COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032357-03**

Denise Morrissey	Employee
Benchmark Assisted Living	Employer
Transportation Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Horan)

APPEARANCES
Patrick P. MacDonald, Esq., for the employee
Paul M. Scannell, Esq., for the insurer

CARROLL, J. The insurer appeals from the decision of an administrative judge denying and dismissing its request to modify or discontinue the employee's § 34 weekly incapacity benefits. The insurer argues that the case should be recommitted to the judge to consider the deposition testimony of Dr. Hewson. The judge stated in his decision that no deposition had been taken. Both parties agree it was taken, and that the transcript was received by them within the time frame set by the judge. Therefore, we recommit the case to the judge to determine whether the deposition was filed with the Department of Industrial Accidents (DIA) within the deadline set. If it was, the judge must consider it. If it was never filed, or if it was filed late, the judge, in the exercise of his discretion, must decide whether the deposition should be entered into evidence.

On September 16, 2003, while working as a nurse's assistant for the employer, fifty-two year old Denise Morrissey sustained an industrial injury when she was moving a bed. (Dec. 251-252.) She left work that day in considerable pain and has not returned. She treats conservatively with a rheumatologist, Dr. Tina Horwitz, every six months. (Dec. 252.)

The insurer's request to modify or discontinue the employee's weekly compensation benefits was denied at conference and its appeal for de novo hearing was

timely filed. (Dec.251.) On March 8, 2005, Dr. James S. Hewson examined the employee pursuant to § 11A and offered a diagnosis of chronic lumbar pain syndrome and fibromyalgia. The parties stipulated, and the judge agreed, that the report was inadequate, so additional evidence was allowed pursuant to § 11(A)(2). (Dec. 252; Tr. 3.) The additional medical evidence consisted of the medical reports of Dr. David Roth, (Ex. 4), Dr. Alec Meleger, (Ex. 5), Dr. Mark A. Lapp, (Ex. 6), Dr. Tina Horwitz, (Ex. 7), Dr. Richard E. Greenberg, (Ex. 8), and three MRI studies. (Ex. 9.)

Prior to the conclusion of the hearing, both the insurer and the employee asked to depose Dr. Hewson. (Tr. 65-66.) The judge set a July 20, 2005 deadline for the close of evidence so as to accommodate the deposition. (Tr. 66.) Both parties attended the deposition of Dr. Hewson on July 7, 2005, and the transcript was notarized by the court reporter on July 18, 2005. (Dep. 39.) Though their agreement is not binding on the judge, the parties agree that the deposition testimony is evidence in this case.[1] In his November 8, 2005 decision denying the insurer's discontinuance complaint, the judge states that no deposition took place. (Dec. 251.)

It is axiomatic that the judge must weigh and consider all properly admitted evidence. Stevens v. City of Brockton, 13 Mass. Workers' Comp. Rep. 166, 168 (1999). Here it is clear from the decision that the deposition of Dr. Hewson was not considered by the judge as he worked toward his decision. (Dec.251.)

The insurer contends error in the transmittal, or misplacement, of the § 11A deposition transcript. (Insurer br. 3-6.) We do not know what happened to the judge's copy of the transcript.[2] We agree, however, that the judge was in error to say that no deposition was taken. This is not a case where, through harmless error, the judge merely failed to list medical evidence as an exhibit but openly considered it in his decision.

[1] Although not stated explicitly, the appellate briefs of both parties assume the deposition was properly admitted evidence.

[2] We have examined the contents of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The deposition transcript is not there.

Hamel v. Dela, Inc., 20 Mass. Workers' Comp. Rep. ___ (June 21, 2006), citing Giovanella v. Westborough State Hosp., 7 Mass. Workers' Comp. Rep. 177 (1993). The judge's findings reflect he did not consider the § 11A examiner's deposition testimony in arriving at his decision to deny and dismiss the insurer's complaint. Failure to consider this portion of the medical evidence could adversely impact on substantial rights, foreclosing the parties from the opportunity to fully present the medical portion of their respective positions. Richard v. Edibles Rest., 8 Mass. Workers' Comp. Rep. 122, 125 (1994). See O'Brien's Case, 424 Mass. 16, 22 (1996).

Accordingly, we recommit the case to the administrative judge to make findings consistent with this decision. If the judge finds that the transcript was or should be admitted, he should then weigh and consider the deposition testimony and make further findings.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **September 11, 2006**

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Mark D. Horan
Administrative Law Judge