COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 037293-11 034762-13**
James Griffin	Employee
Pal Painting Company	Employer
Travelers Insurance Company	Insurer
Jerry Enos Painting Company	Employer
Star Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Judson L. Pierce, Esq., for the employee
Scott E. Richardson, Esq., for Travelers Insurance Company
Susan F. Kendall, Esq., for Star Insurance Company the second insurer at hearing
John J. Canniff, Esq., for Star Insurance Company on appeal

HORAN, J. Travelers Insurance Company (Travelers), the first insurer in this two insurer case, appeals from a decision awarding the employee a closed period of § 34 benefits, and ongoing § 35 benefits.[1] Travelers avers the judge misapplied the successive insurer rule,[2] and erred by not finding Star Insurance Company (Star), the second insurer, liable for the employee's latest period of incapacity and medical treatment. We affirm the decision.

[1] The judge also awarded the employee § 13 medical benefits, including left knee surgery, and an attorney's fee pursuant to § 13A.

[2] The rule dates back to Evans's Case, 299 Mass. 435, 437 (1938), and provides that, "[w]here there have been several compensable injuries, received during the successive periods of coverage of different insurers, the subsequent incapacity must be compensated by . . . the insurer at the time of the most recent injury that bore causal relation to the incapacity." For a more recent discussion of the rule, see Bolduc's Case, 84 Mass. App. Ct. 583, 585-586 (2013).

Travelers accepted liability for the employee's August 2, 2011, injury, suffered while working as a foreman for Pal Painting Company (Pal). (Dec. 705.) On that day, the employee "hurt his knees, the right worse than the left, when he fell out of a truck. . . ." (Dec. 707.) On August 13, 2012, the employee injured his left knee again while working for Pal. (Dec. 707.) On a without prejudice basis, Travelers paid the employee total incapacity benefits from August 14, 2012 to November 22, 2012.[3] (Dec. 707.) Following a conference on the employee's claim for further compensation, Travelers was ordered to pay the employee § 34 benefits from November 23, 2012 to January 19, 2013.[4] Id. Only the employee appealed the conference order. See G. L. c. 152, § 10A(3).

Following his receipt of unemployment benefits from January 20, 2013 to September 9, 2013, the employee began working as a residential painter for Jerry Enos Painting Company (Enos), which was insured by Star. (Dec. 708.) The judge found that, in August 2013, just prior to working as a residential painter with Enos, the employee could walk "with some pain in each knee," and had "good and bad days." Id. While working for Enos, the employee experienced increased knee pain with climbing and kneeling. Id.

On December 4, 2013, the employee was laid off by Enos; he received unemployment compensation from December 18, 2013 to April 4, 2014. Id. On September 2, 2014, the employee underwent a second right knee surgery which

[3] The employee had right knee surgery on August 30, 2012. (Dec. 707.)

[4] On December 14, 2012, the employee filed a claim citing injuries to both knees. That claim included an August 2, 2011 injury date, and also referenced the employee's work, "up to and including 8/13/12." (Form 110 filed 12/19/12.) The conference order, filed on March 26, 2013, also ordered "payment for the requested left knee treatment," and joined "the claim for a left knee injury." The hearing decision orders treatment of the employee's left knee, but causally relates that treatment only to the employee's industrial accident of August 2, 2011. (Dec. 714.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file).

" 'drastically' reduced his knee pain."[5] (Dec. 709.) At the hearing, he sought incapacity and medical benefits from Travelers from December 5-17, 2013, and from April 4, 2014, forward. (Dec. 705.) Alleging that the employee's work for Enos caused him further injury and incapacity, Travelers moved to join Star.[6] The judge allowed the motion. (Dec. 707.)

At the hearing, the judge opened up the medical evidence and considered several medical opinions. Relying on the employee's testimony, and adopting the medical opinion of his treating surgeon, Dr. Jason D. Archibald,[7] the judge found the employee's incapacity after his layoff from Enos was causally related to his August 2, 2011 industrial accident. Accordingly, he ordered Travelers to pay the employee medical and incapacity benefits for all periods claimed.[8] (Dec. 712-714.)

On appeal, we discern that Travelers advances three arguments supporting its position that the judge misapplied the successive insurer rule. First, it argues the judge's finding that,

> the employee's testimony . . . and a temporal relationship of the employee's worsening pain to his continuing work for Jerry Enos Painting suggest that the work performed by the employee for [Enos] did exacerbate his condition

[5] In a § 19 agreement, executed on a without prejudice basis, Star paid the employee total incapacity benefits from September 2, 2014 to November 24, 2014. (§ 19 Agreement approved 8-6-14; Dec. 708.)

[6] The date of injury claimed during Star's period of coverage was December 4, 2013. (Dec. 705.)

[7] On November 4, 2013, Dr. Archibald opined the employee, "has some good days but overall he has not really made any progress in several years with regard to his right knee." (Ex. 9.) On December 5, 2013, the day after his layoff from Enos, Dr. Archibald examined the employee and recommended a second right knee surgery. The judge found that on January 14, 2014, Dr. Archibald causally related the employee's right knee condition to the August 2, 2011 work injury, and stated the employee's condition "does not represent a new injury resulting from his new job" at Enos. (Dec. 711.) On September 26, 2014, the doctor opined that both knee injuries were related to the employee's August 2, 2011 industrial accident.

[8] In his decision, the judge ordered Travelers to pay the employee, *inter alia*, § 34 benefits from April 5, 2014 to December 3, 2014, and § 35 benefits from December 5-17, 2013 and from December 4, 2014, to date and continuing. (Dec. 714.)

and cause him to become disabled

(Dec. 713), constituted "a sufficient basis, under the current state of the law, to confer liability" on Star. (Travelers br. 8.) We disagree. It has long been held that in successive insurer cases, expert medical testimony is required to support a finding of compensability. See Casey's Case, 348 Mass. 572, 574 (1965). And we are compelled to reveal the words Travelers omits from page 713 of the decision quoted above: "an equivocal statement by Dr. James Nairus." (Dec. 713.) Dr. Nairus's opinion, expressly rejected by the judge, was that "the employee's knee complaints are not related to the August 2, 2011 industrial accident but are, instead related either to the employee's 'normal life's activities' *or* to his work for Jerry Enos Painting." (Dec. 713; emphasis added.) Thus, the judge understood the need for a medical opinion implicating the employee's work at Enos in order to properly shift legal responsibility for the employee's later incapacity from Travelers to Star. Because the judge found Dr. Nairus's opinion was "equivocal," he rejected it. (Dec. 713.) There was no error. See Costa's Case, 333 Mass. 286, 288-289 (1955)(no error in adopting medical evidence implicating first insurer in successive insurer case); Larivee v. Brake King, 16 Mass. Workers' Comp. Rep. 457 (2002)(same); compare Carroll v. State Street Bank & Trust, 19 Mass. Workers' Comp. Rep. 306 (2005)(finding against successive insurer reversed as adopted medical opinion did not support finding of a new injury), aff'd sub nom. Carroll's Case, 68 Mass. App. Ct. 1119 (2007) (Memorandum and Order Pursuant to Rule 1:28).

Next, Travelers posits the judge erred by adopting Dr. Archibald's opinion because the doctor was, apparently, not privy to the opinions of other doctors, nor aware of the employee's testimony at the hearing. First, we note the history relied upon by Dr. Archibald is not fundamentally different than the employee's credible hearing testimony.[9] Second, there is no indication in the record that Dr. Archibald was unavailable to be deposed. Travelers could have deposed the doctor to obtain

[9] See, e.g., Comeau v. Enterprise Elecs., Inc., 26 Mass. Workers' Comp. Rep. 229, 244 (2012)(variations in history given by employee for judge to reconcile).

answers to the questions now begged on appeal. It chose not to depose Dr. Archibald. Thus, we cannot know whether the doctor would have altered his opinion. Accordingly, Travelers' arguments go to the weight, and not to the admissibility, of Dr. Archibald's opinion. The weight afforded that opinion was for the judge to decide. Clarici's Case, 340 Mass. 495 (1960).

Finally, Travelers argues that Dr. Nairus was in a better position to opine on whether the employee's work at Enos was responsible for his subsequent incapacity and need for treatment. That was also for the judge to decide. Clarici, supra; Costa, supra; G. L. c. 152, § 11C. Even assuming, arguendo, that Dr. Nairus's opinion was based on a more accurate understanding of "the facts of the Employee's post-surgical experience and condition," (Travelers br. 11), Dr. Nairus's equivocal opinion was insufficient to find Star liable for the employee's incapacity following his work with Enos. (Dec. 713); see discussion, supra.

The decision is affirmed. In light of the employee's failure to file an appellate brief, Travelers is ordered to pay employee's counsel an attorney's fee of $809.10 pursuant to G. L. c. 152, § 13A(6).[10]

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **January 25, 2016**

[10] Soares v. Springfield Wire Inc., 25 Mass. Workers' Comp. Rep. 55, 59 (2011); Cross v. Beverly Rehab., 17 Mass. Workers' Comp. Rep. 241, 244 n.2 (2003); Souza v. Harvard Univ., 17 Mass. Workers' Comp. Rep. 248, 251 (2003); Larivee, supra.