COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 023693-12 032683-14**

James M. Amadon	Employee
Turner Fan Pier Parcel A Fan	Employer
Liberty Mutual Ins. Co.	Insurer
Accord Steel	Employer
AIM Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Koziol)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Boaz N. Levin, Esq., for the employee
Gerard A. Butler, Esq., for Liberty Mutual Ins. Co. at hearing
John J. Canniff, Esq., for Liberty Mutual Ins. Co. on appeal
Joseph Labadini, Esq., for AIM Mutual Ins. Co.

HARPIN, J. Liberty Mutual Insurance (Liberty) appeals the administrative judge's order to pay ongoing § 34A permanent and total incapacity benefits, §30 medical treatment, interest pursuant to § 50, and an enhanced legal fee to employee's counsel. After review, we affirm in part, vacate in part and recommit the case to the administrative judge for further findings.

James Amadon, the employee, was fifty-two years of age at the time of the hearing. He has a high school degree and has been employed his entire adult life as an ironworker. (Dec. 5.) Mr. Amadon obtained a crane operator's license, and has worked as a licensed hoisting engineer and general foreman for large structural steel projects. The work was physically demanding. Frequently, he would be required to join a group of workers to help out and to demonstrate to other workers how to perform the tasks at hand. (Dec. 6.)

On July 20, 2012, the employee sustained a massive rotator cuff tear in his left shoulder while in the course of his employment. Liberty, the insurer at the time of that

incident, accepted liability for the injury.[1] (Dec. 4.) The employee underwent surgery for the tear on September 18, 2012, and returned to work in a sedentary position on March 18, 2013. (Dec. 6.) The position entailed clerical work such as handing out drawings and keeping track of hours. A second surgery to the left shoulder was scheduled for February 20, 2014, as the initial surgery proved unsuccessful. (Dec. 6.)

On Friday, February 7, 2014, the employee left work at his usual time, 3:00 p.m., and drove for twenty minutes to his house, using his assigned company pickup truck. (Dec. 6.) The employee parked at his house, opened the driver-side door and stepped out onto the truck's running board. It was a snowy day, and the employee slipped on the slick running board and fell.[2] During the fall, the employee tucked his left shoulder against his body in a protective posture. (Dec. 6, 13.) He put out his right arm as he fell and impacted the floorboard of the truck with that arm. He then fell to the ground and had difficulty in getting up. Id. He felt excruciating pain in his right shoulder, but experienced no discernable change in his left shoulder. (Dec. 7.) When he was finally able to get up, he called his wife, and she drove him to the emergency room at the Mount Auburn Hospital. Id. The employee went back to work the following Monday, his next

[1] The employee worked for Accord Steel from February, 2001, to February, 2014. (Ex. 6, Employee Biographical Data Sheet). Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file). On July 20, 2012, the date of the injury to the employee's left shoulder, he was working at the Fan Pier project in South Boston, where the general contractor was Turner Construction, also referred to in some documents as James F. Stearns Co. LLC. (Tr. 3, 63-64; First Report of Injury, dated July 20, 2012.)(Rizzo, supra.) On February 7, 2014, the date of the injury to the employee's right shoulder, he was working only for Accord Steel. (First Report of Injury, dated December 29, 2014.)(Rizzo, supra.) The ambiguity is perhaps best explained by AIM's Denial of the December 29, 2014 First Report, where it raised as defenses "Sec. 18 reserved (OCIP likely in control.)" (AIM's Denial dated December 30, 2014.)(Rizzo, supra.) We assume "OCIP" is an acronym for an "owner controlled insurance policy," also known as a "wrap policy," which is a single policy covering all the contractors and sub-contractors working on a single project. Thus, Liberty issued the policy covering all the work on the Fan Pier project. The employee would have been covered for workers' compensation while working there by Liberty for the July 20, 2012 injury, even though he was still an employee of Accord Steel. By February, 2014, he was no longer working on the Fan Pier project. (Tr. 68.)

[2] The parties stipulated that AIM Mutual Insurance Company (AIM) was the insurer on the risk for Accord Steel on February 7, 2014. (Dec. 4; T. 3.)

scheduled work day, and continued to work at his sedentary job, despite pain and without any loss of time from employment, up to the February 20, 2014, left shoulder surgery. He has not returned to work since that date. Id.

The employee brought claims against Liberty for the July 20, 2012, left shoulder injury, and against AIM for the February 7, 2014, right shoulder injury. Both claims were conferenced on May 13, 2015. In his conference orders of July 3, 2015, the judge ordered Liberty to pay for the employee's right shoulder surgery and awarded § 34 benefits, beginning on the date of that surgery. He denied the claim against AIM. (Dec. 3.) Liberty appealed the order against it, and the employee appealed the denial against AIM. Id. Prior to the hearing, the employee was allowed to join a § 34A claim against Liberty. Id.

Dr. John R. Corsetti, the § 11A physician, examined the employee on November 16, 2015. (Dec. 7.) The doctor opined that the accepted left shoulder injury would eventually require conversion to a reverse prosthesis and, regardless of any injury to the right shoulder, it was unlikely that the employee could return to any sort of manual labor. As to the right shoulder, the physician opined that the employee sustained a traumatic rotator cuff tear causally related to the February 7, 2014, incident. Additionally, the physician opined that the repair procedure for the right shoulder was time sensitive in that any prolonged delay would result in significant muscular atrophy. He found the employee to be disabled from gainful employment for the foreseeable future, and that, even if the employee's right shoulder completely healed, his left shoulder condition made it unlikely he would ever return to manual labor work. The doctor imposed, specific to the right shoulder, lifting restrictions not to exceed five pounds and no elevation of the arm above horizontal position. (Dec. 8-9; Ex. 1.) The judge adopted the § 11A examiner's medical opinion. (Dec. 9.)

The parties were allowed to enter additional medical evidence and each submitted medicals for the record. (Dec. 3, 5.) Doctor Barry Saperia examined the employee on April 28, 2016. Pertaining to the right shoulder, he opined that the employee sustained a

full thickness rotator cuff tear and that the employee was a surgical candidate. Further, he opined that the employee remained out of work due to the February 7, 2014, right shoulder injury. (Dec. 10.) The judge adopted the medical opinion of Dr. Saperia. (Dec. 11.)

The judge found the employee to be an honest and credible historian. He adopted the employee's testimony regarding pain, physical limitations, and impact of his injuries on his daily life. (Dec. 11.) Nevertheless, the judge determined that the February 7, 2014, injury did not arise out of his employment and did not constitute an industrial injury under G.L. c. 152 . (Dec. 12 -13.) He did conclude, however, that the injury to the right shoulder was a natural consequence of the 2012 injury to the left shoulder and thus it fell within the ambit of coverage to be provided by the insurer on the risk at that time. (Dec. 14.) Following the analysis outlined in Scheffler's Case, 419 Mass. 251, 256 (1994), the judge determined that the employee had been totally incapacitated from gainful employment since February 7, 2014, and was likely to remain so for the foreseeable future, as a result of his industrial injury on July 20, 2012. (Dec. 14-15.) Accordingly, he ordered Liberty to pay § 34A benefits from November 16, 2015 and continuing, §30 medical expenses, including, without limitation, expenses related to the employee's right shoulder surgery and recovery, § 50 interest, and an enhanced fee to employee's counsel. All claims against AIM were denied and dismissed. (Dec. 16-17.) Only Liberty appealed.

Liberty raises two issues on appeal. First, it contends that the judge erred by failing to find the 2014 injury compensable under the Act. It argues that exceptions to the "going and coming rule" were present in this case, in that the employee had a company computer and phone with him, and that he was "on call all the time." (Tr. 77.) Liberty cites to Rouse v. Greater Lynn Mental health, 16 Mass. Workers' Comp. Rep. 7 (2001) and Wormstead v. Town Manager of Saugus, 366 Mass. 659 (1975) to argue that, with the employee "on call," his injury was compensable even though he had no work at

home he was supposed to do.[3] It concludes by asserting the judge also erred in making no findings about the employee's "on call" status or that he "was likely carrying his company computer and phone when he slipped and fell out of the company truck." (Insurer br. 10.) We disagree.

Liberty's argument amounts to a request that we finds other facts than those found by the judge, and that because of that the "going and coming" rule should not have been applied. However, we are limited to the facts found by the judge, unless they are not supported by the record evidence and reasonable inferences that can be made from that record. Martinez v. Georges Renovations, LLC, 33 Mass. Workers' Comp. Rep. ___ (April 9, 2019)(reviewing board limited to facts found by judge unless they are infected with error or wholly lacking in evidentiary support). The facts found by the judge are supported by the record, and lead inexorably to the conclusion that the "going and coming" rule, although not explicitly cited by the judge, applies here.[4] The judge found the employee "had left work at his usual quitting time," that "[h]e did not intend to do any work that weekend," and that his "job at the time was a desk job." (Dec. 12.) The judge also noted that the employee's sedentary job consisted of handing out drawings, keeping track of hours, reviewing drawings and coordinating delivery of materials. Id. In short, the judge resolved the conflicts in the evidence, finding the employee had a fixed place of employment as the nature of his job duties changed from his prior general foreman position, he was not working at the time of his fall in his truck, and was not going to be working that weekend. (Dec. 12.) Thus, Liberty's argument that the judge did not make any findings whether the employee was "on call" at the time of his accident

[3] The judge found the employee "did not intend to do any work that weekend." (Dec. 12.)

[4] Liberty's citation of Wormstead, supra, is inapposite, as that case specifically did not apply the going and coming rule, as the worker was a travelling employee with no fixed place of employment. The question there was whether the employee's injury, which occurred while he was coming back from lunch, was compensable. The analysis required a determination whether the employee was being paid when the injury occurred; second, whether the employee was on call at that time; and third, whether the employee was engaged in activities consistent with, and helpful to, the accomplishment of his employer's functions. Id, at 664-666.

has no merit. The employee himself was clear he had no intention of working that weekend, (Tr. 76), and the judge made no findings that the employee was engaged in any activity beneficial to the employer's interests, after considering the nature of the employee's present work and the fact he was given a company truck for his use.[5] Given that analysis, the judge properly determined that the 2014 slip and fall did not arise out of or in the course of the employment. We therefore affirm his finding. Noel v. Faulkner Hospital, 31 Mass. Workers' Comp. Rep. 139, 140-141(2017)(where findings are grounded in evidence and inferences drawn therefrom are reasonable, they will not be disturbed upon appeal.)

Second, Liberty argues the judge erred in applying the holding of Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 156 (1991) (although the judge did not cite to it), to find the second injury a consequence of the first injury. (Insurer br. 12.) We agree the judge's finding of causal relationship was error.

The judge found the employee injured his right shoulder because he had tucked his injured left arm into his side to protect it from further injury while he slipped. The judge held that:

> To what degree a fully functional left upper extremity would have been useful to the Employee, once his foot slipped on the running board and he began to fall, is not precisely known; it is common knowledge that such falls can be fast, On the other hand, common sense would lead the reasonably prudent man to use both upper extremities to maintain stability as he alighted in a snowy environment, and there is no indication that the Employee is not a reasonably prudent man. It is clear that [the employee] was unable to hold onto the door or any other part of the vehicle with his left upper extremity as he was exiting the vehicle, or to grab onto any part of the vehicle with his left upper extremity as he began to slip. The instinctive tucking of the injured left arm seems an instantaneous reflex that was reasonable and normal movement or activity, and perhaps all the more so in light of the planned surgery scheduled to take place 13 days later. I conclude and find that the injury to the right arm as it impacted on the floorboard of the vehicle on February 7, 2014 *was a natural consequence of the 2012 industrial injury to the left shoulder*.

[5] The employee stated he had been given the use of company vehicles for ten years. (Dec. 12.)

(Dec. 13-14, emphasis added.)

Liberty argues that under Twomey, a second, non-work-related injury will be found to be compensable only if it is the "natural and proximate result of the original injury." Id., at 158. Although that decision involved the same body part creating a second period of disability, the legal principle is the same when applied to injuries to other body parts. Most significantly, it requires that an expert medical opinion casually relate the second period, or injury to a new body part, to the first injury. Id. at 159. If there is no such medical opinion adopted by the judge, there is no need to determine if the second action was a reasonable and normal and non-negligent activity. Gomes v. Bristol County House of Correction, 13 Mass. Workers' Comp. Rep. 128, 133 (1999)(medical opinion establishing causal relationship required before employee's behaviors are reviewed).

The judge specifically noted that "it is not precisely known" whether the outcome would have been different had the employee had use of "a fully functioning left [arm]," (Dec. 13). In the next sentence the judge attempted to nevertheless speculate that a "reasonably prudent man" would have used both arms "to maintain stability" while falling, followed by an extrapolation that the employee's inability to grab hold onto any part of the vehicle with his left arm made the resultant injury to his right shoulder the "natural consequence" of the 2012 left shoulder injury. (Dec. 13-14.) This set of speculations, unencumbered by any sort of expert opinion as to their likely linkage, is an improper chain of reasoning by the judge. Belanger's Case, 274 Mass. 371 (1931)(judge may not rest liability decision on speculation, conjecture, surmise, or possibility).

In addition, the judge did not adopt any medical evidence of a causal relationship between the 2012 left arm injury and the 2014 right shoulder injury. The adopted opinion of the impartial examiner, Dr. John Corsetti, was that the employee's right shoulder injury had, as its major and predominant cause, the injury of February 7, 2014, not the 2012 injury. (Dec. 9; Ex. 1, 4.) Similarly, the other adopted opinion, that of the employee's evaluating physician, Dr. Barry Saperia, was that the employee's right

shoulder injury was due to his fall out of his truck on February 7, 2014. (Dec. 10; Ex. 8.) In both cases the doctors related the 2014 injury to work *on that date*. Dr. Corsetti wrote that the employee "was working, getting out of his truck on 2/7/14, when he slipped." (Ex. 1, 2.) Dr. Saperia wrote that "on 2/7/14, the patient was at work as an iron worker. He fell getting out of his work truck and landed onto his outstretched right arm." (Ex. 8.) The judge found, as we have noted and affirmed, that the employee's February 7, 2014, incident was not work-related, thus both of the doctor's opinions on causal relationship are not available as support for any conclusion on causal relationship. See LaFlash v. Mount Wachusett Dairy, 18 Mass. Workers' Comp. Rep. 254 260 (2004)(causation opinion of doctor not entitled to weight if based on facts not found by the judge). Thus the requirement of expert causation opinion is not met in this case, and the judge's inference that the right shoulder injury is "the natural and proximate result" of the left shoulder injury is speculative and unsupported. Allie v. Quincy Hospital, 12 Mass. Workers' Comp. Rep. 167, 169 (1998)(judge cannot find causal relationship when there is a lack of an expert medical opinion on that issue); see also Catalina v. Atlantic Paper Box Co., 12 Mass. Workers' Comp. Rep. 510, 511 (1998)("Where the inference drawn by the judge is but one of a number of equally plausible scenarios, it is unsupportable"). Accordingly, we vacate the judge's finding that the 2014 right shoulder injury was causally related to the 2012 industrial accident.

Nevertheless, it is clear the employee's accepted left shoulder injury is significant and permanent. We recommit the case to the administrative judge for further findings as to the extent of the employee's incapacity that is exclusively related to the accepted left shoulder injury.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: May 15, 2019