COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043219-03**

Robert Hamel	Employee
Dela, Inc.	Employer
Acadia Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
Ronald S. Barnes, Esq., for the employee
James W. Stone, Esq., for the insurer

McCARTHY, J. The employee appeals from the decision of an administrative judge denying and dismissing his claim for § 34 weekly incapacity benefits. He contends that although the judge allowed the parties to present additional medical evidence due to the inadequacy of the § 11A examiner's report, the judge failed to list in his decision, and take into consideration, a physician's report introduced into evidence. Since records contained in the board file support the employee's position, we recommit the case to the judge for reconsideration, taking into account the disregarded medical evidence.[1]

On December 19, 2003, Mr. Hamel sustained an industrial injury when a co-worker, while operating a forklift, dropped a pallet onto his left foot. (Dec. 205.) The employee made two trips to an emergency room where he was provided pain medication and released. (Dec. 206.) He was subsequently referred to a rehabilitation hospital and in April 2004 began treatment with Dr. William Lipman and, soon after, with Dr. Jeffrey Norton. Id.

The employee's claim for benefits was denied at conference and his appeal for de novo hearing was timely filed. (Dec. 204.) Dr. Robert Feliz examined the employee pursuant to § 11A. Given the doctor's inability to offer an unequivocal causal

[1] We take judicial notice of the contents of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

relationship opinion, the parties stipulated that his report was inadequate. The judge then allowed the parties to present additional medical evidence pursuant to § 11(A)(2). Id.[2] (Dec. 204.)

The additional medical evidence admitted and listed as exhibits by the judge consists of the medical reports of Dr. William L. Lipman (Ex. 7), Dr. Jeffrey Norton (Ex. 9) and Dr. Robert R. Pennell (Ex. 10.)[3] In his decision, the judge acknowledges Dr. Lipman's reports contained in three pages, the April 14, 2004 report and July 15, 2004 addendum of Dr. Pennell, and the April 6, 2004 report of Dr. Norton with follow-up reports dated May 25, 2004, August 11, 2004 and September 22, 2004. (Dec. 207-208.) The judge makes no mention of the June 22, 2005 report of Dr. Norton.[4]

The judge found that the employee did not suffer a disabling injury at work. (Dec. 209.) In making his determination, the judge relied on the opinions of Dr. Pennell and the § 11A examiner's concurring diagnoses of podagra or gout. Id. The judge found that Dr. Pennell made this diagnosis with conviction and although the § 11A examiner offered a differential diagnosis, also accepting that the condition could be causally related complex regional pain syndrome, *"none of the doctors except for Pennell offered an express opinion on the extent of the employee's disability."* (Dec. 209.) (Emphasis ours.)

The employee argues that had the judge considered the June 22, 2005 report of Dr. Norton, it may have "tipped the scales" in favor of the employee's claim. (Employee br.

---

[2] The § 11A examiner offered a diagnosis of chronic persistent left foot pain, rule out chronic regional pain syndrome/early reflex sympathetic dystrophy versus recurrent gouty synovitis/arthritis/podagra. He stated that it is very difficult to clearly separate or differentiate one condition from the other. If the proper diagnosis is gouty arthritis, then there is no causal relationship to the industrial injury, but if the diagnosis is chronic regional pain syndrome, then there is a causal relationship of the condition to the work incident. (Dec. 207.)

[3] Also admitted was the impartial medical examiner report (Ex. 3), the Anna Jacques Hospital emergency room records (Ex. 5), the Merrimac Valley Hospital emergency room records (Ex. 6) and the records of New England Rehabilitation Hospital. (Ex. 8; Dec. 204.)

[4] The hearing transcript, however, does indicate that the record was to be held open pending the submission of this additional report from Dr. Norton. (Tr. 117.) A review of the board file indicates that the employee forwarded the June 22nd report to the judge on June 29, 2005. (Letter to judge from Ronald Barnes, dated June 29, 2005.) Rizzo, supra.

11.) We agree with the employee that the judge failed to list the medical report and assess the probative weight of that evidence.

This case is governed by the line of cases addressing the failure to list exhibits in the hearing decision. That list includes, but is not limited to, Armstrong v. Trust Ins. Co., 15 Mass. Workers Comp. Rep. 329 (2001); Rodgers v. Massachusetts Dept. of Public Works, 14 Mass. Workers' Comp. Rep. 310 (2000); Stevens v. City of Brockton, 13 Mass. Workers' Comp. Rep. 166 (1999); Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678 (1997); Richard v. Edibles Rest., 8 Mass. Workers' Comp. Rep. 122, 125 (1994)(failure to consider medicals is a denial of due process) Rossi v. Massachusetts Water Resources Auth., 7 Mass. Workers' Comp. Rep. 101 (1993).

This is not simply a case where through harmless error the judge failed to list Dr. Norton's June 22, 2005 report but openly considered it in his decision. Giovanella v. Westborough State Hosp., 7 Mass. Workers' Comp. Rep. 177 (1993). Nothing in the judge's findings suggests that he considered the June 22nd medical report in arriving at his decision to deny and dismiss the employee's claim.

Dr. Norton's June 22nd report was critical to the employee's case since it essentially closed the loop with respect to the employee's medical evidence on extent of disability and causal relationship.[5] It was the fifth and final of a series of reports authored by Dr. Norton and offered into evidence by the employee. Failure to consider this medical evidence would adversely impact the employee's opportunity to fully present the medical portion of his case. See Richard, supra at 125.

The parties stipulate that, for some reason, the June 22nd report did not make it to the board file. (Insurer br. 2, Employee br. 9.) But see footnote 4, supra. We can only wonder whether the judge's consideration of the diagnosis and opinions contained therein

[5] Relevant to extent of disability, the report contains a medical opinion on the employee's period of disability. Dr. Norton opined that the employee's capacity to work was, and will be, compromised during the treatment period associated with his injury. (Report of Dr. Norton, dated June 22, 2005) As for causal relationship, Dr. Norton diagnosed chronic regional pain syndrome, the antithesis of the § 11A physician's podagra or gout differential diagnosis. Id.

would have altered the outcome of the case. Accordingly, we recommit this case to the administrative judge to list the employee's June 22, 2005 report of Dr. Norton as an exhibit to consider it and to make such further findings, if any at all, on incapacity and causal relationship.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: ***June 21, 2006***

_____
Mark D. Horan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge