COMMONWEALTH OF MASSACHSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034853-03**

Denise K. Mehigan Pouliot	Employee
E.W. Audet and Sons, Inc.	Employer
Massachusetts Insurers Insolvency Fund	Petitioner

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Fabiszewski)

This case was heard by Judge Preston.

APPEARANCES
Gregory P. Deschenes, Esq., for Massachusetts Insurer Insolvency Fund, at hearing and on appeal
Elizabeth Merryweather, Esq., for Massachusetts Insurers Insolvency Fund, on appeal
Shenan L. Pellegrini, Esq., for Genesis Insurance Company

CALLIOTTE, J. The Massachusetts Insurers Insolvency Fund (MIIF) appeals from a decision denying its request to substitute Genesis Insurance Company[1] as the party liable to pay the employee's benefits. For the following reasons, we vacate the decision and recommit the case for the creation of an adequate record for appellate review, and further findings of fact and rulings of law consistent with this opinion.

Lumbermens Mutual Insurance Company (Lumbermens) issued a policy of workers' compensation insurance to the Massachusetts Water Resources Authority (MWRA), for the period from March 1, 2003 to March 1, 2004, with E.W. Audet (employer) as a named insured with respect to work performed by the employer at the Walnut Hill Water Treatment Plant, which was owned and operated by the MWRA. (MIIF br. 6; Genesis br. 3.) The employee was injured on October 13, 2003, while

[1] We note that, although Genesis participated in the conference, the hearing and the appeal, the decision does not contain a formal ruling on MIIF's "Motion to Join a Necessary Party." (Exh. A for Identification.) On recommittal, the judge needs to address the motion. However, for ease of reference we refer to MIIF and Genesis as "the parties" as they do in their "Joint Stipulation of Facts and Exhibits." (Exh. B for Identification).

employed by E.W. Audet at the Walnut Hill Plant. Lumbermens accepted her claim, and extensive proceedings followed, including a 2009 hearing decision ordering Lumbermens to pay the employee § 34A permanent and total incapacity benefits. That decision was summarily affirmed by this board on June 3, 2011. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file).

On May 10, 2013, Lumbermens was adjudged insolvent, and MIIF began making workers' compensation payments to the employee pursuant to G.L. c. 175D, §§ 1-5. (MIIF br. 6-7; Genesis br. 4.) On December 4, 2017, MIIF filed a Form 108 Complaint for Discontinuance, a "Motion to Join a Necessary Party [Genesis Insurance Company]," and a "Petition for Substitution of Insurer [Genesis] and for Reimbursement" of benefits paid by MIIF, which generated these proceedings. (Exh. A for Identification; see Exh. 1, DMS printout DIA# 3485303.) Brought pursuant to G. L. c. 152, § 15A and 452 Code Mass. Regs. § 1.20, the petition alleged that Genesis was the successor in interest to Fairfield Insurance Company, which had issued a policy of workers' compensation insurance to the employer covering the date on which the employee was injured. MIIF alleged that Genesis became obligated to pay the employee benefits when Lumbermens became insolvent because MIIF's enabling statute, G.L. c. 175D, requires that when a claim is covered by other solvent insurance, such solvent insurance must be exhausted as a condition of recovery from MIIF. (MIIF br. 5-6.) Genesis countered that the policy issued by Fairfield did not cover the employee because it specifically covered only two of the employer's locations, not including the Walnut Hill location where the employee was injured. Genesis maintained it provided primary coverage for the employer's other locations, such as Walnut Hill, "but only if there was no other insurance for them." Genesis alleged that other insurance was provided by the Lumbermens policy which specifically covered the employer's work at the Walnut Hill plant. (Genesis br. 7.) In a § 10A conference order dated June 12, 2018, the judge denied the "Petition/Claim" for

substitution and reimbursement, without specifically ruling on the joinder motion. Rizzo, supra. MIIF appealed to hearing.

Although the judge stated in his July 7, 2020, hearing decision that MIIF and Genesis appeared before him for hearing on December 9, 2019, (Dec. 2), there is no transcript of the proceeding in OnBase, and no suggestion by the parties that one was created. The single exhibit admitted as evidence was a "DMS printout DIA #348303, 8 pages," (Exh. 1), which is a list of the documents entered into OnBase for the board number associated with the employee's 2003 injury.[2] In addition, the judge listed five documents or groups of documents as "Identified Documents – Non-Evidentiary":

> "A" Insurer (MIIF) Complaint for Modification Discontinuance/Recoupment, and Joinder of Genesis Insurance Company, to Substitute Genesis Insurance Company, in place of MIIF
> "B" Joint Request for Judicial Notice and Joint Stipulation of Facts including attachments, May 24, 2019
> "C" MIIF Hearing Memorandum
> "D" Hearing Memorandum Genesis Insurance Company
> "E" MIIF Response to My Request for Copy of February 28, 2017 Alleged Petition

(Dec. 2.)

The judge continued, "After examining the hearing memorandums and examining the DIA file including the DMS (Document Management System), I find as follows:"

> The Massachusetts Insurer Insolvency Fund and the Genesis Insurance Company appeared before me for hearing December 09, 2019 on the MIIF appeal of my 10A conference denial of June 12, 2018. The MIIF seeks to substitute the Genesis Insurance Company for the MIIF. If that were to happen, the Genesis Insurance Company thereafter might be responsible to continue benefits and reimburse MIIF for benefits it paid to the Employee, Denise K. Mehigan Pouliot. The prior insurer, Lumbermens Insurance Company was adjudged insolvent May 10, 2013. The MIIF has paid Sections 34, 34A, 13 and 30 benefits to Mehigan Pouliot since then and continues to do so. Neither Genesis nor the MIIF presented any witnesses, affidavits or credible evidence at this hearing. They submitted only

[2] OnBase, the department's document management system (DMS), is the department's only board file and record. Morales v. Not Your Average Joe's, Inc., 31 Mass. Workers' Comp. Rep. 1, 6 (2017).

> their hearing memorandums with attached documents on their position regarding the alleged matter proposed to be litigated.
>
> I do not have authority here to write or rewrite insurance contracts, or substitute, or change, or to alter or enforce a court order regarding whether the MIIF remains responsible to pay Mehigan Pouliot her continuing benefits pursuant to Chapter 152. The MIIF could have sought timely relief for its now claimed substitution of insurers in Superior Court. If I had such authority, the MIIF could not overcome its failure to timely file its claim with this Department within the 4(four) year statute of limitations as set out in Chapter 152. I will not ignore the clear language of the statute. I find the DIA does not possess any credible evidence within its Documents Management System (DMS) to verify compliance with the four year statute of limitations. No such evidence exists. I find that this claim by the MIIF is without merit never having been properly timely documented. It is now denied and dismissed. I do not accept or acknowledge that any alleged fact, or law or opinion stated in either hearing memorandum, submitted by either or both of the parties, that is in conflict, or contrary to my decision is accurate or material to my decision.

(Dec. 1-2.) The above is the entirety of the judge's findings of fact and ruling of law.

On appeal, MIIF argues that, 1) the Department has exclusive jurisdiction to decide the merits of the dispute between MIIF and Genesis; 2) the judge has authority to grant the relief MIIF seeks in its petition; 3) the judge ignored the extensive evidentiary record jointly submitted by the parties; 4) the judge failed to make any findings of fact or rulings of law based on the evidence; 5) the judge erred in ruling that MIIF's petition is barred by the statute of limitations because Genesis never raised it as a defense, and, in any case, the four-year statute of limitations in G.L. c. 152, § 41 does not apply to this case, as a matter of law. MIIF requests that we, 1) reverse and vacate the hearing decision; 2) recommit the case for, a) findings of fact and rulings of law based on the Joint Statement of Facts and Exhibits and Joint Request for Judicial Notice submitted to the judge, and b) rulings of law on whether MIIF or Genesis is the party responsible for paying the employee workers' compensation benefits, as well as MIIF's entitlement to reimbursement from Genesis for benefits paid to date; 3) order an evidentiary hearing on the statute of limitations, if we should determine that the four-year statute relied on by the judge applies. (MIIF br. 28-29.)

Genesis responds that the only issues before the reviewing board are procedural, as the judge "did not decide the merits of [MIIF's] Petition, but rather held that he lacked authority to entertain the Petition and that it was not timely filed." (Genesis br. 6.) Genesis does not challenge the DIA's subject matter jurisdiction, as it acknowledges the DIA has full power to decide insurance coverage questions. It maintains, however that the judge does not have authority to rule on MIIF's claim brought pursuant to § 15A, because such claim was not brought prior to a final order, i.e., the 2011 unappealed reviewing board decision affirming the 2009 hearing decision ordering Lumbermens to pay the employee § 34A benefits. Genesis further maintains that the judge's finding that the four-year statute of limitations applies was correctly based, not on "any disbelief regarding the facts of this case, but rather . . . upon a 'reasonable inference' . . . from the *evidence presented* by the parties at Hearing." (Genesis br. 17; emphasis added.)

We agree with MIIF that there are several reasons why the decision must be vacated and recommitted. We first address MIIF's argument that the judge ignored the extensive evidentiary record jointly submitted by the parties in the form of the "Joint Stipulation of Facts and Exhibits," and "Joint Request for Judicial Notice,"[3] (Exh. B for Identification), and failed to make findings of fact and rulings of law based on the evidence. MIIF states that,

> [T]he parties submitted to the administrative judge a Joint Stipulation of Agreed Facts and Exhibits, and Joint Request for Judicial Notice, containing all relevant facts in lieu of live testimony, in order to conserve judicial resources and litigation costs. The Joint Stipulation contains 7 pages of agreed-upon facts and 12 agreed-upon exhibits, while the Joint Request refers to 7 documents and pleadings on the court's docket.

[3] MIIF does not separate its argument that the judge ignored the Joint Request for Judicial Notice from its argument that he ignored the Joint Stipulation of Facts and Exhibits. (MIIF br. 17, 19.) Thus, we do not address judicial notice separately, other than to note that all the documents of which the parties requested the judge take judicial notice were part of the board file. It is well-established that the judge may take judicial notice of documents in the board file. See Rizzo, supra; Bordeleau v. M.C.I. Concord, 35 Mass. Workers' Comp. Rep. 75, 77 (2021)(judge stated he would take judicial notice of board files). Thus, on recommittal, the judge should clarify whether he has taken judicial notice of the requested documents.

(MIIF br. 17-18.) Genesis also acknowledges that "the parties submitted to the Administrative Judge a Joint Stipulation of Agreed Facts and Exhibits, as well as a Joint Request for Judicial Notice, which included the relevant facts." (Genesis br. 16.) However, it "takes no position on the Administrative Judge's finding that '[n]either Genesis nor the MIIF presented any witnesses, affidavits or credible evidence at this hearing. They submitted only their hearing memorandums with attached documents on their position regarding the alleged matter proposed to be litigated.' " (Genesis br. 16, quoting Dec. 3.) Genesis concludes that the judge's decision "properly identified findings of fact and rulings of law which clearly are supported by the *evidence that was before him*," and was further sufficient to meet the requirements of G.L. c. 152, § 11B that the decision " 'set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision.' " (Genesis br. 18, emphasis added.)

We agree with MIIF that, despite the fact that both parties agree the Joint Stipulation of Facts and Exhibits were submitted to the judge, he neither admitted them as evidence, nor based his findings of fact and rulings of law on them, nor made appropriate findings as to why he did not accept the stipulations. In so doing, he both denied the parties their right to a "decision based on the evidence presented at hearing," Haley's Case, 356 Mass. 678, 680-681 (1970), and failed to create an adequate record for appellate review.

The sole piece of evidence the judge lists is a printout from the Board's Document Management System (DMS or OnBase), entitled "Case Document List, Board No 3485303."[4] Absent from this list, and from the judge's discussion, are the parties' Joint Stipulation of Facts, with attached exhibits, and Joint Request for Judicial Notice. These items are clearly designated as "Identified Documents - *Non-evidentiary*." (Dec. 1;

[4] It is unclear for what purpose this document was admitted. It is simply a list and description of documents in DMS from 2/11/15 through 1/7/20, the document date, the date the document was received, and by whom it was submitted. We note that the judge does mention DMS with respect to the statute of limitations: "I find the DIA does not possess any credible evidence within its Documents Management System (DMS) to verify compliance with the four year statute of limitations." (Dec. 3.)

emphasis added.) See Larkin v. Dedham Medical Associates, Inc., 93 Mass. App. Ct. 661 (2018) (" 'absent circumstances or an agreement revealing a different approach, . . . "documents marked for identification are not evidence" ' "). The judge's other findings make it clear he did not consider these identified documents as evidence.

In addition to failing to admit or list the stipulations as evidence, the judge ignored them, stating that, "Neither Genesis nor the MIIF presented any witnesses, affidavits or *credible evidence* at this hearing. They submitted only their hearing memorandums with attached documents on their position regarding the alleged matter proposed to be litigated." (Dec. 3; emphasis added.) He thereby essentially vacated the parties' stipulations. See Goncalves Cordeiro v. Carlos Painting, 33 Mass. Workers' Comp. Rep. 211, 218 (2019)(judge essentially vacated stipulation as to average weekly wage by ignoring it and making further findings of fact altering stipulated average weekly wage), citing Guzman v. Act Abatement Corp., 23 Mass. Workers' Comp. Rep. 291, 297 (2009). This is impermissible.

Because it is undisputed that the parties submitted agreed stipulations of fact, those stipulations should have been admitted as evidence and accepted as fact, absent a finding that those stipulations were improvidently made or not conducive to justice:

> "Nothing is more common in practice or more useful in dispatching the business of the courts than for counsel to admit undisputed facts." Brocklesby v. Newton, 294 Mass. 41, 43 (1936). Generally such stipulations are binding on the parties, and respected by the courts, unless a court determines that to do so would be "improvident or not conducive to justice." Loring v. Mercer, 318 Mass. 599, 601 (1945).

Goddard v. Goucher, 89 Mass. App. Ct. 41, 44 (2015). Here, the judge made no determination that the stipulated facts were made improvidently or were not conducive to justice, nor did either party request such a determination. See Stuart v. Brookline, 412 Mass. 251 (1992)(where case submitted to trial court on statement of agreed facts, Appeals Court refused to discharge statement of agreed facts as not conducive to justice, where defendant had not asked for modification or rescission of any part of the statement of agreed facts at trial).

The judge did not have discretion to vacate the stipulations without making the appropriate findings and providing the parties notice and an opportunity to submit further evidence. Goncalves-Cordeiro, supra, citing Guzman, supra. In the absence of such notice and findings, the judge should have entered the stipulations as evidence and used them as the basis for his findings of fact and rulings of law. Goddard, supra; see, e.g., Keaney v. New England Deaconess Hospital, 32 Mass. Workers' Comp. Rep. 259 (2018)(where the case was tried on a "joint stipulation of facts" and accompanying joint exhibits, the judge noted that "no witnesses appeared" and based her findings of fact on the employee's joint proposed stipulations, as well as the joint exhibits).

Furthermore, the judge's statement that he does "not accept or acknowledge that any alleged fact or law or opinion stated in either hearing memorandum submitted, by either or both of the parties, that is in conflict, or contrary to my decision is accurate, or material to my decision," (Dec. 3), not only ignores the stipulations, but is so broad and lacking in specificity, that we cannot possibly "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). As we have long held,

> *When a record is presented to the reviewing board that does not conform to the standard allowing for full appellate review, it is the duty of the board to recommit the case for further findings of fact and rulings on matters of law until a proper record is obtained*. See Moore's Case, 330 Mass.[1, 6 (1953)]. A decision cannot stand in the absence of a foundation for the judge's ultimate conclusion . . . . Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. (1993). [The parties are] entitled to a review by the board pursuant to § 11C, see Demetrius's Case, 304 Mass at 288, and that is not possible on the record before us."

Praetz, supra (emphasis added). Here, the judge clearly failed to create an adequate record for review by failing to admit, consider, or make findings of fact and rulings of law on the "Joint Stipulation of Facts and Exhibits" submitted by the parties. On recommittal, the judge must either admit them as evidence, and make appropriate findings based thereon, or, if he vacates any or all of the stipulations, make findings

explaining why they were improvidently made or not conducive to justice. If the judge makes findings which support discharging the Joint Stipulations, the parties must be given notice and an opportunity to submit further evidence. Goncalves Cordeiro, supra; Guzman, supra, citing Huard v. Forest Street Housing, Inc., 366 Mass. 203, 208 (1974).

Despite failing to create an adequate record for review or to make adequate factual findings based on the evidence submitted, the judge made two apparent rulings of law: 1) that he does not have authority to decide the case; rather MIIF could have filed its petition in Superior Court, and 2) that MIIF's claim was not timely filed under the four-year statute of limitations in chapter 152. To the extent these legal rulings do not depend on factual findings the judge must make on recommittal, we address them.

We first address, in part, the judge's finding regarding his lack of authority. The judge wrote,

> I do not have authority here to write or rewrite insurance contracts, or substitute, or change, or to alter or enforce a court order regarding whether the MIIF remains responsible to pay Mehigan Pouliot her continuing benefits pursuant to Chapter 152. The MIIF could have sought timely relief for its now claimed substitution of insurers in the Superior Court.

(Dec. 3.) The basis for these findings is unclear. To the extent this statement, particularly the second sentence, is a determination that jurisdiction necessarily lies elsewhere, we disagree.[5]

It has long been held that the DIA has full power to adjudicate questions of insurance coverage, Leone's Case, 239 Mass. 1 (1921), as well as exclusive jurisdiction to do so. Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262, 266 (1985)(in coverage dispute between insurers, Utica erred in bringing a declaratory judgment action in Superior Court before exhausting its administrative remedies, thereby

[5] Although the parties do not dispute that jurisdiction lies with the Department, (MIIF br. 12-15; Genesis br. 10-11), subject matter jurisdiction cannot be conferred by consent, conduct or waiver. Cohen v. Cohen, 470 Mass. 708, 713 (2015). As stated above, the judge himself, through his suggestion that Superior Court was the proper forum, has put jurisdiction at issue.

"circumventing the exclusive and mandatory administrative appeal provisions of G.L. c. 152"). Subsequent decisions have affirmed both the exclusive jurisdiction of the Department to decide coverage questions and principles requiring exhaustion of administrative remedies. See Lee v. Int'l Data Group, 55 Mass. App. Ct. 110, 113(2002), quoting Locke, Workmen's Compensation § 131, at 136 (2d ed. 1981)("to the extent an issue of insurance coverage may exist, the DIA has full power to decide such questions of coverage raised in connection with a claim for compensation, and 'the parties have no right to try out the issue in a separate proceeding in court' "). See also, Merchants Ins. Group v. Spicer, 88 Mass. App. Ct. 262, 268 (2015)(citing Lee, supra, with approval, and holding that, in a case involving coverage issues, the insurer was required to exhaust its administrative remedies at the DIA, and, thus, had no right to file a declaratory judgment in Superior Court where a claim under the policy was pending at the DIA); and Nason, Koziol & Wall, Worker's Compensation §§ 7.13 at 154 (3d ed. 2003). [6] Therefore, to the extent the judge held that MIIF's remedy necessarily lay in Superior Court, he erred.

The judge's further finding that, "I do not have authority here to write or rewrite insurance contracts, or substitute, or change, or to alter or enforce a court order regarding whether the MIIF remains responsible to pay Mehigan Pouliot her continuing benefits pursuant to Chapter 152," (Dec. 3), is puzzling. He is not being asked to "write or rewrite insurance contracts," but to interpret them, which is clearly within his authority. Burrell v. All Pro Piano Movers/Omar Soffan, and Mayakaya Corp., d/b/a Royal Academy of Performing Art, 34 Mass. Workers' Comp. Rep. 51 (2020). Moreover, the "court order" to which the judge refers is unclear. If he is referring to the insolvency order, such order is not in evidence, nor have its terms been discussed by the parties. If he is referring to the 2009 hearing decision, as we assume he is, he has failed to make any

[6] Although not technically an insurer, Pilon's Case, 69 Mass. App. Ct. 167, 171 (2007), MIIF "stands in place of an insolvent insurer, and is obligated to pay all 'covered' claims against that insurer." Massachusetts Insurers Insolvency Fund v. Berkshire Bank, 475 Mass. 839, 841 (2016), citing G. L. c. 175D, § 5(1), and Mass. Insurers Insolvency Fund v. Smith, 458 Mass. 561, 562 (2010).

findings as to how he is being asked to "substitute or change or to alter or enforce" it or why he is unable to do so. On recommittal, he should make such findings.

Even without specific findings by the judge supporting his conclusion that he does not have authority to decide whether MIIF or Genesis is responsible for paying benefits to the employee, the parties on appeal have made extensive arguments regarding the judge's authority, or lack thereof, under G. L. c. 152, § 15A to decide this issue. MIIF maintains that it correctly filed its petition pursuant to § 15A and 452 Code Mass. Regs. §1.20, along with a Form 108 complaint to discontinue the employee's benefits. (MIIF br. 15-17; MIIF reply br. 3-15.) Genesis initially stipulated that the DIA "has jurisdiction over this proceeding pursuant to G.L. c. 152, §15A," (Exh. B for Identification, Joint Stipulation of Facts),[7] but now maintains that §15A is not applicable here, and that it is the only mechanism for settling disputes between insurers. Genesis argues that §15A provides for adjudication of coverage issues only prior to a final order, which it claims is the 2009 hearing decision requiring Lumbermens to pay § 34A benefits, which was summarily affirmed by the reviewing board in 2011. Genesis also argues that the so-called "finality doctrine" (which mirrors res judicata), bars consideration of MIIF's petition. (Genesis br. 11-15.) We do not address these arguments, as doing so may require delving into substantive issues which the judge has not yet decided, and about which he must make further findings of fact and rulings of law. However, we disagree, as a matter of law, with Genesis' assumption that § 15A is the only mechanism for settling disputes between insurers, or that it must necessarily be invoked for the judge to settle such disputes, or conversely, that its improper invocation would deprive the judge of the authority to decide the issues raised in MIIF's petition.

[7] "In contrast to stipulations of fact, courts are not bound by stipulations of law, . . ." Shea v. Cameron, 92 Mass. App. Ct. 731, 735 (2018), citing Goddard, supra at 46-47. Therefore, even if the stipulations were accepted by the judge, the stipulation that "[f]or purposes of this proceeding and any appeals therefrom . . . the Massachusetts Department of Industrial Accidents (the "DIA") has jurisdiction over this proceeding pursuant to G.L. c. 152, § 15A," (Joint Stipulation of Facts and Exhibits), would have no legal effect.

Section 15A[8] is a voluntary mechanism which may be invoked in the absence of a dispute as to compensability, whereby the insurers may agree, or the judge may order, that one of them will pay compensation to the employee pending a final decision as to which is liable. If there is a dispute as to compensability, § 15A may apply to provide for an expedited decision-making process. However, there is no requirement that this voluntary mechanism be utilized in all instances where there is a dispute between insurers. See Stillman v. General Dynamics, 23 Mass. Workers Comp. Rep. 121, 126 (2009)(§ 15A is a voluntary mechanism; thus, joinder and utilization of § 15A is not mandatory, though it is highly favored in insurer cases). In fact, even if the petition had not been filed pursuant to § 15A, that factor alone would not have deprived the judge of authority to decide the issues in the case. Bolduc's Case, 84 Mass. App. Ct. 583, 588 (2013)("procedural missteps by the parties do not bind the board, so that failure to invoke § 15A's expedited hearing procedure did not deprive the board of jurisdiction to adjudicate claim before it or to interpret statute). Conversely, if, as Genesis argues, § 15A does not apply to this situation, the "procedural misstep" of filing the petition pursuant to § 15A would not deprive the judge of the ability to adjudicate MIIF's petition. See Bolduc's Case, supra.

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[8] General Laws, c. 152, §15A, provides:

> If one or more claims are filed for an injury and two or more insurers, any one of which may be held to be liable to pay compensation therefor, agree that the injured employee would be entitled to receive such compensation but for the existence of a controversy as to which of said insurers is liable to pay the same, such one of said insurers as they may mutually agree upon or as may be selected by a single member of the board shall pay to the injured employee the compensation aforesaid, pending a final decision of the board as to the matter in controversy, and such decision shall require that the amount of compensation so paid shall be deducted from the award if made against another insurer and be paid by said other insurer to the insurer agreed upon or selected by the single member as aforesaid. If, however, said insurers cannot agree that such employee would be entitled to compensation irrespective of the existence of such controversy, then a hearing to determine the question of liability and the payment of compensation shall be held forthwith by the division, such hearing to take precedence over other pending matters.

As the leading commentator has noted,

> The procedure established by § 15A [enacted in 1931] has been superseded by the conference-order procedure under § 10A. . . Even in the absence of the insurer's agreement required by § 15A, an administrative judge . . . can order payment of compensation against one insurer under § 10A. Compensation paid under the order will be subject to reimbursement as provided in § 15A.

Nason, Koziol & Wall, supra, § 9.13 at 269. In many cases where there is a coverage dispute between insurers as to which is liable, a second insurer is simply joined,[9] either by the employee or by the first insurer, and coverage is adjudicated without any mention or application of § 15A. See, e.g., Burrell, supra (Trust Fund joined to claim against Utica in coverage dispute); Conners v. Zampell Refractories, 28 Mass. Workers' Comp. Rep. 263 (2014)(Liberty joined MIIF and another insurer); Moran v. Signature Breads, Inc., 25 Mass. Workers' Comp. 113 (2011)(motions to join successive insurers allowed). Accordingly, because § 15A's invocation is not required here, we do not decide whether it applies only prior to a final order or whether the 2009 hearing decision affirmed by the reviewing board in 2011 was a final order in this context. Neither do we address Genesis' argument, made in conjunction with its § 15A argument, that the so-called "finality doctrine" applies to bar consideration of MIIF's petition. On recommittal, the judge may address these arguments, to the extent they may be applicable, making clear and specific findings of fact and rulings of law, and keeping in mind that the fact that MIIF's petition was filed pursuant to §15A does not, in and of itself, deprive him of the authority to decide which insurer is liable to pay compensation to the employee. See Praetz, supra.

[9] 452 Code Mass. Regs. § 1.20(1), provides:

> An administrative judge before whom a proceeding is pending may join, or any other party to such proceeding may request the administrative judge to join, as party, on written notice and a right to be heard, an insurer, employer or other person who may be liable for payment of compensation to the claimant.

With respect to the timeliness of MIIF's petition to substitute Genesis, the judge held that, even if he had authority to decide the case, "MIIF could not overcome its failure to timely file its claim with this Department within the 4(four) year statute of limitations as set out in Chapter 152." (Dec. 3.) MIIF argues that Genesis did not raise § 41's four-year statute of limitations and it is therefore waived.[10] MIIF further contends that, even if Genesis had raised it, the four-year limitations period set out in § 41, does not apply in this situation.

We agree with MIIF that, if Genesis did not raise § 41's statute of limitations as an affirmative defense, it is waived. See Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 202 (2017)("Section 41 . . . is in the nature of an affirmative defense which must be raised" before it comes into play), and cases cited; Griffin v. M.B.T.A., 34 Mass. Workers' Comp. Rep. ___ (May 4, 2020). Genesis does not argue, either in its Conference Memorandum, its Hearing Memorandum (Exh. D for Identification), or its appellate brief that it raised § 41 or that the statute of limitations barred MIIF's petition. See Rizzo, supra. Nor does MIIF make any counterargument or even mention the statute of limitations in its Evidentiary Hearing Memorandum. (Exh. C for identification.)

Genesis, in fact, concedes that it did not raise § 41, but contends the judge appropriately raised it himself: "The fact that the statute of limitations was not raised by Genesis, but rather was raised sua sponte by Judge Preston is irrelevant and does not make it an improper basis for Judge Preston's decision." (Genesis br. 21.) We disagree. The judge may not raise an affirmative defense sua sponte, particularly without notice to

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[10] General laws, chapter 152, § 41, provides:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between the disability and his employment. . . .
>
> The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury.

the parties and an opportunity to be heard. See Haley's Case, supra at 681 (1970)(parties are entitled to opportunity to present evidence and "to know what evidence is presented against them and to an opportunity to rebut such evidence, and to argue . . . on the issues of fact and law involved in the hearing"). Here, prior to the issuance of the judge's decision, there was no indication that the affirmative defense of the statute of limitations under § 41 was at issue. Thus, the parties, MIIF in particular, were deprived of the opportunity to address that issue. As we wrote in Milton v. GT Advanced Technologies, 32 Mass. Workers' Comp. Rep. 197, 202 (2018), "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. . . . [R]equiring 'the judge to rule on issues neither party has clearly raised at the hearing would potentially create due process violations.' " (Internal citations omitted.)[11] Cf. Dyan v. S&F Concrete, 25 Mass. Workers' Comp. Rep. 405, 410 (2011)(judge's finding that affirmative defense of § 1(7A) was waived is arbitrary and capricious where parties clearly acknowledged parameters of § 1(7A) dispute throughout hearing). Accordingly, we hold that the § 41 affirmative defense was waived because it was not raised, and the judge therefore erred in addressing it. Doherty, supra at 204, citing Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001).

However, even if Genesis did not waive § 41's four-year limitations period, we agree with MIIF that the judge erred by finding it applied to bar MIIF's petition. The entire focus of § 41 is on the timing of both the initial notice to the insurer or employer, and the filing of the claim for compensation. Section 41 requires "notice to the insurer or insured as soon as practicable after the happening thereof," and the filing of a claim for compensation "within four years from the date *the employee* first became aware of the causal relationship between the disability and his employment." (Emphasis added.) It

[11] See also 452 Code Mass. Regs. § 1.11(3)("Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer . . . has declined to pay compensation").

thus specifically applies, as MIIF argues, to the time by which an employee must assert a claim for benefits after an injury. (MIIF reply br. 18.) See, e.g., Sullivan's Case, 76 Mass. App. Ct. 26 (2009)(for purposes of determining when statute of limitations begins to run, date of injury and date employee became aware of causal relationship between disability and employment may be the same). We have found no cases, nor has Genesis directed us to any, where the four-year limitations period has been applied to a situation such as this.[12] Thus, we hold the judge erred in holding MIIF's petition was barred by the four-year statute of limitations in § 41.

Accordingly, we vacate the decision denying and dismissing MIIF's petition, and recommit the case for the judge to create an adequate record for appellate review, either admitting as evidence the "Joint Stipulations of Fact and Exhibits" and making findings of fact and rulings of law based thereon, or making findings regarding why some or all of the stipulations were improvidently made or are not conducive to justice. In addition, we vacate the judge's rulings of law with respect to jurisdiction, and hold that the fact that MIIF's petition was filed pursuant to §15A does not abrogate the judge's authority to decide the case. Finally, we vacate the judge's holding that chapter 152's four-year statute of limitations under § 41 bars MIIF's petition. We do not address any of the other arguments in the parties' "evidentiary" hearing memoranda (Exhs. C and D for

[12] The only situation we are aware of in which § 41 applies to coverage disputes between insurers is where a successive insurer is brought in with a different date of injury. In that case, the successive insurer must either be joined or a claim filed against it within four years of the date the employee became aware of the causal relationship between the new injury and his disability. However, where the dispute is over which insurer is liable for the *same* injury date, as here, § 41 provides that the statute of limitations is tolled for any benefits due, where compensation is paid, as it was by Lumbermens, or where a claim "for such injury" is timely filed, as it was by the employee against Lumbermens. See Green's Case, 46 Mass. App. Ct. 910 (1999). This is consistent with the joinder provision of 452 Code Mass. Regs. 1.20(2). See Comeau v. Enterprise Electronics, 29 Mass. Workers' Comp. Rep 187, ___ n.8 (2015)(452 Code Mass. Regs. 1.20[2] appears to apply only if the matter joined related back to the original date of injury, as it removes the defense of late claim under § 41). See also Nason, Koziol and Wall, supra, § 16.5 ("Rule 1.20[2], provides that a party to be joined shall not be allowed to raise a defense of late claim if the original claim was filed timely and the party requesting joinder made a reasonable attempt to ascertain the correct party prior to filing the original claim). Thus, even if § 41 applied, it would have been tolled.

Identification) or in their appellate briefs as to why MIIF's petition is or is not barred. The judge is free to consider them on recommittal. If the judge determines the petition is not barred, he should address the substantive issues MIIF has raised below.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: ***August 22, 2022***