

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 002518-96**

Theresa M. Armstrong  
Trust Insurance Company  
Arbella Indemnity Insurance Company

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Carroll, Wilson and Maze-Rothstein)

**APPEARANCES**

John L. Collins, Esq., for the employee  
Michael W. Morrissey, Esq., for the insurer at hearing and on brief  
Keith J. Bridgford, Esq., for the insurer on brief

**CARROLL, J.** The insurer appeals from a decision in which an administrative judge awarded the employee ongoing partial incapacity benefits, based on an accepted industrial injury involving repetitive stress to the employee's neck and left shoulder. Along with issues of no merit, the insurer argues one that requires recommittal. The judge altogether failed to list in his decision twenty-six additional medical documents introduced by the parties pursuant to the judge's determination that the medical issues were complex, in accordance with G.L. c. 152, § 11A(2). As there is no indication in the decision that the judge even reviewed the additional medical evidence, we must recommit the case for a hearing de novo on the extent of incapacity.

The facts of the case hardly bear any relevance to the issue at hand. Suffice it to say that the employee left her employment as a claims adjuster due to pain which she developed in her neck and left shoulder from typing and writing for seven and a half hours a day, while holding a telephone receiver in the crook of her neck much of the time. The pain eventually spread throughout the left side of her body, until she was unable to continue working as of January 19, 1996. (Dec. 4.) The impartial physician diagnosed the employee as having a reflex sympathetic dystrophy of the left upper

extremity, causally related to the employee's work, which resulted in a partial medical disability. (Dec. 4-5.)

The employee sought permanent and total incapacity benefits from May 1, 1998, which claim went to hearing on January 14, 1999. The judge deemed the medical issues complex, thereby allowing the parties to introduce additional medical evidence. (Dec. 2.) The judge adopted the impartial physician's opinions, and awarded the employee ongoing § 35 partial incapacity benefits from November 23, 1998. (Dec. 5-7.)

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, Rossi v. Massachusetts Water Resources Auth., 7 Mass. Workers' Comp. Rep. 101 (1993); Richard v. Edibles Restaurant, 8 Mass. Workers' Comp. Rep. 122, 125 (1994); Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678 (1997); Stevens v. City of Brockton, 13 Mass. Workers' Comp. Rep. 166 (1999); and Rodgers v. Massachusetts Dept. of Public Works, 14 Mass. Workers' Comp. Rep. 310 (2000). "It is axiomatic that the judge must weigh and consider all properly admitted evidence. There is no indication in the decision that [any additional medical evidence] was made a part of the hearing record and considered by the judge as he worked toward his decision."<sup>1</sup> Stevens, *supra* at 168.

This is not simply a case where through harmless error a judge failed to list exhibits but obviously considered the offered medicals as reflected in his recitation of the medical evidence. Elizabeth Giovanella v. Westborough State Hospital, 7 Mass. Workers' Comp. Rep. 177 (1993). Nothing in the findings suggests the judge considered the medical reports timely delivered by the [parties]. Failure to consider the [parties'] medical evidence would adversely impact on substantial rights . . . foreclosing the [parties] from the opportunity to [present their respective medical cases].

Richard, *supra* at 125. See O'Brien's Case, 424 Mass. 16, 22 (1996).

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<sup>1</sup> In recognizing that "[s]ince her visit with Dr. Genovese on January 22, 1996, she has been diagnosed with one form or another of chronic pain syndrome," (Dec. 6), the administrative judge seems to be relying on Dr. Merlino's view of the history from the records. (Depo. 77-78.)

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We transfer the case to the senior judge for assignment as appropriate to an administrative judge for further proceedings consistent with this opinion. Pending the issuance of the new decision, the judge's order of § 35 incapacity benefits shall stand.

So ordered.

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Martine Carroll  
Administrative Law Judge

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Sara Holmes Wilson  
Administrative Law Judge

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Susan Maze-Rothstein  
Administrative Law Judge

Filed: **September 26, 2001**  
MC/jdm