COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038163-08**

William Goodwin	Employee
Keyspan New England, LLC[1]	Employer
Keyspan New England, LLC	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Koziol)

The case was heard by Administrative Judge Levine.

APPEARANCES
Joseph P. McKenna, Jr., Esq., for the employee
W. Todd Huston, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision in which the administrative judge concluded the employee had proved that his work injury remained a major cause of his ongoing incapacity under the provisions of § 1(7A).[2] The self-insurer argues that the exclusive medical evidence provided by the impartial medical examiner did not support the judge's conclusion. We disagree, and affirm the decision

The employee, fifty-five years old on the date of the hearing, had "spent his entire working career in the employ of the self-insurer or its predecessors." (Dec. 4.) In the approximately seventeen years prior to his industrial injury, he had worked as a pipefitter, which involved working in cellars and crawl spaces, using a variety of tools

[1] Now National Grid.

[2] 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.

including wrenches and welding equipment, considerable pushing, and overhead and extended arm work. (Id.) On December 29, 2008, while working overhead, using two wrenches to repair a gas leak, the employee felt a "pop" in the back of his neck. Although he had experienced pain in his neck before this incident, it was different now, more toward his right shoulder, with numbness or pain radiating down his right arm. The pain was significantly worse than in the past, and it did not go away. (Dec. 4-5.)

The employee continued to work full duty but partnered with a co-worker who did more of the work. Thinking the pain would resolve on its own, the employee did not report his injury until February 2, 2009. (Id.) The employee first saw Dr. Arnold Soslow on March 6, 2009, and was placed on light duty by his employer that same day. On March 20, 2009, a cervical MRI revealed extensive degenerative disc disease and disc degeneration at multiple levels, with osteophyte formation, facet changes and impingement of the thecal sac at C4-5 and C6, primarily on the right side. On October 5, 2009, the employee underwent a cervical decompression. After periods of total and partial incapacity,[3] the employee returned to full duty work on February 1, 2010. (Dec. 5-6.)

The employee filed a claim for benefits, which the self-insurer denied. The parties cross-appealed the § 10A conference order of payment of § 35 benefits and, on November 18, 2009, Dr. Nabil Basta performed a § 11A impartial medical examination. (Dec. 2, 6.) He diagnosed a cervical strain and aggravation of pre-existing cervical spondylosis at multiple levels. Dr. Basta opined the work injury was responsible for forty per cent of the employee's disability, and sixty per cent was attributable to the employee's pre-existing degenerative condition. Dr. Basta testified that the work injury was not a major cause of the employee's disability, because he

[3] The parties stipulated, and the judge found, that the employee was partially incapacitated from March 6, 2009 to October 4, 2009 and from October 26, 2009 to January 31, 2010; totally incapacitated from October 5, 2009 to October 25, 2009; and that he returned to full duty work on February 1, 2010. (Dec. 5-6.)

considered that anything less than fifty per cent causation could not be characterized as "major." (Dec. 6; Dep. 14.)

Following our opinion in Lesoine v. Corcoran Mgmt. Co., Inc., 22 Mass. Workers' Comp. Rep. 153 (2008), wherein Dr. Basta also was the impartial physician, the judge discredited Dr. Basta's definition of "a major," as it is used in § 1(7A), and concluded that his opinion ascribing forty per cent causation to the work injury met the statute's heightened standard applicable to "combination" injuries, such as the present cervical aggravation. (Dec. 6-7.) The judge, quoting from Lesoine, wrote:

> [A]s Dr. Basta is reported to have done in Lesoine, . . . Dr. Basta comprehends "a higher standard of proof than what § 1(7A) requires." . . . The teaching of Lesoine is that " 'a major' cause can be something less than the most important cause or, stated differently, well under fifty per[]cent causative of the employee's disability. . . . [W]hile only one cause can be properly labeled 'the' major cause in a given case, multiple causes may qualify as 'a' major cause of the employee's disability. . . . [I] interpret the totality of Dr. Basta's testimony, especially his forty per[]cent assessment," . . . to find that the employee has satisfied his burden of proof under § 1(7A). There is no significant difference between Dr. Basta's testimony/opinions regarding the meaning of "a major" in the present case as compared to the description in Lesoine of his testimony/opinions on the same subject.

(Dec. 6-7.)

Contrary to the self-insurer's argument, the judge's decision is legally sound. In Lesoine, supra, we concluded that a medical opinion assessing the contributions of non work-related and work-related causes in exactly the same sixty/forty per cent ratio was adequate to support a finding of "major" causation under § 1(7A), the adopted medical expert's opinion nothwithstanding. The self-insurer's attempts to distinguish Lesoine are unavailing. The self-insurer argues that, unlike the present case, Dr. Basta's opinion in Lesoine was indeterminate, i.e., he could not say whether the work contribution was "a major cause." While this is true as far as it goes, it ignores the dispositive part of Dr. Basta's opinion in Lesoine, namely, that the work injury's contribution was a forty per cent cause of the employee's disability and his need for treatment. Id. at 159. Again, this opinion as to "a major" causation is

identical to the doctor's opinion here.[4] The self-insurer also argues that Dr. Basta did not change his opinion when asked to assume and accept that "a major" cause could be "well under fifty percent." (Dep. 21.)[5] The judge, however, did not adopt that aspect of Dr. Basta's opinion. It is axiomatic that he was under no obligation to do so. See, e.g., Tucker v. Stanley & Sons, Inc., 24 Mass. Workers' Comp. Rep. 239 (2010), citing Clarici's Case, 340 Mass. 495, 497 (1960)(judge free to adopt such portions of medical testimony as he deemed credible).

When, as here, there are but two identified causes, a forty per cent cause is certainly "a major" cause. It is not within the purview of the impartial physician to define the legal scope of the statutory language. "In light of Dr. Basta's mis-understanding 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 per[]cent assessment, to conclude the employee carried his § 1(7A) burden of proof." Lesoine, supra at 159. The judge here properly applied that holding to a

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[4] Moreover, the self-insurer's reliance on Healey v. Tewksbury Hosp., 21 Mass. Workers' Comp. Rep. 87 (2007), is misplaced. In Healey, the impartial physician did not address the relative percentages of causation as between the pre-existing, non work-related conditions and the work injury; rather, he opined that the work injury remained "a significant factor, but not a major factor" in the employee's present disability. The doctor testified that by "significant," he meant "just like every other injury." Id. at 88-89. The reviewing board reversed the administrative judge's holding that the doctor's opinion satisfied the "a major" cause provision of § 1(7A).

[5] The actual questions put to Dr. Basta by self-insurer's counsel were curiously worded:

> Q.: *If I were to assume* that a major cause can be well under 50 per[]cent causative of the employee's disability, hypothetically, *I'm assuming that*, does that change your opinion as to whether or not in Mr. Goodwin's case the industrial accident was a major cause of his disability and need for treatment?
> A.: It doesn't change my opinion.
> Q.: Again, hypothetically, *if I were to assume* that a major cause can be less than the most important cause, would that change your opinion as to whether the industrial accident was not a major cause of this employee's disability and need for treatment?
> A.: It doesn't change my opinion.

(Dep. 21; emphasis added.)

virtually identical medical opinion from the same impartial physician. There is no error.

Accordingly, we affirm the decision. Pursuant to § 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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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **October 24, 2011**