COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 037512-14 001604-16**

Dale Milton	Employee
GT Advanced Technologies, Inc.	Employer
Travelers Casualty & Surety Co. of America	Insurer
Allergan, Inc.	Employer
Travelers Indemnity Company	Insurer

REVIEWING BOARD DECISION

(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Preston.

APPEARANCES

Michael L. Tyner, Esq., for the employee
Donald G. Culgin, Esq., for Travelers Casualty & Surety Co. of America at hearing
Matthew F. King, for Travelers Casualty & Surety Co. of America at deposition
John J. Canniff, Esq., for Travelers Casualty & Surety Co. of America, on appeal
Scott E. Richardson, Esq., for Travelers Indemnity Company

CALLIOTTE, J. The employee in this successive insurer case appeals from a decision denying and dismissing his claims against both insurers.[1] We agree with the employee that the judge erred by expanding the parameters of the dispute before him, making arbitrary and capricious credibility findings, and failing to make sufficient findings for us to conduct an effective appellate review. We therefore vacate the decision and recommit the case for further findings.

The employee, forty-four years old at the time of hearing, worked as a facility manager/technician for Allergan from 2007 through 2012. In November 2012, he left Allergan for GT Advanced Technologies to make more money. The two jobs had physically similar duties, and both involved heavy work. (Dec. 3.)

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[1] The claim against Travelers Casualty & Surety Co. of America, (board number 037512-14), which insured GT Advanced Technologies, Inc., will be referred to as "Travelers/GT." The claim against Travelers Indemnity Company, (board number 001604-16), which insured Allergan, will be referred to as "Travelers/Allergan."

The employee filed claims against both insurers for § 34 benefits from February 5, 2015, and continuing. Both claims were denied at conference. (Dec. 2-3.)[2] The employee appealed. (Dec. 2-3.) The judge's remaining findings, in their entirety, are as follows:

> The employee claims after working from November 2012 until February 5, 2015, he could no longer perform his job at G.T. because he aggravated/worsened some claimed residual symptoms from an *alleged previous claimed low back industrial injury of March 29, 2011* while then working for Allergan.
>
> I do not find the Employee to be a credible witness, nor a truthful historian with physicians regarding his claimed scenario from 2011 through hearing of low back complaints and their origination. I cannot connect the dots from his testimony and the evidence before me to find that the job he did at G.T. worsened or aggravated the *alleged residual low back symptomology from an alleged March 29, 2011 industrial event*. I do not accept that he ever was furnished any accommodations, or needed such, to do his facility manager job. I do not accept that his departure from G.T. had anything to do with any industrial injury. *I do not find any convincing testimony that an industrial accident occurred with either Employer*. I do not find the Employee's medical history as recited to each medical provider to be credible, *nor establish that personal injuries occurred at either employer while he was so employed.*

(Dec. 3-4; emphases added.) With that, the judge denied and dismissed both claims. (Dec. 4.)

On appeal, the employee first argues that the judge erred by expanding the parameters of the dispute before him by finding no "convincing testimony that an industrial accident occurred with either Employer," (Dec. 3-4), when it was undisputed

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[2] The claims specified dates of injury of March 29, 2011, against Travelers/Allergan, and October 27, 2014, against Travelers/GT. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (1996)(judicial notice taken of board file). The employee testified that he was transferred from GT in Salem, Massachusetts to GT in Merrimack New Hampshire after October 27, 2014, (Tr. 25), and last worked for GT on February 5, 2015, (Tr. 30), the date on which his claim for benefits begins. He further testified that he received workers' compensation benefits in New Hampshire for about a year, which were terminated by way of a hearing decision effective February 24, 2016. (Tr. 40.) The employee stipulated in his closing argument, Rizzo, supra, and appellate brief that Travelers/GT would be entitled to credit itself for benefits it paid pursuant to New Hampshire's workers' compensation statute from any benefits awarded in the instant claim. (Employee br. 2, fn.)

that the employee had suffered an injury on March 29, 2011, while working for Allergan. We agree.

The employee correctly points out that Travelers/Allergan, the insurer on the risk on March 29, 2011, did not contest liability for that injury, either at conference or at hearing. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(permissible to take judicial notice of board file). In its brief to the reviewing board, Travelers/Allergan clearly confirms that,

> Allergan did not dispute liability for the incident on March 29, 2011 during the pendency of this claim. It raised defenses to disability and extent, causal relationships [sic] and for medical benefits as well as [an] assertion that any injury sustained on that date was aggravated by subsequent employment with another Massachusetts employer. Liability was not raised as a defense at the hearing or the conference which preceded it. (See Conference Memorandum, July 11, 2016). *Allergan does not dispute the Appellant's argument that liability for the March 29, 2011 incident was not at issue in the litigation of his claim.*

(Travelers/Allergan br. 2; emphasis added.)[3]

We have long held that the parties frame the boundaries of their disagreement when they set out the specific claims and the defenses raised, and that a judge errs by expanding the parameters of the dispute beyond those set by the parties. Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000), citing Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)(where dispute was only as to extent of medical disability, medical conflict was erroneously widened when § 11A examiner addressed causal relationship). In Remillard v. TJX Companies, Inc., 27 Mass. Workers' Comp. Rep. 97 (2013), which was also a successive insurer case, we held that, where the insurer did not raise liability as an issue or defend at hearing on the ground the employee had suffered a new injury after she returned to work with a new employer, the issue of liability was not before the judge. Id. at 102. We further held that

[3] Travelers/GT, on the other hand, did dispute liability, as well as disability, causal relationship, including § 1(7A), entitlement to §§ 13, 30 and 36 benefits, and it raised the affirmative defenses of res judicata and collateral estoppel. (Ex. 3, Insurer Hearing Memorandum for GT Advanced Technologies, DIA# 37512-14.)

requiring "the judge to rule on issues neither party has clearly raised at the hearing would potentially create due process violations." Id. at 102-103, citing Haley's Case, 356 Mass. 678, 681 (1970).[4]

Here, although Travelers/Allergan raised the issue of successor insurer liability--i.e., that the employee aggravated his original injury after he began working for a new employer (GT)--it did not contest liability for the initial injury of March 29, 2011, at Allergan. Its failure to raise initial liability thus established the occurrence of the March 29, 2011, injury. See Ginley's Case, 244 Mass. 346, 347-348 (1923)(employee does not have burden to prove elements of his claim which are conceded by insurer); see also Yeshiau v. Mt. Auburn Hospital, 27 Mass. Workers' Comp. Rep. 15, 19 n.10 (2013)(self-insurer's concession at oral argument that it did not question permanency obviated the need for employee to prove that element of her claim). The judge's consideration of initial liability where it was not contested, violates not only the statute and regulations, but basic principles of due process. Thus, because Travelers/Allergan conceded liability for the March 29, 2011, injury, by failing to raise initial liability as an issue, the judge impermissibly expanded the parameters of the dispute between the parties by consistently referring to the "alleged" industrial injury of March 29, 2011, and by ultimately finding no injury occurred on that date. (Dec. 4.) Cf. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections and arguments not raised below are waived on appeal).

The employee also raises concerns about the judge's credibility findings, arguing that the decision is arbitrary and capricious because the judge failed to explain his reasons for not crediting the employee, thus defeating the opportunity for any meaningful

[4] See also 452 Code Mass. Regs. § 1.11(3), which states, in pertinent part, "Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the ground on which the insurer . . . has declined to pay compensation . . . ." " 'The import of [this regulation] is unmistakable: an insurer must give the employee fair notice of the grounds for its defense at hearing.' " Remillard, supra at 102, quoting Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 597-598 (1995).

appellate review. The insurers counter that credibility determinations are the exclusive province of the administrative judge, and the reviewing board has no power to disturb those findings. See, e.g. Lettich's Case, 403 Mass. 389, 394 (1988).

Generally, credibility is a sound basis on which a judge may deny a claim. However, a judge's credibility determinations may be overturned as arbitrary and capricious if they are not based on the record evidence or reasonable inferences drawn therefrom and pertinent to the claim. Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349, 351 (2002), citing Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001) and Yates v. ASCAP, 11 Mass. Workers' Cop. Rep. 447, 454-455 (1997). In addition, "credibility findings that bear no relation to the issues that are in dispute at hearing," are also arbitrary and capricious, and entitled to no deference. Correia, Jr. v. Unicco Service Co., 16 Mass. Workers' Comp. Rep. 415, 421 (2002), citing Pittsley, supra, and Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep 364 (2016). Here, the judge's finding that no injury occurred on March 29, 2011, is arbitrary and capricious because it is based on his disbelief of the employee's testimony on an issue that was not disputed. We therefore vacate the judge's finding that no injury occurred on March 29, 2011, as both outside the parameters of the dispute and arbitrary and capricious.

Some, if not all, of the judge's remaining credibility findings may have been tainted by his erroneous finding that no injury occurred at Allergan. However, because the judge simply rejected as not credible essentially every aspect of the employee's testimony and his medical history, without making findings of fact as to the nature of the injury, the testimony he credits, the medical evidence he adopts, or almost any other aspect of the case, we cannot make that determination. See Leary v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 73, 78 (2010)(judge's consideration of non-evidentiary surveillance video may have tainted her credibility findings, but because of lack of specificity of findings, we cannot make that determination, and must vacate credibility findings). We must therefore vacate the judge's other credibility findings as well. Id.

On recommittal, the judge must make credibility findings based on the evidence of record, or reasonable inferences drawn therefrom, Pittsley, supra, which are limited to the issues in dispute. Correia, supra. In making new credibility findings, he does not have to explain *why* he does not find the employee credible, Latino v. Beth Israel Deaconess Medical Center, 19 Mass. Workers' Comp. Rep. 88, 89 (2005), but he does need to link his credibility findings to the facts he finds and the issues in the case. See Frey, supra at 368 ("a finding that the employee lacks credibility, do[es] not, ipso facto, bar an otherwise compensable claim; the lack of credibility must adversely affect, i.e., must be connected to, one of the substantive elements of the employee's case: liability, causal relationship or extent of incapacity").

In a successive insurer case where the first insurer's liability for the initial injury is not disputed, the issues become extent of disability, if any, and whether such disability is causally related to the initial injury or to an aggravation of that injury while the employee was working for the second employer. See Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007);[5] Havill v. Mead Westvaco/Willow Mill, 26 Mass. Workers' Comp. Rep. 255 (2012). The judge here has not only made almost no factual findings, he has done virtually no analysis of the issues, nor has he addressed the medical evidence submitted,

[5] In Pilon's Case, supra, the court explained:

> Where an employee suffers two or more compensable injuries that are causally related to a resulting incapacity, only one insurer is chargeable for the payment of compensation for the same disability. The successive insurer rule provides that the insurer covering the risk at the time of the most recent injury that bears causal relation to the disability claimed must pay the entire compensation. See Fitzpatrick's Case, 331 Mass. 298, 300 (1954); Casey's Case, 348 Mass. 572, 574 (1965); Zerofski's Case, 385 Mass. 590, 592 (1982). The subsequent injury need not be a significant contributing cause to the incapacity. So long as it is to the "slightest extent" a contributing cause, the insurer at the time of the recent injury will be held liable to cover the entire incapacity. See Rock's Case, 323 Mass. 428, 429 (1948). The determination whether there was a subsequent injury and whether it had causal connection to the ensuing incapacity is essentially a question of fact. Costa's Case, 333 Mass. 286, 288 (1955); see also Zerofski's Case, 385 Mass. at 594, on which expert medical opinion is required. See Casey's Case, supra.

Id. at 169.

consisting of the § 11A report and deposition of Dr. Graf, and numerous records submitted by the employee. On recommittal, the judge must make sufficient findings so that we may "determine with reasonable certainty whether correct rules of law have been applied to the facts that could be properly found." Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Without such clear findings on "the issues in controversy, the decision on each, and a brief statement of the grounds for each such decision," G. L. c. 152, § 11B, we cannot perform our appellate function. Tejada v. M.B.T.A. 10 Mass. Workers' Comp. Rep. 482, 484 (1995).

Accordingly, we vacate the decision and recommit the case for further findings and analysis consistent with this opinion. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7) to defray the reasonable costs of counsel. If such fee is sought, the employee's counsel is directed to submit to this board for review, a duly executed fee agreement between counsel and the employee setting out either the specific fee agreed to for this appellate work, or an hourly rate, together with an affidavit from counsel as to the hours spent in preparing and presenting this appeal. No fee shall be due and collected from the employee unless and until that fee agreement and affidavit are reviewed and approved by this board.

So ordered.

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Carol Calliotte
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***October 16, 2018***

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Martin J. Long
Administrative Law Judge