precisely invoking the words "a major." Siano v. Specialty Bolt and Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002)("A major cause is an important, a serious, a moderately significant cause"). It is sufficient if the medical expert utilizes words that are "substantially equivalent" in meaning. Id. In the case at hand, the § 11A examiner used just such equivalent language when he opined that:

> The closed head injury, subdural hematoma along with the fracture of the L4 vertebrate are clearly *totally and solely* related to the work site injury of July 09, 1998.
>
> . . .
>
> [T]he fracture of the L4 vertebrate appears to have *markedly accentuated and caused to be much more symptomatic* the underlying degenerative changes throughout his [the employee's] entire central skeletal axis.

(Rep. of § 11A Examiner 4; emphasis supplied.) Further, in response to hypothetical questions, the impartial examiner wrote:

> 1. The examiner concludes that the work site injury of July 09, 1998 did in fact cause an aggravation of a preexisting underlying condition but this was *not of a temporary period but of a permanent nature* and he has not yet returned to his base line pre-injury condition.
> 2. This examiner is of the opinion that the employee's *present symptoms* are a result of the injury of July 09, 1998 and *cannot be attributed to the preexisting assumed degenerative condition* consistent with an individual this age who had been employed in heavy duty labor.

(Rep. of § 11A Examiner 4; emphasis supplied.)

The medical evidence in the case before us provides ample support for the judge's conclusion that the work injury remains a major cause of the employee's physical condition. (Rep. of § 11A Examiner 3-4; Dep. 28.) Contrast Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001) (benefits properly denied where medical evidence insufficient and burden is on the employee to move to supplement an inadequate medical record). Accord Blair v. Olympus Healthcare, 17 Mass. Workers' Comp. Rep. 37, 40-41 (2003); Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. 7, 8 (2003).

The decision is affirmed. The insurer shall pay an attorney's fee of $1,273.54.

So ordered.

Filed: **September 30, 2003**

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Sara Holmes Wilson
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge