COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014335-08 020198-10**

Kujtime Uka	Employee
Westwood Lodge Hospital	Employer
Indemnity Insurance Co. of North America	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Joyce E. Davis, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on appeal
Christopher L. Maclachlan, Esq., for the insurer on appeal

KOZIOL, J. The employee appeals from a decision awarding a closed period of § 35 partial incapacity benefits for physical injuries sustained when she was beaten about the head and struck in the face by patients on October 20, 2006, and May 26, 2008, respectively, and denying her claim for benefits for psychological injuries. 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 asserts that she timely submitted her additional medical evidence to the judge by electronically forwarding her ten-exhibit submission, through the use of an encrypted record transmission service, "YouSendIt."[2] (Employee br. 7-8.) The transmission receipt provided by "YouSendIt," shows

[1] As a result, we do not reach the other issues raised by the employee.

[2] The employee appended that submission and a table of contents as "Exhibit A" to her brief. The table of contents indicates the medical submission contains ten exhibits. Although the hard copy filed by the employee provides only 109 pages of that submission, the electronic version, filed through the use of an encrypted transmission service, is 192 pages in length and appears to contain all of the records listed in the table of contents. (Employee br. Ex. A.)

that the documents were sent to the judge and his assistant. (Employee br. Ex. D.) The decision did not list these records as exhibits, and the judge did not mention the employee's additional medical evidence in his decision. The department's document management system, OnBase, also did not contain the employee's additional medical evidence. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file). The insurer timely received the employee's additional medical evidence and did not raise any objection to its admission in evidence below. (Ins. br. 2-3.) However, the insurer's counsel corresponded with the employee's counsel, expressing his concerns that the records were not properly tabbed and appeared to be out of order.[3] (Employee br. Ex. E.) We cannot discern whether the employee's additional medical evidence was reviewed by the judge.[4]

[3] The insurer's counsel complained that without "any dividers or tabs I am unable to reconcile the records to the list of exhibits, making it extremely difficult and confusing to review them." (Employee br. Ex. E.) In response, employee's counsel noted that the electronic records were "bookmarked" and that counsel "simply need[ed] to open the bookmark" and "click on the bookmark" in order to access the "corresponding document." (Employee br. Ex. E.) We also experienced difficulty finding the medical records cited by counsel in their briefs, (Employee br. 8-9; Ins. br. 2-3), despite the material's alleged presence in the Appendix to the employee's brief. When the electronic version of the employee's additional medical evidence exhibit is printed or viewed without the use of the PDF bookmark tool, the records do not appear in the order set forth in the exhibit's table of contents. (Employee br. Ex. A.) Moreover, counsel did not tab or otherwise subdivide the copy of the exhibit appended to the hard copy of her brief. Id. Aside from informally requiring parties to bookmark their electronic exhibits and providing an online tutorial on how to accomplish that task, our department has not prescribed rules for the electronic submission of exhibits. Nonetheless, we note that it has always been counsel's responsibility to ensure the documents contained in an exhibit appear in the same chronological order set forth in the exhibit's table of contents. We see no reason why the same care should not be given to electronic exhibits.

[4] Despite employee's counsel's protestations that she was not told to check the OnBase record to ensure her exhibits had been received and entered, (Employee br. 8), we observe that the best practice is to check OnBase within fourteen days of submitting an exhibit at hearing in order to ensure that it was received and entered in OnBase. That way, any missing material may be brought to the judge's attention in a prompt manner.

The insurer, however, urges us to affirm the decision, asserting the error is harmless because the evidence submitted by the employee was cumulative of its additional medical evidence. (Dec. 3, Ex. 40.) Although the insurer acknowledges that its submission did not contain records from the employee's treating psychiatrist, Dr. Mahmood Sharfi, and the employee's treating therapist, Sara Rosin, LICSW of Riverside Community Care, it claims the omission of those reports and records was harmless because those records do not "offer[] an *admissible* medical opinion on the medical issues in dispute; namely disability and causation." (Ins. br. 2-3; emphasis added.) Any objection to the admissibility of the employee's medical evidence has been waived because the insurer did not object to its admission at hearing. Smith v. Northeastern Univ., 24 Mass. Workers' Comp. Rep. 229 (2010)(objections to the admission of evidence not raised below are waived). The situation requires us to vacate the decision and recommit the matter to the judge for consideration of the employee's additional medical evidence. Tunis v. Hillcrest Educ. Ctrs., 26 Mass. Workers' Comp. Rep. 299 (2012).

Because the rules of evidence apply in workers' compensation hearings, counsel must provide certified copies of medical records in order to ensure the records' admissibility at hearing. However, we are concerned about the volume of redundant material contained in the parties' additional medical evidence exhibits. The employee's exhibit is 192 pages in length, and the judge expressly noted that the insurer's exhibit is a "523 page submission." (Employee br., Ex. A; Dec. 3, Ex. 40.) Both the employee and the insurer submitted records from Dr. Karen Scanlon, Dr. Savitha Gowda, and Dr. Mazen Eneyni. While we lack the Trial Court's formal pretrial procedure, nothing prohibits the parties from communicating with each other prior to admitting their additional medical evidence, in order to identify records that may be submitted as joint exhibits, or to reach an agreement regarding the scope of the records that will be submitted from each provider. Failure to do so not only results in a duplication of effort by

counsel, but also the submission of voluminous medical records containing a substantial amount of irrelevant, private and personal health information.[5]

Accordingly, because the insurer never objected to the admissibility of any of the records contained in the employee's additional medical evidence submission, on recommittal the employee should submit to the judge, only those medical records from her original submission that are relevant to the dispute and not already part of the record. We vacate the decision and recommit the matter for further action in accordance with this decision.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **January 30, 2014**

[5] The employee's 192 page submission contains the entire certified medical records from Dr. Scanlon and Dr. Gowda, including the results of numerous blood tests, EKG tapes, gynecological records, vaccination records, and mammography reports. (Employee br. Ex. A.) Dr. Scanlon's records also contain an EKG tape and podiatry records belonging to another patient, not the employee. (Employee br. Ex. A.)