

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 042478-07

Amy M. Tunis
Hillcrest Educational Centers
Commerce and Industry Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Poulter.

APPEARANCES

Edward J. Spence, III, Esq., for the employee
William M. LeDoux, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision awarding her § 35 partial incapacity benefits from December 12, 2009 to date and continuing, as a result of a December 20, 2007, industrial accident. One of the arguments raised by the employee requires us to vacate the decision and recommit the case to the administrative judge.¹

The employee's claim for § 34 temporary total incapacity benefits was denied by the insurer. At conference, a different judge issued an order for a closed period of § 34 benefits from December 7, 2009² through August 7, 2010, and § 35 benefits from August 8, 2010, to date and continuing. (Dec. 1-2.) Both parties appealed and on August 23, 2010, the employee was examined by a § 11A impartial medical examiner, Dr. Michael R. Sorrell. At the subsequent hearing, the judge found the matter to be medically complex and allowed the parties to submit additional medical evidence. (Dec. 2.) The employee submitted the March 4, 2011, medical report of Dr. John Pomichter, as well as the January 28, 2010,

¹ In light of our holding we do not reach the other issues raised by the employee.

² At the hearing, the employee sought § 34 benefits from December 12, 2009, to date and continuing. (Tr. 4; Dec. 2.)

report and May 6, 2010, note of her treating rheumatologist, Dr. John French. However, the decision lists the employee's additional medical evidence as comprising solely of two medical reports of Dr. John Pomichter "dated March 4, 2011 and January 28, 2010."³ (Dec. 2.) The judge mistakenly attributed the January 28, 2010, report to Dr. Pomichter. Moreover, the judge never listed the report or note of Dr. French or discussed his opinions. Because the hearing decision does not list or discuss this evidence, recommitment is required for its consideration. Rodriguez v. Palm Manor Nursing Home, 23 Mass. Workers' Comp. Rep. 157 (2009); Pelchat v. Demoulas Supermarkets, 23 Mass. Workers' Comp. Rep. 47 (2009). Accordingly, we vacate the decision and recommit the matter for further action in accordance with this decision.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: **November 6, 2012**

³ The employee states "[t]here are two letters from Dr. Pomichter (3/12/10 and 3/4/11), (R.A.1-2), but there is no letter dated January 28, 2010 from anybody but Dr. French." (Employee br. 7.) Later, the employee argues "[t]he March 10, 2010 [sic] medical report belonged to Dr. Pomichter. . . ." (Employee br. 15.) The record does not show that Dr. Pomichter's report of March 12, 2010, was submitted to the judge. (Employee br. R.A.-1.) Rather, the employee's submission of additional medical evidence, dated March 25, 2011, consisted solely of Dr. Pomichter's March 4, 2011, report and Dr. French's report and note. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file).