COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 007733-11**
Ronald Vancelette	Employee
Andover Personnel	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Horan and Harpin)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Robert Riccio, Esq., for the insurer

LEVINE, J. The employee appeals from a decision denying and dismissing his claim for benefits. For the reasons that follow, we vacate the decision and recommit the case for a hearing de novo before a different administrative judge.

The employee, forty-one years old at the time of the hearing, (Tr. 19), alleged he was injured on February 8, 2011, his second day of employment. (Dec. 3.) Following a § 10A conference, the judge ordered the insurer to pay § 35 benefits from February 8, 2011, to December 8, 2011. Both parties appealed to a § 11 evidentiary hearing. (Dec. 2.)

The employee testified that he was injured when a forklift pushed three empty, very large plastic containers into him. (Tr. 27-30). He testified his left foot got caught under the containers and he had pain in his lower back, in his right hip and down to his right knee. (Tr. 31.)

In his decision, the judge observed that the employee claimed that his left foot got caught in a forklift mishap, but neither the § 11A examiner's report nor the employee's testimony indicate that any treatment was sought for a left leg injury. Also, a CT scan and x-ray taken on the date of the alleged industrial injury noted no

evidence of traumatic injury. And a subsequent office note from the treating doctor raised the question of symptom magnification and drug seeking behavior. (Dec. 4.)

In addition, the judge found that the employee served five periods of incarceration, most recently from October 14, 2005, to February 15, 2008 for a conviction for breaking and entering and larceny of property. (Dec. 3.) The judge noted that Massachusetts law allows an inference of untruthfulness to be drawn and applied to the testimony of convicted felons in certain situations. (Dec. 5).[1]

However, central to this appeal are the following comments made by the judge:

> In reviewing the Employee's previous workers' compensation claim files, I have detected an interesting consistency in the amount of time between his date of hire and his date of injury in four cases:
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> - In DIA No. 2031390, the hiring date was 4/09/90 and the injury date was 4/20/90;
> - In DIA No. 4253606, the hiring date was 9/10/03 and the injury date was 11/25/03;
> - In DIA No. 2527104, the hiring date was 8/09/04 and the injury date was 8/17/04;
> - In this case, the hiring date was 2/07/11 and the injury date was 2/08/11.
>
> The history of three claims of injury within 2 weeks of hire, and one more of an injury within 11 weeks of hire, creates an inference that the Employee is, at minimum, a compensation-minded individual. I also infer from it that his current claim is questionable.

(Dec. 4.)

Concluding that the employee was not a credible witness with respect to his claim of an industrial injury or resulting incapacity, the judge denied and dismissed the claim. (Dec. 5.)

On appeal, the employee contends his due process rights were violated when the judge conducted a sua sponte review of the employee's previous workers' compensation claims, without notice to the parties, and then made credibility findings based thereon. This prevented the employee from objecting to the evidence,

[1] On appeal the employee does not challenge this finding.

explaining the evidence or rebutting the inference drawn by the administrative judge from the evidence. (Employee br. 17.) We agree.

"Credibility determinations are the sole province of the hearing judge, Lettich's Case, 402 Mass. 389, 394 (1988), and we will not disturb them unless they are arbitrary and capricious . . . or derived from inferences which are not reasonably drawn from the evidence." Lefebvre v. Sandelswood, Inc., 21 Mass. Workers' Comp. Rep. 135, 140 (2007). However, the parties have a fundamental due process right to a hearing at which they have an "opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, *to know what evidence is presented against them and to have an opportunity to rebut it*, as well as to develop a record for meaningful appellate review. Anderson v. Lucent Techs., 21 Mass. Workers' Comp. Rep. 93, 95-96 (2007)(emphasis in original). See also Haley's Case, 356 Mass. 667 (1972).

In opposing the employee's appeal, the insurer cites LeBlanc v. Keystone Maint. and Constr., 26 Mass. Workers' Comp. Rep. 315 (2012), in which evidence of the employee's prior lump sum settlements was admitted at the hearing. The judge in his decision commented that "in certain situations [a history of past workers' compensation] can be a factor in assessing the credibility of a claimant . . . ." Id. at 319. The reviewing board rejected the employee's contention that this comment constituted reversible error because the judge's "subsequent findings indicate that he relied, not on the fact the employee had filed prior claims and settled them, but on medical reports which contradicted the employee's position at hearing, thus revealing 'significant discrepancies in his testimony.' " Id. at 321. Moreover, the judge found other permissible bases not to credit the employee, including that the employee's testimony appeared rehearsed and that the employee was able to fully participate in the hearing despite his testimony of negative side effects concerning his ability to think. Id. at 321-322.

In contrast, the judge in the present case, without notice to the parties, investigated[2] the employee's past history of workers' compensation claims and then specifically relied on his ex parte investigation to question the employee's claim. (Dec. 4.) Failure to notify the parties of this investigation in advance of the decision deprived them of the opportunity to object, or to explain or rebut the evidence, thus violating their due process rights. Anderson, supra. Compare McGrath v. NSTAR Elec. and Gas, 26 Mass. Workers' Comp. Rep. 113, 116 (2012)(without advance notice to the parties, judge consulted a certain treatise to support his conclusion); Pobieglo v. Department of Correction, 24 Mass. Workers' Comp. Rep. 97, 100 (2010) (judge failed to notify parties of the source for his determination of earning capacity). Although the judge noted other reasons not to credit the employee, the judge here, unlike the judge in LeBlanc, specifically referenced the employee's claims history as a basis to question his claim. That history was an important factor in finding the employee not to be credible. Because the error went to a central issue in dispute, it is not harmless. McGrath, supra. Compare Fantasia v. Northeast Mfg. Co., 14 Mass. Workers' Comp. Rep. 200, 205 (2000) (cannot tell how much weight judge gave to erroneous finding). Cf. Fox, supra (similar error, but harmless because the investigation was into irrelevant matters).

Accordingly, we vacate the decision and transfer the case to the senior judge for reassignment to a different administrative judge for a hearing de novo. See Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 83 (1997)(appropriate to reassign to a different judge when judge's assessment of credibility infected by improperly admitted and considered evidence).

So ordered.

[2] Although § 11 of the Act empowers the judge to do "inquiries and investigations," it does not negate the parties' rights to know about and respond to them in a timely fashion. Fox v. STG Properties/Scott Gerace, 26 Mass. Workers' Comp. Rep. 57, 58-59 n.1 (2012).

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Frederick E. Levine
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **May 6, 2014**